

No. PD-13/1/2018-PPP Cell/e-330932

भारत सरकार/GOVERNMENT OF INDIA

पत्तन, पोत परिवहन और जलमार्ग मंत्रालय

MINISTRY OF PORTS, SHIPPING AND WATERWAYS

(पब्लिक प्राइवेट पार्टनरशिप विंग/PPP WING)

परिवहन भवन/Parivahan Bhawan,

1, संसद मार्ग/1, Sansad Maig,

नई दिल्ली/New Delhi - 110001

दिनांक/Dated 10 May, 2022

OFFICE MEMORANDUM

Subject: Guidelines for dealing with stressed Public Private Partnership (PPP) Projects at Major Ports in respect of (i) Projects which became stressed during construction stage, i.e. Pre-COD stage; and (ii) Projects, both at Pre-COD and Post-COD stage, which became stressed due to borrowings being categorized by the lenders to the projects as NPA and/or lenders have approached NCLT for recovery of their dues.

In the past decade, the Government of India invited private investment in the Major Port Sector and several projects were awarded under DBFOT basis or its similar variants across the major ports in the country. In spite of due diligence and caution at the time of conceptualizing these projects from various perspectives, the survival of some of the projects is at a risk due to various reasons that were either not foreseen or those which were beyond the control of the contracting parties.

2 On examining the issues, it was noticed that these projects are either being operated under stress or have been abandoned/ terminated, some leading to litigation. It was felt that there is a need to address the issues concerning these concessions so that the Major Port Sector continues to attract private investment which would have a positive impact on the growth of port infrastructure in the country.

3 In order to deal with some of such projects and issues, the first Guidelines on Stressed PPP projects were issued by this Ministry vide its letter No.PD-13/1/2018-PPP Cell, dated 11.07.2018. These guidelines covered only those stressed projects which faced issues after resuming Commercial Operations i.e. **Post-Commercial Operation Date**. However, it is observed that there are PPP Projects which have faced issues during construction stage as well i.e. **Pre- Commercial Operation Date**. It has also been observed that there is another category of stressed projects both at Pre-COD and Post COD stage which require a totally different treatment due to their **borrowings being categorized by lenders as NPA and/or lenders have approached NCLT for recovery of their dues**.

4 The Ministry of Ports, Shipping & Waterways constituted a Committee headed by the Additional Secretary & Financial Advisor, Ministry of Ports, Shipping & Waterways (hereinafter "**Committee**") to examine these guiding principles and to recommend how these could be adopted to deal with PPP projects/cases/issues referred to in Para 3 above in respect of Major Ports. The Committee submitted its report on 24.02.2020 and 2.03.2020.

2/-

5 It is further, informed that the draft policy guidelines were circulated vide O.M. No. PD-13/1/2018-PPP Cell (e330932) dated 4.10.2021 to the Department of Economic Affairs, Department of Expenditure, Department of Legal Affairs and Niti Aayog for comments/inputs.

6 Based on the report of the Committee and inputs received from the above mentioned departments, the Government has taken the following decisions and provide the below mentioned guidelines to deal with such cases:-

(A) Projects which became stressed during construction stage, i.e., Pre-COD stage i.e. where the work has stopped due to inability of Concessionaire to continue with the execution of the project because of the reasons inter-alia aggressive bidding and the optimistic projections with regard to volumes & charges, unforeseen dynamic changes in their business:

- i. In case it is not found feasible to complete the project i.e. to achieve COD of a Stressed Project within the frame work of Concession Agreement of the Project, Major Ports may take up foreclosure of Concession Agreement by way of a written document incorporating terms that are mutually agreed and executed between the parties (i.e. the Concessioneing Authority and the Concessionaire).
- ii. The Concessioneing Authority would pay to the Concessionaire or to the lenders of the Concessionaire (as the case may be), as full and final settlement for taking over the useful assets created by the Concessionaire, an amount equal to the lower of the following sums :
 - a. the value of the work done by the concessionaire in accordance with the Concession Agreement and found useful by the major port (i.e. the Concessioneing Authority); or
 - b. 90% of Debt Due as defined in the Concession Agreement; or
 - c. Any other amount as may be mutually agreed in writing between the Concessioneing Authority and the Concessionaire as per the relevant provisions of MCA 2021
- iii. **Valuation of useful work done:**
 - a. The Concessioneing Authority should first assess the assets and ascertain that it is economically and financially viable to settle as per the aforesaid methodology which should include the implication of stamp duty and registration charges, if any, in respect of taking over of such assets.
 - b. The Concessioneing Authority shall decide on the useful assets to be taken over which can be put to productive use, and in case of partial completion, the Concessioneing Authority shall decide on such assets which can be taken over after undertaking the pending works and can be put to use. For this purpose, the Concessioneing Authority will get the usefulness of the assets assessed and appraised by 'Discounted Cash flow method'.
 - c. The Concessioneing Authority shall provide a list of three Independent Valuers to the Concessionaire and the Concessionaire has to select one of them and communicate consent to carry out valuation.
 - d. The Independent Valuer will complete the valuation of both movable and immovable assets created on 'as is where is basis' and give detailed report with valuation of each component of the project within 3 (three) months from the receipt of mandate in that

regard. The method of valuation shall be the Actual Cost or Replacement Value (ascertained by following principles as defined in Indian Accounting Standards – IND AS 113) whichever is lower.

iv. Calculation of Debt Due:

- a. Wherever there is Debt Due outstanding, the debt due for the purpose of calculation of compensation shall be the dues payable by Concessionaire to lenders as on the Cut Off Date as mutually agreed between the Concessioneing Authority, Concessionaire and the lenders of the Concessionaire or as per provisions of Concession Agreement, whichever is lower.
- b. In case dues payable by concessionaire to lenders are not covered under the definition of 'Debt Due', as per Concession Agreement, the payment of compensation be restricted to the value of work done, found useful and assessed.

v. Payment of Compensation:

- a. The agreed terms for foreclosure between the Concessioneing Authority and the Concessionaire should provide that the Concessionaire should ensure that, the project site is handed over to the Concessioneing Authority encumbrance free and without litigation of any kind whatsoever.
- b. The amount of compensation so arrived (whether or not there is 'Debt Due' on the Concessionaire) shall be paid in the manner laid down in the specific Concession Agreement.
- c. The compensation payable by the Concessioneing Authority towards taking over the useful assets created by the Concessionaire as cited above, shall be made after deduction of all the statutory dues and charges that is payable by the Concessionaire to Concessioneing Authority in respect of such assets and also such other dues and charges payable by the Concessionaire to any other government agency during the construction phase in respect of which the Concessioneing Authority has received any communication or order.
- d. The Concessioneing Authority should preferably make payment to the lenders of the concessionaire (if any) in respect of the project. In case the payment is not required to be made to the lenders, then a 'NOC' must be obtained from the lenders regarding the said payment.
- e. payment needs to be made in a manner that fulfils the order either
 - (a) in accordance with manner laid down in the existing concession agreement or
 - (b) through the escrow mechanism clearly defining the payment waterfall i.e. order of priority of payments such as taxes and statutory dues payable by the concessionaire, compensation to Senior lenders in terms of financing documents, all amounts due to the Concessioneing Authority, payments to other stakeholders, etc.

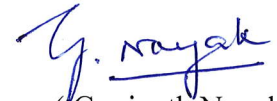
(B) Projects, both at Pre-COD and Post-COD stage, which became stressed due to borrowings being categorized by the lenders to the projects as NPA and/or lenders have approached NCLT for recovery of their dues, i.e., the PPP projects undertaken by the Major Ports where the work has stopped due to inability of Concessionaire to continue

with the execution of the project on account of borrowings of the Concessionaire having been categorized by lenders as NPA and / or proceedings initiated against it before the NCLT under the Insolvency and Bankruptcy Code 2016 or under Section 241(2) of the Companies Act 2013.

- i. Concessioneing Authority shall issue a common directive requiring the Concessionaire(s) to immediately inform the Concessioneing Authority in case the loan account of the concessionaire in respect of a particular PPP project at the Major Ports has been declared as 'NPA' by the lenders and/or if any insolvency resolution process has been initiated against the Concessionaire by the lenders.
- ii. In cases where the lenders after declaring the loan account of the Concessionaire as 'NPA' have initiated insolvency resolution process against the Concessionaire under the IBC or on being informed by Concessionaire or on having come to know otherwise of insolvency resolution proceedings having been initiated against the Concessionaire, the Concessioneing Authority should follow the process as given below:
 - a. Regularly monitor the insolvency resolution proceedings filed against the Concessionaire.
 - b. Identify on its own or through the concessionaire, the status of the NCLT proceedings including the order(s) passed by the NCLT to appoint the Insolvency Resolution Professional (IRP) and the constitution of the Committee of Creditors (CoC).
 - c. Be aware of the public notice that is issued by the IRP to invite claims from the creditors (i.e. financial creditors and operational creditors).
 - d. After the issuance of public notice by the IRP, the Concessioneing Authority should file a claim with the IRP with respect to the outstanding dues against the Concessionaire.
 - e. Subsequent to filing of claim by the Concessioneing Authority, follow up with the IRP must be done to monitor decisions of the CoC and a written request be made to the IRP for settlement of the Concessionaire's account based on foreclosure of Concession Agreement by way of a written document incorporating the terms that are mutually agreed and executed between the parties (i.e. Concessioneing Authority and the lenders). The amount that the Concessioneing Authority would offer in the request to IRP shall be equal to the lower of the following:
 - i. The value of the work done by the concessionaire in accordance with the Concession Agreement and found useful by the Major Port (i.e. the Concessioneing Authority); or
 - ii. Amount under claim in NCLT
 - iii. Any other amount as may be mutually agreed in writing between the Concessioneing Authority and the Lenders

The valuation of useful work done will be as per Para 6(A)(iii) above.

- f. Such settlement should be proposed with the IRP / CoC with the exclusion of the Concessionaire's role as once the insolvency resolution process is initiated against the Concessionaire and the IRP is appointed, the IRP is the designated 'manager' of the Concessionaire and foreclosure process can only be initiated or concluded after the IRP has received approval from the CoC. Accordingly, a declaration be also made in the foreclosure proposal to be submitted stating that beyond this, there will be no other liability on account of the said project on the Concessioneing Authority.
 - g. Once the CoC approves the request for settlement by foreclosure, on the above lines, the Concessioneing Authority may conclude the foreclosure of the project / Concessionaire's account as above.
 - h. Once the foreclosure process is concluded as per the above terms, the Concessioneing Authority must take over the project site along with the useful assets created by the Concessionaire at the project site; whereafter all ongoing legal proceedings between the Concessioneing Authority and the Concessionaire in respect of the said project shall stand exhausted.
 - i. If the request for settlement is not approved by the CoC, then the Concessioneing Authority shall follow the provisions of the IBC as the Concessioneing Authority would be regarded as an 'operational creditor' of the Concessionaire.
7. 'In-principle' approval of Ministry shall be obtained for the projects to be taken up for revival/resolution under aforementioned guidelines. Also, monthly progress update shall be provided to Ministry till project is successfully revived.
8. The above guidelines have been concurred in by IFW vide Note #378 dated 7th March 2022.
9. These guidelines may be adopted for projects implemented under EPC mode also.
10. This issues with approval of Hon'ble Minister for Ports, Shipping and Waterways.



(Gopinath Nayak)

Under Secretary to the Government of India

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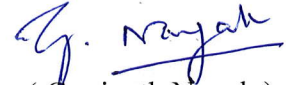
To:-

- i. Chairpersons, All Major Port Authorities
- ii. CMD, KPL

Copy to:-

- i. PS to Hon'ble Minister for Ports, Shipping & Waterways
- ii. PS to Hon'ble MoS (Shri Shripad Naik), MoPSW
- iii. PS to Hon'ble MoS (Shri Shantanu Thakur), MoPSW
- iv. PPS to Secretary (Ports, Shipping & Waterways)

- v. PPS to AS&FA, Ministry of Ports, Shipping & Waterways
- vi. JS (SM & PPP), MoPSW / JS (Ports and Shipping)
- vii. Economic Adviser/ Statistical Adviser, MoPSW
- viii. MD, IPA, New Delhi.


(Gopinath Nayak)
Under Secretary