

Ministry of Finance
Department of Economic Affairs

Subject: Minutes of meeting of the Empowered Institution held on 22.06.2006.

The 4th meeting of the Empowered Institution (EI) was held on 22.06.2006 at 3.00 PM in Room No.131-A to consider proposals for Viability Gap Funding (VGF) scheme. The list of participants is at Flag-A.

Agenda Item 1: Proposals seeking “in-principle” approval for VGF

2. The following projects were considered by the Empowered Institution for "in principle" approval for VGF:

- (1) Strengthening of Mandsaur-Sitamau Road (Upto Rajasthan Border) State Highway in Madhya Pradesh
- (2) Strengthening of Matkuli-Tamia-Chindwara State Highways in Madhya Pradesh
- (3) Strengthening of Chandpur-Alirajpur-Kukshi-Badwani State Highways in Madhya Pradesh
- (4) Four laning of the existing two lane Sardar Patel Ring Road around Ahmedabad city.
- (5) Upgradation of Sawai Madhopur to Bharatpur State Highway in Rajasthan
- (6) Upgradation of Jaipur to Nagaur State Highway in Rajasthan
- (7) Upgradation of Jaipur to Bhilwara State Highway, Rajasthan
- (8) Upgradation of Bhilwara to Bundi State Highway, Rajasthan

3. In the first instance the Empowered Institution considered the 3 highway projects from Madhya Pradesh together as these involved the same concession agreement and had similar project details. Madhya Pradesh Road Development Corporation (MPRDC) made a presentation highlighting the project details and the salient features of the concession agreement. The issues discussed were as follows:

- (a) **Compliance with the Scheme:** It was noted that while the projects meet the basic procedural conditions of the VGF Scheme but there remained several shortcomings in the proposal.
- (b) **Traffic Survey:** The traffic survey for the projects was conducted in 2004 by MPRDC and any other traffic survey information pertaining to earlier years is not relevant.
- (c) **Disbursement of VGF:** MPRDC confirmed that the schedule of disbursement of the VGF received from the GOI would conform to the provisions of the Scheme.
- (d) **Concession Agreement:** MPRDC stated that the concession agreement (CA) was based on the Model Concession Agreement (MCA) issued by GOI in 2006 barring some deviations to suit local conditions. Further MPRDC has considered the comments of GOI on the concession and agreed to most of the suggestions. On the remaining issues MPRDC was of the view that no change is warranted. The Empowered Institution stated that while the Project Authority could deviate from the MCA of GOI, however, on some issues, which are considered basic to a PPP project, the deviations would not be acceptable. On other issues GOI would give its suggestions and it was for the State Government to take the final view. While discussing the individual comments following was noted:
 - a. **Scope of Work:** It was suggested that the best practices and basic principles of PPP required that the Detailed Project Report is not a part of the bidding documents or concession agreement. The design of the project should be the responsibility of the BOT operator who in turn would be bound by the specifications mandated by MPRDC prior to bidding. Planning Commission has got the draft Manual of Specifications for four laning through BOT prepared through the Indian Road Congress and MPRDC

could use the same as the basis to develop their own manual. MPRDC may take the final view in this regard.

- b. **Change of Scope:** MPRDC was requested to explain with example whether there is a cap on the extension of the concession period in event of a change of scope. It was also stated that the provision in the CA that any change in scope of work post completion is only with mutual consent is not desirable. The provisions were open-ended and could lead to major disputes.
- c. **Approvals and Consents** Any open issues/subjective/discretionary approvals to be granted after the grant of concession should be avoided. This is in keeping with prevalent BOT best practices. As this could be crucial to the successful implementation of the project, MPRDC was requested to address the comments in this regard.
- d. **Independent Consultant:** This is one of the major points of difference between the formulation proposed by GOI and MPRDC's formulation. It was pointed out that this is a fundamental structural issue that needs to be decided by MPRDC. As per BOT best practices and international precedents, the independence of the Independent Consultant is crucial to the successful implementation of the project, therefore, MPRDC was requested to address the comments in this regard.
- e. **Definition of Total Project Cost (TPC):** The definition of TPC contained in the CA includes the cost of land whereas the VGF Scheme stipulates that TPC should exclude cost of land. MPRDC stated that the cost of land is not an important component in the instant projects but is an integral part of the project cost of the four laning projects which is likely to be posed to GOI for VGF, and in which the land cost is to be loaded on the Project Cost. Therefore, contrary to the definition of TPC under the VGF scheme, where cost of land is excluded, MPRDC proposes to include cost of land in the definition of Total Project Cost. Empowered Institution stated that as this proposition violates the VGF Scheme it can not be accepted. For the determination of the VGF proposed to be obtained from GOI under the VGF Scheme the TPC should be calculated without the cost of land.
- f. **Commencement Date:** The formulation proposed by GOI was that unless financial close is achieved, no rights and obligations under the Concession Agreement should be triggered. Therefore, unless the financial close is achieved, the concessionaire cannot have any rights, for example, take possession of the land. In case the concessionaire exercises rights but fails to achieve financial close, then there could be potential disputes and litigation and recovery of the land could be an issue. MPRDC's formulation de links commencement date from financial close. This may not be desirable. In a separate comment GOI has recommended a clause which permits the concessionaire to access the site for carrying out pre construction site tests and planning etc. Therefore, MPRDC's comment allowing the concessionaire access to the site has already been dealt with. In view of the above MPRDC may be requested to accept the formulation suggested by GOI.
- g. **Right of Way:** GOI in its comments had stated that the rights of way being granted to the concessionaire will have to be subject to existing rights of way and also, while constructing the highway, existing highway will have to continue to be operational. MPRDC's contention that since this is a strengthening project this issue is not material is not clear. The concessionaire must ensure that disruption of existing traffic is to the minimum required.
- h. **Conditions Precedent:** After detailed deliberations MPRDC agreed to adopt the provisions relating to conditions precedent as contained in the MCA.
- i. **Change in Ownership** – The provision for change in ownership has been included in the CA as a representation and warranty provision but should be made a substantive clause under the obligations of the Concessionaire, the violation of which is an event of default. The issue is not very major since there is agreement on the concept and

perhaps with minor re drafting, the issue can be resolved. The obligation to maintain minimum equity levels should be a substantive obligation and not just a representation and warranty.

4. Empowered Institution gave in-principle approval to the above projects subject to the conditions that MPRDC would amend the CA to address the comments of GOI and seek the approval of the Empowered Institution on the amended CA prior to inviting the bids.

5. The Empowered Institution then considered the proposal for four-laning of Sardar Patel Ring Road project in Ahmedabad. Ahmedabad Urban Development Authority (AUDA) made a presentation highlighting the salient features of the project. It was stated that to enable smooth implementation of four-laning of the Ring Road AUDA had attempted to undertake land acquisition and complete the first two lanes then transfer the entire project to a private operator on the BOT basis for construction of the remaining two lanes. This approach was adopted to smoothen the implementation of the project and ensure that the BOT operator does not encounter any major problems in implementation. However, since AUDA has borrowed funds to complete the first two-lanes they would need to reimburse the same and it is proposed to ask the BOT operator to repay this amount in 8 equal installments. AUDA requested that the proposal may be considered as a package of four-laning exercise and not just Two-Laning since that is the basis of its initial conception. Tolling is already being done on the existing Two-Lanes and once the project is transferred this will be an income for the operator and a loss for AUDA. Thus it is fair to seek a reimbursement from the BOT operator of the initial investment done by AUDA.

6. Empowered Institution stated that VGF Scheme can not be used to recover past investment done by the Project Authority. AUDA was requested to revise the project by excluding the past expenditure made by AUDA on the project from the total project cost and re-submit the proposal afresh for consideration by the Empowered Institution.

7. Empowered Institution then considered the four proposals received from Rajasthan State Road Development & Construction Corp. (RSRDCC) for upgradation of State Highways.

8. RSRDCC made a presentation highlighting the salient features of the projects. It was noted that the projects were similar in nature and based on the same concession agreement. Hence the Empowered Institution considered the four projects together. The following issues were discussed:

- (a) **Compliance with the Scheme:** It was noted that while the projects meet the basic procedural conditions of the VGF Scheme but there remained several shortcomings in the proposal.
- (b) **Traffic Survey:** It was noted that the rate of growth projected by RSRDCC appeared unrealistic. However, RSRDCC contended that these were all single lane roads and thus heavy vehicles avoided these stretches, with the proposed two-laning the diverted traffic would come to these roads. For normal traffic growth a rate of growth of 5% was assumed which was realistic.
- (c) **Concession Agreement:** It was noted that the concession agreement required extensive modifications. Planning Commission stated that it will be circulating a MCA for State Highways shortly. RSRDCC welcomed the proposal of Planning Commission and stated that they will adopt the MCA subject to modifications required to suit the local conditions.

9. Empowered Institution gave "in principle" approval to the above proposals forwarded by RSRDCC for availing VGF subject to the condition that the Concession Agreement is revised based on the MCA issued by the GOI, with any modifications as the Project Authorities may like

to make to adapt the agreement to local conditions. The amendments made, if any, will be subject to the approval of the Empowered Institution.

Agenda Item 2: Proposal seeking extension for GIDB

10. The Empowered Institution had granted "in principle" approval to 3 projects received from Gujarat Infrastructure Development Board (GIDB) for four-laning of State Highways in Gujarat on 17.2.2006. The proposal of GIDB seeking extension in time for inviting bids was considered by the Empowered Institution and it was agreed to grant extension for two months to GIDB to enable them to complete documentation for calling bids for the three highway projects for which "in principle" approval was granted by the Empowered Institution in February, 2006 subject to the following conditions:

- (a) GIDB would be asked to submit a clear time frame for achieving pending tasks leading to the bids being invited
- (b) GIDB may be requested to compress the time frame to the minimum level required
- (c) GIDB would submit its concession agreement for clearance by the Empowered Institution before inviting bids.

Agenda Item 3: Factoring the debt available from IIFC in project proposals

11. It was decided that it may not be appropriate to ask Project Authorities to factor in debt available from IIFC in DPRs. However, bidders would be free to approach IIFC and take its likely assistance into account while submitting their bids.

12. The meeting ended with thanks to the Chair.