सत्यमेव जयते

भारतीय राष्ट्रीय राजमार्ग प्राधिकरण
(सड़क परिवहन और राजमार्ग मंत्रालय, भारत सरकार)
National Highways Authority of India
(Ministry of Road Transport and Highways, Government of India)
जी-5 एवं 6, सेक्टर-10, द्वारका, नई दिल्ली - 110 075 ● G-5 & 6, Sector-10, Dwarka, New Delhi-110075
दूरभाष/Phone : 91-11-25074100 / 25074200

NHAI/ Policy Guidelines/ HAM Project/ 2024
Policy Circular No.8.4.47/2024 dated 05th December, 2024

{Decision taken on E-Office File No. PROJ-36017(11)/1/2024-NHAI- RO Vijayawada (Comp. No. 248990)}

Sub: Clarification regarding Payment adjusted to the Price Index Multiple as applicable on the Reference Index Date during Construction Period as per Clause 23.4 vis-à-vis provisions under Clause 12.3.2 of MCA of HAM Projects.-reg.

Executive Committee, NHAI vide its 634th meeting held on 05.10.2024 on Agenda Item No. 634.03 (Copy enclosed at **Annexure- I**) pertaining to 4-laning of Bethamangala- Baireddypalle Section of Bangalore-Chennai Expressway directed Contract Management Division to examine and Clarify on the Payment of Instalments of Bid Project Cost (BPC) adjusted for the Price Index Multiple (PIM) as applicable on the Reference Index Date preceding the date of achievement of Payment Milestone, in case the Project Milestone is delayed during Construction Period.

2. The matter was examined, not only specific to Concession Agreement of subject Project but also for other HAM Projects based on MCA dated 10.11.2020 and it was found that there is no difference in the provisions of both documents. Accordingly, the following clarifications are provided in the matter:

(i) Clause 23.4 (Payment during Construction Period): The Payments for Payment Milestones under this clause are not linked to the achievement of Project Milestones as per Schedule-G during Construction Period till the Scheduled Completion Date. The Payments during the Construction Period are based solely on the achievement of Physical Progress, and the Instalments of the BPC are adjusted for the Price Index Multiple as given in the clause. Thus, the Payment Mechanism under Clause 23.4 Operates Independent of the provisions under Clause 12.3.2.

(ii) Clause 12.3.2 (Damages for Delay): If the Concessionaire fails to achieve any Project Milestone as per Schedule-G within 90 days, it is liable to Pay Damages as stipulated in Cl. 12.3.2.

3. It is to be noted that Physical Progress % given in the Payment Milestones under Cl. 23.4 may not match with the Project Milestones given in Schedule-G. This also supports the above Clarification.

4. This Clarification is not applicable to the Projects where Scheduled Completion is delayed.

5. This issues with the approval of Competent Authority.

Encl.: As stated above

05/12/24

(CS. Sanjay Kumar Patel)
General Manager (Coord.)

To:

All Officers of NHAI HQ/ ROs/ PIUs/ CMUs/ Site Offices

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1. Hindi Division for translation in Hindi.
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(Annexure - I)

UPC Code:- N/01003/03001/AP

Agenda Note for EC

Name of Work: Construction of Four Lane Bangalore Chennai Expressway from Ch.71.000 to Ch.96.000 (Bethamangala to Baireddypalle Section) in the states of Karnataka and Andhra Pradesh under Bharatmala Pariyojana on Hybrid Annuity Mode (Phase II/Package-I)- **Clarification on Interpretation on payment of Price escalation to the concessionaire during the grace period-Reg.**

Proposal: The instant proposal is for clarification of the Executive Committee on the matter of interpretation regarding payment of Price Escalation to the concessionaire during the grace period.

Salient Feature: -

1	Name of the Project	Construction of Four Lane Bangalore Chennai Expressway from Ch.71.000 to Ch.96.000 (Bethamangala to Baireddypalle Section) in the states of Karnataka and Andhra Pradesh under Bharatmala Pariyojana on Hybrid Annuity Mode (Phase II/Package-I)
2	Mode of Implementation	HAM Mode
3	Name of Contractor / Concessionaire	M/s Montecarlo Bangalore Chennai Expressway P2P1 Pvt. Ltd.
4	Name of AE/IE	M/s SATRA Services and Solutions in JV with Feedback Infra Private Limited.
5	Length of the Project	25 Km
6	Contract value	Rs. 1192 Cr
7	Appointed Date	10.10.2022
8	Scheduled completion date	09.10.2024
9	Status of project	Under Construction
10	Current Physical progress	53.20% completed on 31.05.2024

Background of the proposal:

1. The Project of Construction of Four Lane **Bangalore Chennai Expressway** from Ch.71.000 to Ch.96.000 (Bethamangala to Baireddypalle Section) in the states of Karnataka and Andhra Pradesh under Bharatmala Pariyojana on Hybrid Annuity Mode **(Phase II/Package-I)** was awarded to the Concessionaire- M/s Montecarlo Bangalore Chennai Expressway P2P1 Pvt. Ltd. on 15.09.2021, and appointed date 10.10.2022.

2. The project is under construction and the concessionaire has achieved a physical progress of 61.98% as on 25.09.2024.

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3. During the audit of PIU-Chittoor b/w 05.02.2024 to 26.04.2024 by the Audit Party of DGCA, Hyderabad certain observations on payment of Price Escalation during the grace period were raised. These were promptly attended to and replies were furnished by PD, Chittoor. However, the office of DGCA has sought the comments of Competent Authority.

4. In this connection the following relevant Clauses of the Concession agreement are reproduced hereunder:
(a) Clause 1.4.2 (a):

"between two or more Clauses Of this Agreement. the provisions of a specific Clause relevant to the issue under consideration shall prevail over those Other Clauses".

(b) Clause 12.3.2:

"The Concessionaire shall construct the Project in accordance with the Project Completion Schedule set forth in Schedule-G. In the event that the Concessionaire fails to achieve any Project Milestone within a period of 90 (ninety) days from the date set forth for such Project Milestone in Schedule-G unless such failure has occurred due to Force Majeure or for reasons attributable to the Authority, it shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one percent) of the amount of Performance Security for delay of each day until such Project Milestone is achieved; provided that if any or all Project Milestones or the Scheduled Completion Date are extended in accordance with the provisions of this Agreement, the dates set forth in Schedule-G shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if Schedule-G has been amended as above; provided further that in the event COD is achieved on or before the Scheduled Completion Date, the Damages paid under this Clause 12,3.2 shall be refunded by the Authority to the Concessionaire, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 123.2 Shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof.

(c) Schedule-G : Project Completion Schedule:

Project Completion Schedule
During Construction Period. the Concessionaire shall comply with the requirements set forth in this Schedule-G for each of the Project Milestones and the Scheduled Completion Date (the "Project Completion Schedule"). Within 15 (fifteen) days of the date Of each Project Milestone, the Concessionaire shall notify the Authority of such compliance along with necessary particulars thereof.
Project Milestone-I:

Project Milestone-I shall Occur on the date falling on the (One Hundred and Fiftieth) day from the Appointed Date (the "Project Milestone-I").
Prior to the occurrence of Project Milestone-I. the Concessionaire shall have expended not less than (twenty percent) of the total capital cost set forth in the Financial Package.
Prior to the occurrence of Project Milestone –I, the Concessionaire shall have commenced construction of the Project and achieved 20% Physical Progress.

(d) Clause 23.4: Payment during Construction Period

Upon receiving a report from the Independent Engineer certifying the achievement of the below mentioned Payment Milestone, the Authority shall disburse, within 15(fifteen) days of the receipt of each such report, an instalment equal to 4% (four percent) of the Bid project Cost, adjusted for the Price Index Multiple as applicable on the Reference Index Date preceding the date or that report.

For the purpose of this Clause 23.4, the Payment Milestone for release of payment during Construction Period shall be as under:

a) I (first) Payment Milestone – On achievement of Physical Progress
b) II (second) Payment Milestone – On achievement of 10% Physical Progress
c) III (third) Payment Milestone –On achievement of 200/0 Physical Progress
d) IV (fourth) Payment Milestone – On achievement of 30% Physical Progress
e) V (fifth) Payment Milestone – On achievement of 40% Physical Progress
f) VI (sixth) Payment Milestone – On achievement of 50% Physical Progress
g) VII (seventh) Payment Milestone – On achievement of 60% Physical Progress
h) VIII (eighth) Payment Milestone – On achievement of 70% Physical Progress
i) IX (nineth) Payment Milestone – On achievement of 80% Physical Progress
j) X (tenth) Payment Milestone – On achievement of 90% Physical Progress
Provided that in case Of Change of Scope, the Physical Progress shall be recalculated to account for the changed scope.

5. Observation of Audit party are as under:

As per Schedule-G of the Agreement in respect of (i) Bethamangala-Baireddypalle project should be completed within 730 days i.e., by 09.10.2024 from the Appointed Date (10. 10.2022). Project Milestone-I shall occur on the date falling on the 150th day (09.03.2023) from the appointed date. Prior to occurrence of Project Milestone-I, the Concessionaire shall have commenced construction of the Project and achieved 20% of physical progress.

As per Article-23.4 of the agreements, upon receiving a report from the Independent Engineer (IE) certifying achievement of specified percentage 1 [1] of physical of the project, the Authority shall disburse, an instalment

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equal to 4% of the Bid Project Cost (BPC), adjusted for the Price Index Multiple (PIM) as applicable on the Reference Index Date preceding the date of that report.

As per Schedule-G of the agreement, the Project Milestone-I shall occur before March, 2023 on completion of 20% physical progress, whereas physical progress for Milestone payment No.3.3 occurred after March, 2023. Hence, the Reference Index for Milestone Payment No.3.3 should be taken as February 2023 (preceding Project Milestone-I dated on 09.03.2023) and payments should be restricted accordingly.

[Example: As per Schedule-G of CA Project Milestone-I (Project Milestone-I: Physical Progress of 20% & Financial Progress of 20%) shall occur on or before March-2023, whereas the concessionaire has achieved the Project Milestone -I during the month of May-23. Accordingly, payment milestone corresponding to 20% Physical Progress has been released by calculating PIM with reference to the month of May-23. However, the audit party has informed that the PIM shall be with reference to the month of March-23.]

6. Comments of RO Vijayawada/PD Chittoor:-

In this connection, PD - Chittoor vide letter dated 30.03.2024C has submitted reply informing that As per clause 12.3.2 of CA, the concessionaire shall construct the project in accordance with the Project Completion Schedule set forth in Schedule-G. In the event that the concessionaire fails to achieve any project milestone within a period of 90 days from the date set-forth for such Project-Milestone in schedule-G damages may be levied.

In the subject case the Project Milestone-I has been achieved within a period of 90 days of scheduled date as set forth in Schedule-G of CA. However, as per clause 1.4.2(a) in case of ambiguities or discrepancies within this agreement between two or more clauses of this agreement, the provisions of a specific clause relevant to the issue under consideration shall prevail over those in other clauses.

Article-23 deals with "Payment of Bid Project Cost" shall be considered relevant over Clause 12.3.2 of CA. As per clause 23.4, upon receiving a report from the Independent Engineer (IE) certifying the achievement of Payment Milestone, the authority shall disburse an instalment equal to 4% of BPC adjusted for Price index as applicable on the Reference Index date preceding the date of that report. Accordingly, it is to inform that the PIM has been calculated on date of report i.e., achievement of 20% physical progress certified by the IE and accordingly, Indices are affected as per CA provisions and hence there is no excess payment due to non- consideration of project

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milestone date in calculation of PIM. Accordingly, the observation/para maybe closed.

However, DGCA vide letter dated 16.04.2024 informed that there are ambiguities in the agreement. and that 90 days grace period is for the purpose of damages. In contracts with price variation clause, no price variation is allowed beyond the scheduled date, unless the delay is attributable to NHAI. Audit observation may be brought to the notice of competent authority for their remarks and the same may be intimated to Audit for taking a decision.

RO, Vijayawada concurs with the comments of PD, Chittoor.

7. **Comments of Technical Division:**

Based on the above submission of PD & RO Vijayawada, Technical Division is of following view:

(a) As the recommendation by RO/PD for clarification of the Executive Committee on the matter of interpretation regarding payment of Price Escalation to the concessionaire during the grace period, the proposal has been examined and the proposal has been forwarded to CMD division for interpretation regarding whether the price adjustment is payable to the concessionaire during the grace period.

(b) In this regard, the CMD Division has returned the file mentioning that as per directions of Member (PPP) at Note# 19 of E-file No. E-242026. Tech Div. should not send cases/ files for interpretation of Contract Clauses to CMD, as it would shirk responsibility of Tech Div & unnecessarily delay the decisions of NHAI. If required Tech Div. may submit its interpretation/ recommendations before EC.

(c) Further, As per clause 12.3.2 of CA, the concessionaire shall construct the project in accordance with the Project Completion Schedule set forth in Schedule-G. In the event that the concessionaire fails to achieve any project milestone within a period of 90 days from the date set-forth for such Project-Milestone in schedule-G damages may be levied.

Recommendation of Technical Division: - The price Index Multiple (PIM) for calculation of escalation during the release of payment for Project Milestones shall be calculated in respect of the scheduled dates as per Schedule-G of the Concession Agreement irrespective of the actual date of achievement of such Project Milestone and the grace period is only for the purpose of damages if concessionaire fails to archive particular MI. Moreover, In general it is observed in many cases while giving the EoT to concessionaire/contractor through settlement agreement the price indices payable to concessionaire/contractor only upto the EoT period. Further, if work is not completed withing the EoT period and delay attributable to Concessionaire/contractor the price indices frozen on the EoT period and further damages will be applicable to Concessionaire/contractor as per Contract agreement.

Recommendation of Member (T): - As per the recommendation of Technical Division.

Financial Implications: -

Indirect - NIL

Direct - 4.72cr.

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Approval Sought: - Proposal is for clarification of the Executive Committee on the matter of interpretation regarding payment of Price Escalation to the concessionaire during the grace period.

Baidya

(Tarun Kumar Baidya),
CGM (Tech) - AP
03.10.2024

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