

File No.PD-13/1/2018-PPPCell

File No. PD-13/1/2018-PPP Cell
Government of India
Ministry of Shipping

Transport Bhawan,
New Delhi-110001
Dated: 11.07.2018

To,

- 1.All Chairmen, Major Ports and CMD KPL
2. Member (Finance) TAMP
3. MD, IPA

Subject: Stressed PPP Projects regarding.

Sir,

I am directed to say that over the years, it has been observed that in spite of due diligence and caution at the time of conceptualizing PPP projects from various perspectives, the survival of some of the PPP projects in Major Ports are at risk due to various reasons that were either not foreseen or those were beyond the control of the Concessioning Authority/ the Concessionaire. Some of the main reasons for this situation are aggressive bidding, the optimistic projections with regard to volumes and charges, inadequate availability of rakes from Railways, unforeseen dynamic changes in the business conditions and absence of flexibility in provisions of concession agreement to overcome such dynamic changes. Some of the PPP projects are either being operated under stress or have been abandoned/terminated, leading to avoidable litigations and if such scenario continues, the Major Ports may not be in a position to attract adequate private investments which would have adverse impact on the growth of port infrastructure in the country.

2. These issues have been raised in various meetings and accordingly, considering the importance of issue, a Committee under the Chairmanship of Chairman IPA was formed on 28/12/2017 to take timely decision on port issues such as MGT, Permissions, port charges, storage charges etc. of PPP users.

3. The committee, after detailed examination of various issues including the issue of storage charges faced in the PPP projects in various Major Ports, submitted its reports on 4.4.2018 to the Ministry(Annexure-I). Besides proposing measures for removal of stress, the Committee recommended the following criteria for classification of a PPP project as 'Stressed Project':-

- (a) The project is sub-optimally utilized as evidenced by the actual cargo handled by the operator during two preceding Financial years being less than 70% of the projection as per DPR/Feasibility report forming part of the bid document and
- (b) Project SPV incurring cash loss continuously for two preceding financial years and

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- (c) That the losses incurred by concessionaire has caused atleast 50% erosion of its peak Net Worth during the operation period.

4. In respect of projects that are identified as stressed projects due to abnormal storage charges, the committee suggested the following option for rationalization of storage charges levied at the DBFOT terminals to make them competitive with neighbouring Non-Major Ports which are run by private organisations:

To extend the free period depending on the local conditions with a view to optimize the capacity utilization of the berth with periodical review duly ensuring the following:

- (i) No Storage Charges and hence no Royalty if cargo is cleared within the free period as per executed concession agreement;
- (ii) If the cargo is cleared after the expiry of free period as per executed concession agreement but within the extended free period, no storage charges will be there but the concessionaire shall pay Royalty equal to 1% of ARR; and
- (iii) If the cargo is cleared after extended free period, concessionaire shall pay Royalty equal to quoted percentage on actual storage charges recovered or 1% of ARR whichever is higher, for the period beyond the extended period.

5. Further, a committee under the chairmanship of AS&FA, MoS along with JS(P) and Chairmen of DPT, VPT & KoPT, was constituted vide letter No. PD-13/26/2015-PPP Cell dated 21.05.2018 of MoS for examination of IPA Report for suggesting future course of action. The Committee examined the report of IPA and also took note of the following aspects:

- (i) The norm of 1% to 5% of revenue towards storage charges out of the gross revenue from handling charges as per 2008 TAMP guidelines.
- (ii) The case of M/s.VGCBPL at Visakhapatnam Port in which, the %of storage charges collected was much higher than 1% that was considered while notifying the tariff as per the TAMP Guidelines, 2008
- (iii) The actual revenue realized from storage charges is very high compared to the norm of 1% prescribed by the TAMP.
- (iv) In situations where the demand of the cargo comes down, the telescopic increase of storage charges beyond free time is acting as deterrent for the importers leading to migration of cargo to the non major-ports offering more free time.
- (v) The norm fixed by TAMP anticipating 1% revenue towards the storage charges out of gross revenue from handling charges was based on certain assumptions regarding the dwell time of the cargo and such situation in actual

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practice changes based on the market condition, availability of rakes, storage space at importers premises etc.

- (vi) The underlying assumption of fixing the dwell time may be appropriate for a certain period of time but will not be static throughout the concession period. The situation dynamically changes depending upon the market conditions and availability of logistics.
- (vii) As a result of higher storage charges if the cargo continues to get diverted to the neighbouring competing Ports, the income generation from the project has been coming down making the asset unviable because of reduction in throughput. This is affecting not only the revenue share but the revenue from the vessel related charges is also decreasing for the Concessioning Authority.
- (viii) The issue of storage charges and reduction in throughput has also resulted in inefficient and reduced usage of mechanized facilities created with a huge investment under PPP mode and has increased the handling of such cargoes at other semi-mechanized/non-mechanized berths defeating the very purpose/objective of mechanization and is also leading to intervention by regulatory agencies from environmental perspective.
- (ix) In a similar issue in case of a PPP project i.e VGCBPL at VPT on a reference of the matter by Ministry, a report was submitted by TAMP vide letter no. TAMP/64/2015-VPT dated 11.09.2015 in which it was recommended that "With the approval of Ministry of Shipping for rationalization of storage charges the VPT can formulate a well analyzed proposal in consultation with the VGCBPL for downward revision of the storage charges in such a way as to achieve the Annual Revenue Requirement (ARR) of Rs. 1.37 crores considered in the tariff order of November, 2009 passed by TAMP for prescription of existing storage charges at VGCBPL and file the proposal before TAMP. While the VGCBPL levies the storage charge at the reduced rate to be approved based on the proposal of VPT, the revenue share payable by the VGCBPL to the VPT at the agreed percentage should not be less than the revenue share calculated on the ARR of Rs 1.3706 cr in November, 2009 order"
- (x) The committee also noted that the clause 21.(9) of the Concession Agreement, has a provision that "Amendments, modifications or alterations" to the terms and conditions of the agreement shall be valid if the same be in writing and agreed to by the parties.

The Committee submitted its views/ recommendations on the issue of Storage Charges on 07.06.2018.

6. The Committee headed by AS&FA, MoS is of the view that wherever such issue of abnormal storage charges emerges in stressed projects as defined in Para 3 above, the Ports may approach TAMP under the provisions of "Amendments, modifications or alterations" to the terms and conditions of the concession agreement with an appropriate

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proposal for rationalization of storage charges in consultation with concessionaires so as to achieve the ARR as per the TAMP guidelines/notification. TAMP has to consider such proposals on merit. The Committee also recommended review of the situation by the Concessioning Authority periodically for optimum utilization of the facility created.

7. The Major ports are, therefore, directed to adopt the aforesaid procedure including review of the situation periodically for optimum utilization of the facility created.

8. Other issues:

In respect of the other issues which are contained in IPA committee report namely, on license fee, flexibility in operations, surrendering of partial project facility, payments on termination to concessionaires/lender, actual project cost, stressed project due to issues relating to migration from tariff guideline 2005 to tariff guidelines 2013 and termination payment relating to 13th and 15th berth at Deendayal Port, AS&FA committee accepted the IPA committee recommendations, therefore, the ports are directed to take actions as per the recommendations contained in IPA report.

9. This issues with the approval of Minister, Ministry of Shipping.

Yours faithfully

Narender Kumar
(Narender Kumar)

Under Secretary to the Govt. of India

Tel No. 011-23722253

E-mail: narender.kumar61@nic.in

Copy to

- i. PS to Hon'ble Minister (Shipping)
- ii. OSD to Hon'ble Minister (Shipping)
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- iv. PS to Hon'ble Minister State for Shipping (MM)
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KUMAR
Date: 2018.07.11 16:05:42 IST
Reason: Approved

Report of the Committee Chaired by Chairman, IPA on the issues pertaining to Stressed PPP Projects

Chapter 1 : Background

In the past decade, Government of India invited private investment into Major Port Sector and several projects were awarded under DBFOT basis 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 are either not foreseen or those are beyond the control of the parties. Some of the main reasons for this situation may be the aggressive bidding and the optimistic projections with regard to volumes & charges, unforeseen dynamic changes in the business and absence of flexibility to overcome such dynamic changes in the Concession Agreements.

On examining the issue, it was noticed that these projects are either being operated under stress or have been abandoned / terminated, leading to avoidable litigations. If this scenario continues the Major Port Sector may not be in a position to attract private investments in a big way which would have adverse impact on the growth of Port Infrastructure in the country.

Ministry of Shipping vide their letter dated 04/01/2018 advised IPA to examine the issue of stressed projects at Major Ports. A committee was constituted for the purpose which deliberated on the issue in the meetings held for the purpose. It was observed that in certain cases solution may not be available within the framework of executed concession agreements and it may be necessary to consider modifications in certain provisions to save the projects.

This report is in the above background keeping in view the deliberations at the meetings of the Committee

Chapter 2 : The Framework

The Committee, on having gone through the main features of the projects and the issues understood to be responsible for the stress, felt that in certain cases solution may not be available within the framework of executed concession agreements and it may be necessary to consider amendments in certain provisions to save the projects. Accordingly, committee has not ruled out considering a solution if it is unavoidable to save the project simply because it may require an amendment to the provisions of executed concession agreements. In order to ensure that no amendment is in favour one party to the concession agreement at the cost of other, it is envisaged that any change shall be with mutual consent only and wherever considered necessary shall require the consent of lenders as well.

Revisiting of already executed concession agreements needs to address various concerns such as loss of sanctity of contracts and undermining competitive bidding principals applied in the initial award of project due to bilateral nature of the amendments. In order to handle the likely opportunistic behaviour of private player through grant of unfair benefits, any amendments should not be to ensure the envisaged return on investment by the private player but only to save the project from continuous losses leading to closure of the same. Thus, renegotiation should be to the extent required for survival of the project i.e. it should be a sort of course correction activity.

Kelkar Report on revisiting of PPP Model also states that Renegotiation of Contracts should be taken up only if:

- (i) Evidence that the project distress is material and likely to result in default under the concession agreement at some future point should it continue;
- (ii) Not caused by the private party and likely to cause adverse outcomes for the government and/or users of the concession assets;
- (iii) Evidence that a renegotiated concession agreement is likely to have direct cost implications for the government that are less than the financial outcomes of doing nothing;
- (iv) Likely to have social benefits or avoided costs that provides better long-term outcomes; and
- (v) Not materially different in terms of risk allocation to the Government of India.

It also says that Renegotiation should not be taken up in case of

- (i) Any event of distress that was foreseeable at the time of financial closure;
- (ii) Any event that would affect the concessionaire just as any other company in its ordinary course of business (for example general changes in law);
- (iii) Any impact arising from assumptions made or risks taken by the concessionaire in preparing its bid;
- (iv) Any impact arising directly or indirectly from the performance, action or inaction of the concessionaire; and
- (v) Any failure of any associated party for concessionaire to perform or provide finance to the concessionaire.

The Committee is of the view that in order to have a uniform approach, circumstances under which a project shall be classified as a Stressed Project for taking remedial steps should be clearly defined with minimum subjectivity based on quantifiable parameters. Accordingly, the Committee proposes criteria for classification as a stressed project as follows:

The alteration in terms and conditions of Concession Agreement may arise due to aberration in one or more of the various parameters of physical and financial performance such (i) Lower Turnover/ Revenue (ii) Higher Capital cost of the Project (iii) Delays in approvals/ clearances by Government (iv) Non-availability / delay in providing supporting infrastructure (v) Delayed/ Inadequate financial arrangement (vi) Variation in contractual specifications caused by changed scenario and (vii) Disagreement on causes and effects of the above variations. However the impact of all these is invariably reflected in project capacity utilisation and loss from project operations. The committee, therefore, recommends following criteria for classification of a project as “Stressed Project”:

- a) The project is sub-optimally utilised as evidenced by the actual cargo handled by the operator during two preceding financial years being less than 70% of the projections as per DPR/ Feasibility Report forming part of the Bid Document and
- b) Project SPV incurring cash loss continuously for two preceding financial years and
- c) That the losses incurred by Concessionaire has caused at least 50% erosion of its peak net worth during the operation period.

Chapter 3 : The Issues related to Stressed Projects

Committee received notes from major ports on issues perceived to be responsible for causing stress, the stressed projects along with possible solutions for removal of the stress. Details about such projects are available in next chapter. The issues, proposed solution and views of the committee on the same are given hereunder:

(1) Abnormally High Storage Charges:

It was brought out by Visakhapatnam Port to the Committee that one of the predominant reasons for stress of PPP projects is the abnormal storage charges at PPP terminals which has a significant impact on the handling cost resulting in underutilization of terminal capacity which in turn have an adverse effect on revenue earnings, viability of the project etc. A study of this issue showed that free storage period of 5 to 15 days is envisaged in concession agreements based on the conditions prevailing at the time of conceiving the project whereas in actual practice it has been observed that the average dwell time is around 30 to 45 days. The storage charges worked out on this basis as % of overall handling charges are much higher than the envisaged 1% to 5% in the policy guidelines on Annual Revenue Requirement (A.R.R.) notified by TAMP vide notification Dt.26th February 2008.

This scenario is resulting in migration of the traffic to the nearby Private Port, where the free storage period is 60 days leading to very low capacity utilization of the terminal. It was stated that substantial improvement in capacity utilisation can be achieved through rationalisation of storage charges.

The committee considered following options for rationalisation of storage charges levied at the DBFOT Terminals:

- a. Considering extension of free time, duly ensuring that the loss of revenue share by Port for such extended period (beyond the free period envisaged in the agreement), shall first be compensated completely (as per the agreed revenue share in the concession agreement) from the revenue generated out of Storage Charges during initial days and after that only, the Concessionaire will be entitled

- for his share of revenue. The Port Trust Board may decide the free time depending up on the local conditions by reviewing periodically.
- b. To follow the suggestion of TAMP that was given in respect of VGCB terminal of VPT for rationalisation of Storage Charges.
 - c. To continue the free period as per the concession agreement and to collect the storage charges as per the first slab dispensing the telescopic rate.
 - d. To extend the free period depending on the local conditions with a view to optimise the capacity utilization of the berth with periodical review duly ensuring the following:
 - (i) No Storage Charges and hence no Royalty if cargo is cleared within the free period as per executed concession agreement.
 - (ii) If the cargo is cleared after the expiry of free period as per executed concession agreement but within the extended free period, no storage charges will be there but the concessionaire shall pay Royalty equal to quoted % of 1% of ARR.
 - (iii) If the cargo is cleared after extended free period then Royalty as per (i) above till the extended period. For subsequent period, concessionaire shall pay Royalty equal to quoted % on actual storage charges recovered or 1% of ARR whichever is higher.

After deliberations, the committee is of the view that the option at (d) above appears to be ideal for rationalisation of storage charges.

- (i) Accordingly, Government, in consultation with the Tariff Authority for Major Ports (TAMP), may make such orders, not inconsistent with the basic features of 2008 Guidelines as may be necessary for removing the difficulty as per para 1.4 of 2008 TAMP Guidelines.
- (ii) In order to carry out the above modification under Article 21.9 of the Concession Agreement covering “Amendments, Modifications or Alterations”, while moving the proposal, the consent for the modification shall be obtained in cases where the modification is not at the request of concessionaire.
- (iii) The stressed projects may be considered on case to case basis and appropriate need-based extension in free period may be considered.

(2) Licence Fee:

Another issue being faced is of License Fee payable by concessionaire to port as licensee of project site and port assets. The committee was advised that it is due to certain changes made to the model concession agreement at the Port level. The related facts are:

- a. The clause relating to License Fee envisaged in the MCA is *“The Concessionaire shall, as consideration for the use, in its capacity as a bare licensee of the Project Site and the equipment comprised in the Port’s Assets, made available in accordance with Article 2.427, pay to the Concessioneing Authority the sum of Rs [●] (Rupees [●] Only) (as specified in the bid documents) (the “License Fee”). Such amount shall be paid by the Concessionaire _____ (as agreed upon in lump sum or in half yearly / yearly installments)”*.
- b. It was informed that in some of the Concession Agreements, an escalation of 2% per annum was also included to the above sum payable as the Licence Fee where agreed to be paid in instalments. Besides this the clause was modified in certain concession agreement that *the concessionaire shall pay such license fee in advance every year till the end of license period as per schedule of Rates prevailing from time to time and first of such payments to be made upon entering into the concession agreement”*
- c. When the concessionaires objected for such calculation (as per schedule of rate prevailing from time to time) of license fee for PPP projects, the issue was referred to TAMP by VPT to examine whether the revision as above was factored while notifying the tariff, if not whether it can be considered for revision of tariff duly considering the quantum of escalation for every five years.
- d. TAMP vide its letter dt.27.12.2017, clarified that a fixed sum arrived on the basis of the SoR prevailing during the period of Bid with 2% escalation every year was only considered for fixation of Tariff but not the SoR prevailing from time to time. TAMP further clarified that no upward revision can be considered on account of this factor and the only factor for reviewing Tariff shall be the WPI, as per the 2008 Guidelines.
- e. Similar issue prevailing at Chennai Port Trust was also discussed where the concessionaire is objecting for revision of SOR from time to time and invoked arbitration clause.

- f. The revised MCA approved by the Cabinet recently the clause is very specific that licence fee may be increased by certain percentage every year and no periodical revision of SOR is envisaged. The committee felt that the spirit of this provision should also be kept in mind in resolving the issue of licence fee in case of the earlier projects.

On this issue, the following options come up for consideration of the committee: -

- a. The parties having signed the concession agreement with the modified clause may invoke the Dispute Resolution Clause provided in the Agreement and settle the matter by availing assistance of expert or arbitration.
- b. Keeping in view the clarification of TAMP, that no review of tariff for upward revision of the same considering the escalation of license fee as per SOR prevailing from time to time is possible, the parties may amend the clause/article in line with TAMP clarification by confining the license fee to 2% escalation every year.

The committee observed that “revision of license fee as per Schedule of Rates from time to time” was incorporated in Bid Documents and accordingly risk of upward revision of SOR was known to concessionaire at the time of bidding and accordingly Concessionaire must have factored it while quoting Revenue Share. Accordingly, the above option should be taken up only in those cases where the increase in license fee is found to be unaffordable and necessary to remove stress.

Further it was observed that the increase in license fee on account of increase in SOR, where prescribed in executed concession agreement, is not a matter of dispute but in projects where relief in license fee is to be considered under above circumstances the procedure similar to Dispute Resolution i.e. Amicable settlement/ Assistance of Expert may be employed.

(3) Flexibility in operations:

The committee was informed that due to unforeseen dynamic changes in the business, the optimistic conditions laid at the stage of conceptualization, the absence of provision for flexibility in operations etc, had adversely affected the viability of project. There are certain

projects which are under stress and rendering the impossibility of running the terminal. In these cases, there is neither concessionaire event of default nor concessioning authority event of default.

There is no provision enabling the Bidder to exit within the Concession period, except by termination for the event of default of Concessionaire / Concessioning Authority or force majeure. However, such provision exists in the NHAI Agreements. It was noted that provision for such Exit Clause as well as the Clause of mutual termination would enable to overcome certain constraints being faced by the stressed projects. If a provision for mutual termination and a first right of refusal to the Concessionaire in the re-bidding is likely to bring alive the stressed asset.

Committee observed that in Mumbai Port such issue is being dealt with for which cabinet approval is awaited. If approved the same model may be adopted for PPP projects in all Major ports.

Alternatively, a procedure similar to the one prescribed for Migration of BoT operators covered under Guidelines for Regulation of Tariff at Major Ports, 2004 notified on 31 March 2005 (2005 Guidelines) to Guidelines for Determination of Tariff for Projects at Major Ports, 2013 notified on 30 September 2013 (2013 Guidelines) may be employed in such circumstances.

(4) Surrendering of partial project facility:

The project facilities such as storage yard, etc., allotted to PPP projects as a part of project facility is not fully utilised and the Operators are proposing to hand over such unutilised facility to the Port authorities.

On this it was opined that by taking back of such facility, if Ports are in a position to earn more revenue by other means, then Port may consider to take over the same subject to no relaxation to the concessionaire in respect of MGT and performance parameters on this count.

(5) Payments on termination to Concessionaire / Lenders:

It was brought to the notice of committee that there is no provision in the Concession Agreement for payment of compensation to the Concessionaire / Lender, consequent on termination during construction phase. It was proposed that the parties (port and concessionaire) should either resolve any dispute / conflict as per the remedy provided in the Contract or by invoking the Dispute Resolution Article in the absence of express remedy in the Contract. In case Concessionaire / Lender fail to exercise the options available as per concession agreement, the following was suggested:

- i) The project assets are to be valued by appointing a Consultant mutually agreed upon by both the Concessionaire/Lender and Concessioneing Authority.
- ii) The value determined is to be considered as equity / debt of the Lender in the project.
- iii) Port may invest the balance amount for completion of the project by infusing amount by way of equity / debt, either by its own funds or by way of opting for loan.
- iv) After completion of the project, the Lender may be given an option to quit by disposing his equity if he so desires.

The committee observed in case of termination due to concessionaire Event of Default, the revised MCA of port sector and also MCA of NHAI for BoT(Toll), provides for Termination Payment only after completion of project i.e. if COD has been achieved. However, it is understood that some milestone - based termination payment is under consideration of NHAI in such cases. Accordingly, committee may consider the issue after a decision is taken by NHAI.

(6) Actual Project Cost:

It was noticed that the “Actual Project Cost” was defined in the Concession Agreement as

“the actual Capital Cost incurred by the Concessionaire on the Project and / or the project facilities and services as certified by the Statutory Auditor and if the same exceeds the estimated Project cost and / or does not form part of the financing plan submitted prior to financial close, the amount of estimated Project Cost or in the

financing plan as the case may be increased by the amount(s) approved in writing by the Concessioing Authority.”

In some cases, it was noticed that the concessionaire is not obtaining prior approval from the Concessioing authority for increase in project cost. Further, the Concessionaire is also availing the debt from the lender / banks based on increased project cost. Therefore, in the event of termination of project, the debt due to the lenders may be more than the debt indicated in the financing plan approved by the authority. It was suggested to the committee that if the concessionaire does not obtain written permission for change in Project cost, in such cases the lowest of the following may be considered as Project Cost:

- a) The Project Cost as per TEFRR.
- b) The Project Cost as per Financing Plan approved by the authority.
- c) The actual Project Cost as certified by the Auditor.

It was observed that in existing projects all three costs are already known and any change at this stage which may affect termination compensation may not be desirable as it directly affects the Lenders who are not a party to Concession Agreement.

(7) Stressed Projects due to issues relating to Migration from Tariff Guideline 2005 to Tariff Guidelines 2013:

The committee proposes that such projects may be dealt with as per migration guidelines prepared by the Ministry (**Annexure 1**).

(8) Termination Payment relating to 13th and 15th Berth at Deendayal Port

The committee asked the port to submit in detail the circumstances under which termination payment has not been made in these projects. The detailed position as brought out in the notes received from DPT is given in next chapter.

Keeping in view the position the Committee is of the view that DPT has taken necessary steps (i) as per provisions of concession agreement and (ii) keeping in view the port's interest.

Chapter 4 : The Projects Details

Projects at Visakhapatnam Port

The performance of PPP Terminals at VPT with reference to the storage charges stipulated in the concession agreements of these terminals is as follows:

Name of the terminal	Capacity MMTPA	Traffic handled 2014-15 MMTPA	Traffic handled 2015-16 MMTPA	Traffic handled 2016-17 MMTPA
VGCB	10.18	7.12	6.89	4.25
EQ-1	6.41	1.01	0.85	NIL
WQ-6	2.08	0.002	0.13	0.41
EQ-1A	7.36	-	--	--

The cargo at VGCB and EQ-1 has come down from 7.12 MT to 4.25 MT and from 1.01 to nil at the two terminals respectively as compared to 2014-15 when storage charges were same. This indicates that some other factors are also responsible for sub-optimal cargo handling at these terminals.

A comparative scenario of storage charges at the PPP terminals in VPT as compared to the neighbouring private port “Gangavaram Port Limited” is as under:

Port/berth	Handling charges/ tonne (Rs.)	Free storage period (days)	Storage charges per tonne (Rs.)			
			If cargo remains for 10 days	If cargo remains for 20 days	If cargo remains for 45 days	If cargo remains for 60 days
VPT/VGCB	168.21	10	--	30.20	231.70	352.60
VPT/EQ-1	199.79	5	10.10	70.80	273.05	394.40
VPT/WQ-6	106.04	5	58.10	226.58	807.33	1155.78
VPT/EQ-1A	172.83	5	6.65	46.60	179.85	259.80
Gangavaram	200*	60-120	nil	nil	nil	nil

- a) The VGCBPL terminal at VPT (Import Coal Terminal) that commenced its commercial operations from 8.4.2013

- b) This project was envisaged with a daily unloading capacity of 42000 to 70000 metric tons depending on the size of vessel, with a free storage period of 10 days, and with an anticipated availability of ten railway rakes per day.
- c) Beyond the free storage period, the storage charges are telescopic which doubles for every five days from the eleventh day starting from Rs.2.01/- per ton per day and increasing up to Rs. 8.03/- per tonne from 21st day.
- d) Longer storage period due to non-availability of sufficient Railway rakes for evacuation of cargo as envisaged at the time of Concession Agreement.
- e) Economic and Financial conditions of the customers, Storage infrastructure at the customer's premises, etc., also resulting in longer storage period.
- f) As per the TAMP Guidelines on Annual Revenue Requirement (A.R.R), the coal handling terminal has to earn 98% revenue through handling charges, 1% revenue through Storage Charges and 1% towards miscellaneous charges whereas the revenue from storage charges at the VGCBPL terminal in VPT is around 15 to 25 percent. which is very high
- g) On referring the issue, TAMP also recommended for rationalization of storage charges vide their letter Dt. 11.9.2015 and suggested the following:
- h) "With the approval of the MoS for rationalisation of Storage Charges, VPT can formulate a well-analysed proposal in consultation with VGCBPL for downward revision of Storage Charges in such a way to achieve the A.R.R. of Rs.1.37 Crores considered in the Tariff Order of November, 2009 passed by TAMP for prescription of existing Storage Charges at VGCBPL and file the proposal before TAMP. However, it may be ensured that the agreed percentage should not be less than the revenue share payable to VPT calculated on the A.R.R. of Rs.1.37 Crores in November, 2009 Order".
- i) While conceiving the project, a mix of Handymax, Panamax, capsized vessels were considered and accordingly project facilities have been worked out. Whereas, on commencement of commercial operations practical issues such as, increase in number of cape size vessels handled with very short intervals, non-availability of rakes, lack of sufficient infrastructure at customer premises etc., have come across and it has become a challenge to overcome these practical difficulties.

Project at Deendayal Port:**Adani Kandla Bulk Terminal (P) Ltd.**

1. In order to meet the gap between the Capacity of port in terms of handling Dry Bulk cargo and projected traffic, Deendayal Port Trust had embark upon to develop a Dry Bulk Terminal off Tekra near Tuna outside Kandla Creek to handle the Dry Bulk cargo on BOT basis
2. Deendayal Port has entered into Concession Agreement with M/s Adani Kandla Bulk Terminal Pvt. Ltd (AKBTPL) (Concessionaire), on 27.06.12 to develop the subject project on BOT basis.
3. Consequent upon fulfilling of all Conditions Precedent (CPs) by both the parties (KPT & AKBTPL), KPT had awarded the Concession of the Project to M/s AKBTPL on 19.12.12.
4. M/s AKBTPL has stated the commercial operation and obtained the Completion certificate from Independent Engineer on 17.03.2015.
5. Cargo Handled by M/s AKBTPL from Feb'2015 till December 2017.

Year	Cargo Handled (Lac MT)	Revenue (Rs. Crore)	Remarks
2014-15	1.73	-	COD in February 2015
2015-16	16.37	77.56	
2016-17	17.48	99.21	
2017-18	27.89	-	Till December 2017

Issue Regarding the Project:

1. The TAMP vide its order No. TAMP/42/2009-DPT dated 17th August 2010 had approved the Upfront Tariff for the above project based on the Guidelines for upfront Tariff setting for PPP Projects at Major Ports, 2008.
2. After signing the Agreement, on 19.08.2013, M/s AKBTPL had directly approached the TAMP for revision of the approved Tariff, indicating abnormally high storage charges due to faulty assumptions of 60% of cargo being evacuated in first 5 days of free period on the basis of which TAMP order dated 02.11.2010 was passed.

3. On 26.09.13, TAMP responded to M/s AKBTPPL (by endorsing a copy to DPT) that their request for revision of Tariff is found to be beyond the scope of Guideline for Upfront Tariff for PPP Projects of Major Ports, 2008. On 20.01.14, M/s AKBTPPL submitted to DPT that the approved Tariff for storage charges for the Project are exorbitantly high and can prove to be major deterrent in attracting traffic to the project and requested DPT to pursue the matter along with the storage charges of 13th to 16th berths in general interest of the trade.
4. The Upfront Tariff approved for the project is based on the Tariff Guidelines for PPP projects -2008 approved by the Ministry. As per these guidelines, for fixing the tariff for various services, the Total Revenue Requirement for the project is required to be apportioned in following manner and rates of the individual tariff items under each following group is determined: -
 - Tariff Group % of total revenue allocation
 - Cargo Handling charges 90%
 - Storage charges 5%
 - Miscellaneous charges 5%

On referring the historical figures of last three years, if Concessionaire continued to charge the users the storage charges as per TAMP approved ceiling rates and the amount of total storage charges payable by users will become exorbitant as compared to the envisaged revenue requirement (5% of total revenue requirement) for storage in the approved tariff

Concessionaire has offered to pay the Concessioneing Authority the 5% of the total gross revenue as per the TAMP norms for apportionment of total Revenue requirement specified at TAMP 2008 guidelines.

Concessionaire had committed that there would an increase up to 50% in the volume of cargo if rationalization of storage charges would happen. As per the commitment of the Concessionaire, a senility analysis has been made from a 10% to 50 %increase in the volume of Cargo and the projected increase of revenue share has calculated.

Based on the above sensitivity analysis calculations, DPT may have a revenue gain of Rs 25.79 crores in the first year of storage tariff rationalization and Rs 35.88 crores from the

second year onwards as per the commitment of the Concessionaire for 50% increase in the volume of cargo.

It is envisaged that with the rationalization of the tariff the concessionaire may achieve the required MGT and the given calculations are also in line with the required MGT.

Berth No. 13

Deendayal Port Trust (DPT), pursuant to a competitive bidding process entered into Concession Agreement on 03.12.2009 for development of 13th Multipurpose Cargo Berth with RAS Infraport Pvt. Ltd (RAS). RAS started the commercial operations from 18.02.2013.

After starting the Commercial operations RAS have handled 66,90,494 Tonne of cargo at 13th Berth, year wise cargo handled till September 2017 is as below.

Year	Cargo Handled (in Tonne)
2012-13	56,000
2013-14	14,46,674
2014-15	13,37,223
2015-16	14,18,184
2016-17	16,21,902
2017-18 (upto Sept-17)	8,10,510
Total	66,90,494

Despite handling of 66,90,494 Tonnes of Cargo, RAS has paid Royalty only for two months towards cargo handled by it for 56,000 Tonnes. The outstanding payable by RAS towards Royalty amounts to Rs114.11 lacs.

The act of non-payment of outstanding dues including License Fee and Royalty was considered as an Event of Default of RAS as per Article 15.1 of the Concession Agreement and thereby a Consultation Notice was issued to RAS on 22.08.2014 to cure its underlying Event of Defaults.

In view of the above a proposal to terminate the Concession Agreement was submitted before the board for approval in its meeting held in March 2015.

In a meeting with Ministry held on 20.03.2015, an idea to restructure 13th & 15th Berth in line with the project being restructured at Kamarajar Ports Ltd subject to payment of all outstanding dues by both the Concessionaires of 13th and 15th Berths was suggested.

A Sub-Committee of Trustees to go through the Concession Agreement, to analyse the complex issues involved including outstanding dues, etc., in detail and to suggest suitable remedial measures for a comprehensive proposal to the Board. The Sub-Committee of the trustee in its meeting held on 15.05.2015 recommended the Board to approve restructuring of berth 13 and 15 with the terms which includes payment of all outstanding dues including License Fee and Royalty. The Board of DPT in its meeting held on 08.06.2015 accepted the recommendations of the Sub-Committee of Trustees made during the meeting held on 15.5.2015. The same was intimated to the Concessionaires and Lenders for their consent. Subsequently, RAS and its Lenders had furnished their consent for restructuring.

However, RAS failed to pay the pending License Fees in spite of giving a number of extensions in payment due date.

On 09.06.2016, a joint meeting was held at Ministry and it was decided that principal amount of outstanding License Fee should be paid immediately by RAS and the disputed amount of License Fee and interest may be resolved through Dispute resolution mechanism as laid down in the signed Concession Agreement. As decided in the meeting, RAS was asked to deposit the LF, but again it failed to deposit the same with DPT.

Subsequently the port got legal opinion that a fresh consultation notice is required to be issued before 11.06.2017. Accordingly, a Consultation Notice was issued on 07.06.2017, with 15 days remedial period was issued to RAS & its Lenders; specifying the reasonable details of the underlying Events of Default(s) that has been committed by RAS under Article 15 of the CA. In terms of CA, Consultation Notice, it was requested to the Concessionaire to (i) pay the outstanding amount and (ii) to cure their Events of Defaults within a period of 15 days.

DPT vide its letter dated 17.06.17 communicated to Lenders that if before expiry of the remedial period, the Lenders do not make any representation in line with the clause 3.3.1

of the substitution agreement (regarding the intention to substitute the concessionaire by a selectee), it will be deemed that the Lenders have waived their right of substitution and they don't intend to exercise the same. In this regard, DPT did not receive any representation from Lenders within the stipulated time i.e. 15 days from the issuance of consultation notice and hence it was deemed that Lenders do not intend to exercise their rights as per Article 15.4 of the Concession Agreement.

RAS had also invoked Article 19.3 (Arbitration) of the Concession Agreement by its letter dated 6th February 2017, thereby an Arbitral Tribunal was constituted for adjudication of disputes between the parties under the Concession Agreement. The Parties have filed their claim and counter claim before the Arbitration Tribunal. The details of counter claim filed by DPT before the Arbitration Tribunal and the 90% of the Debt due are as under.

Counter Claim of DPT (in Rs)	90% of Debt Due (in Rs)
Outstanding Dues = 1,69,24,27,046	
Opportunity Loss = 22,71,20,48,200	183,90,04,471
<u>Total claim = 24,40,44,75,246</u>	

Since, there were substantial dues outstanding (Rs. 1,69,24,27,046/-; summary of the same as given above) from RAS, before the concession agreement stands terminated as per the Termination Notice dated 01.07.2017, DPT had sought a legal opinion from Senior Advocate Shri Mihir Thakor regarding termination compensation. He in his opinion stated that *“As against this (i.e. the Compensation payable by DPT to the Concessionaire), KPT has a huge claim. In the circumstances, there is no reason to pass the resolution as proposed. I would believe that KPT is entitled to get possession of the Project Facilities and Services of RAS as per the terms and conditions of the agreement. Accordingly, KPT should call upon RAS to handover possession of these assets.”* Further, he in his opinion has also suggested that *“DPT should take appropriate action to recover possession of the project facilities and would be at liberty to furnish security/deposit money as per clause 17 in the court if necessary”*.

By considering the opinion of Senior Advocate, Board of DPT has approved *“to take appropriate action to take over the possession of the Project site, facilities and services from the Concessionaire of 13th berth and in the event of refusal by the Concessionaire to*

handover the peaceful possession of the berth, necessary course of action may be initiated in the matter, as per the Concession Agreement and law of the land”.

Accordingly, at the expiry of the termination notice period (issued by DPT), DPT took over the possession of the berth no 13 on 29.09.2017, without paying the Termination Compensation; and thereafter DPT has started the operations at the berth. With the expiry of the Termination Period (as per DPT's Termination Notice dated 01.07.2017), the Concession Agreement between RAS and DPT stands terminated on 29th September 2017.

Consequently, Lenders of the Project i.e. ICICI, BoI and SIDBI, filed a civil suit before the commercial court Rajkot against DPT and RAS seeking permanent injunction along with the interim relief applications. DPT has filed its reply in the matter and it is pending for adjudication.

Thereafter, the lenders have also filed an application against DPT and RAS & others, before the Debt Recovery Tribunal for an amount of Rs 206,90,93,337.44. DPT is in the process of filing its reply in consultation with its Advocate and the matter is pending for adjudication.

In view of the foregoing and keeping in mind that the matter is sub-judice, and the fact that RAS has no asset or financial credentials, KPT is of the view it may cause serious prejudice to the interest of DPT if it would pay such substantial amounts i.e. 90% of the debt due at this stage.

Berth No. 15

Deendayal Port Trust (DPT), for development of 15th Multipurpose Cargo Berth entered in to concession agreement with JRE Infra Pvt. Ltd (JRE). DPT fulfilled all the Conditions Precedent on its part and handed over the physical possession of the Project Site on 08.08.2011. After JRE fulfilling its Conditions Precedent with delay, on 27.09.2011 the Award of Concession of the Project was issued by DPT to JRE and thereby JRE commenced the Construction activity of berth No. 15.

Subsequently, JRE obtained the Provisional Completion Certificate from the Independent Engineer on 26.08.2013 and started the commercial operations at Berth no 15 from 16.11.2013. JRE failed to complete all the items of punch list within the stipulated scheduled period. Thereby, from 1.11.14 to 15.09.15 the Provisional Completion Certificate for 15 Berth was withdrawn due to non-completion of punch list.

Initially, JRE after taking over the possession on the Project site have paid License Fees for two years. However, JRE has not paid the License Fee as stipulated under article 9.1 of the Concession Agreement, therefore a huge amount of Rs 42,17,61,320 is outstanding towards License Fee including service tax and interest.

After starting the Commercial operations JRE have handled 13,49,337 Tonne of cargo at 13th Berth, year wise cargo handled till September 2017 is as below.

Year	Cargo Handled (in Tonne)
2013-14	49,726
2014-15	2,26,661.45
2015-16	1,11,930
2016-17	6,16,838
2017-18 (upto Sept-17)	3,44,182
Total	13,49,337

Despite handling of 13,49,337 Tonnes of Cargo, JRE has not paid any Royalty from start of commercial operation at berth no 15. The outstanding payable by JRE towards Royalty amounts to Rs. 19,97,15,117.

Due to non-payment of outstanding dues, as per the Concession Agreement and non completion of punch list, Consultation Notice dated 08.10.2014 was served upon JRE and its Lenders. However, JRE failed to cure their underlying event of default. Due to non-curing of underlying Event of Defaults by JRE, a proposal to terminate the Concession Agreement of 15th Berth was submitted before the board for approval in its meeting held in March 2015.

Meanwhile, in the meeting with Ministry held on 20.03.2015, an idea to restructure 13th & 15th Berth in line with the project being restructured at Kamarajar Ports Ltd subject to

payment of all outstanding dues by both the Concessionaires of 13th and 15th Berths was suggested.

A Sub-Committee of Trustees to go through the Concession Agreement, to analyse the complex issues involved including outstanding dues, etc., in detail and to suggest suitable remedial measures for a comprehensive proposal to the Board. The Sub-Committee of the trustee in its meeting held on 15.05.2015 recommended the Board to approve restructuring of berth 13 and 15 with the terms which includes payment of all outstanding dues including License Fee and Royalty. The same was intimated to the Concessionaires and Lenders for their consent. Subsequently, JRE and its Lenders had furnished their consent for restructuring. However, JRE failed to pay the pending License Fees despite giving extensions in time to pay the same.

Again on 09.06.2016, a joint meeting was held under the chairmanship of Joint Secretary, MoS. During the meeting, on outstanding amount of License Fee, it was decided that principal amount of outstanding License Fee should be paid immediately by JRE and the disputed amount of License Fee and interest may be resolved through Dispute resolution mechanism as laid down in the signed Concession Agreement. As decided in the meeting, JRE was asked to deposit the LF, but again it failed to deposit the same with DPT.

Since JRE have not met with the agreed terms of Repositioning KPT keeping in view the legal opinion approved to initiate the Arbitration as per Article 19.3 of the Concession Agreement.

Subsequently, as per legal opinion, KPT served a Consultation Notice with 15 days remedial period was issued to JRE & its Lenders for payment of the outstanding amount and (ii) to cure their Events of Defaults within a period of 15 days. Further during the meeting held on 17.06.2017 lenders were informed that in line with clause 3.3.1 of the signed substitution agreement lenders are required to make a representation regarding their intention to substitute the Concessionaire by the selectee within 15 days from the issuance of Consultation notice. It was also communicated vide letter of 17.06.2017 to lenders that if they do not make any representation in line with the clause 3.3.1 of the substitution agreement (regarding the intention to substitute the concessionaire by a selectee), it will be deemed that

the Lenders have waived their right of substitution and they don't intend to exercise the same. In this regard, DPT did not receive any representation from Lenders within the stipulated time.

Since JRE neither cured the underlying events of defaults as specified in Consultation notice dated 07.06.17 as issued by DPT nor the Lenders made any representation in line with clause 3.3.1 of the substitution agreement & also not showed any intention to exercise their right as per article 15.4 of the Concession Agreement, DPT issued a Termination Notice on 01.07.2017 with a notice period of 90 days in accordance with Article 16.1 of the Concession Agreement.

During the meeting held on 3rd July 2017 at MoS (GOI) New Delhi, that the issues may be resolved through an Arbitration process. In view of the disputes between the parties (DPT and JRE Infra Pvt. Ltd), DPT had invoked Article 19.3 (Arbitration) of the Concession Agreement, thereby an Arbitral Tribunal was constituted for adjudication of disputes between the parties under the Concession Agreement. The claim and counter claim has been filed by the Parties before the Arbitration Tribunal. The details of claim filed by DPT before the Arbitration Tribunal and the 90% of the Debt due are as under.

Claim by DPT (in Rs)	90% of Debt Due (in Rs)
Outstanding Dues = 64,08,58,679	92,82,32,724
Opportunity Loss = 24,01,93,55,821	
<u>Total claim = 24,66,02,14,500</u>	

Since, there were substantial dues outstanding (Rs. 64,08,58,679/- from JRE, KPT considering the opinion of Senior Advocate, approved *“to take appropriate action to take over the possession of the Project site, facilities and services from the Concessionaire of 15th berth and in the event of refusal by the Concessionaire to handover the peaceful possession of the berth, necessary course of action may be initiated in the matter, as per the Concession Agreement and law of the land”*.

Accordingly, at the expiry of the Termination Notice period, as per the Concession Agreement JRE failed to fulfil its obligation of handing over the Project Site, Facilities and

Services to DPT on the Transfer Date and DPT has not paid the termination Compensation to JRE. With the expiry of the Termination Period as per DPT's Termination Notice dated 1st July 2017, the Concession Agreement stands terminated on 29th September 2017.

It is further submitted that in past DPT has issued several notices to the Escrow Bank (i.e. SBI) for breach of order of priority in appropriation of the amounts from the Escrow Account. DPT has raised specific assertions in its pleading before the Arbitrators regarding collusion between the SBI (Lenders) and JRE, inasmuch as the Bank has not provided complete record of financial transactions of JRE; and though the bank was requested to exercise its right of substitution as per the Concession Agreement during the Consultation Process (even before the Termination process), which was consciously not opted by the Lenders.

Hence in view of the foregoing and keeping in mind that the matter is sub-judice and the fact that JRE has no asset or financial credentials, DPT is of the view that it may cause serious prejudice to the interest of DPT if it would have paid Termination Compensation amount i.e. 90% of the debt due on the Transfer Date.

Immediately post expiry of Termination Notice, JRE in the interregnum had filed an application under Section 17 of the Arbitration and Conciliation Act, 1996 before the constituted Arbitral Tribunal, seeking inter alia, *“Direct the Claimant to forthwith pay the amount of Rs. 92,82,32,724/-, (being 90% of the Debt Due to the Lender, State Bank of India in accordance with Article 17.1(b) of the Concession Agreement along with interest as per Article 17.5 of the Concession Agreement;”* DPT had contested the grant of reliefs as prayed in the said application by filing its reply.

The Arbitration Tribunal vide its order dated 4th December 2017 directed *“DPT to deposit an amount of Rs.92,82,32,724/- by way of Debt Due to the Lenders in an Escrow Account with the State Bank of India.....**The amount so deposited in Escrow Account shall earn interest. The principal amount and the interest shall remain available for appropriation and disbursal in accordance with the Award finally made by the Tribunal.....**”*

Pursuant to the order dated 4th December 2017, Board of DPT approved to implement the order and accordingly, DPT has deposited the amount of Rs.92,82,32,724/- with an intent and a clear understanding that the amount would be available for appropriation and disbursal in accordance with final award that may be made by the Arbitration Tribunal.

However, as against the above clear findings, the subsequent order dated 23rd December 2017 passed by the Arbitration Tribunal, without hearing DPT, created complication when it observes in Para 5 as under:

“....that the money is available to be commercially used by SBI and is not going to be returned in any case. The order clearly reveals that the amount so deposited would always remain with SBI, though certain directions operative between the parties only may be made by the Tribunal at the stage of final hearing.”

The above observations of the Tribunal created a situation where in spite of the award being made in favour of the DPT, the amount lying with the SBI which was expressly made available for appropriation and disbursal in accordance with the award finally made by the Tribunal would not be made available to DPT.

In the circumstances, pertinently in view of the subsequent directions dated 23rd December 2017, DPT in consultation with its Senior Advocate preferred writ petition before the Hon'ble high court of Gujarat and appeals before the commercial court Rajkot challenging the order dated 4th December 2017 and 23rd December 2017. The Writ petition is disposed off by granting ad-interim relief, that SBI bank and others are restrained from appropriating amount of Rs.92,82,32,724/- from the Escrow Account of the Parties maintained with SBI. Further, the appeals filed before the commercial court Rajkot are pending for adjudication.

Hence, in view the above, at the cost of repetition it is respectfully submitted that in the case of JRE, DPT has deposited the amount of Rs. 92,82,32,724/- in the Escrow Account, with an intent and a clear understanding that the amount would be available for appropriation and disbursal in accordance with final award that may be made by the Arbitration Tribunal and not otherwise.

Chapter 5 : Process for Handling Stressed Projects

Port may make out a detailed comprehensive Proposal for taking a decision on changing the terms and conditions of the concession agreement for removal of stress. While the Proposal will be case specific keeping in view the reasons and extent of stress and proposed solution for removal of stress, it may broadly cover the following general aspects:

- (i) Project Particulars such as capacity, cargo, date of commercial operation, revenue share etc. and details of concessionaire
- (ii) Physical and Financial Performance of the project/ concessionaire for last 3 years such as cargo handled, revenue earned, profit/ loss from operations
- (iii) Financial Position of the Concessionaire such as Paid Up Capital, Reserves & Surplus and Net worth as at the close of last 3 financial years
- (iv) Status of meeting MGT and making payment to port of license fee, royalty etc. and repayment of borrowings to lenders
- (v) Comments on compliance of other obligations as per concession agreement such as performance parameters
- (vi) Perceived cause of stress and supporting documents evidencing the same e.g. comparative tariff at the port and neighbouring port where the cargo is perceived to be getting diverted due to higher tariff.
- (vii) Proposed modifications in terms and conditions of concession agreement which should be agreed by concessionaire as necessary and sufficient
- (viii) Financial Model for the remaining concession period with and without incorporating proposed changes evidencing that the proposed changes are necessary and sufficient and have been proposed for the required/ adequate period
- (ix) Assessment of Financial position after implementation of the changes evidencing removal of stress.
- (x) Details of existing claims/ counter-claims/litigations and how they are proposed to be treated keeping in view that the port is agreeable to amend the provisions of executed concession agreement.
- (xi) Keeping in view the above facts, figures and basis of future projections port shall put up the matter to Board ensuring that the proposed recommendations are

consistent with the broad policy framework approved by Government for renegotiation of contracts.

- (xii) The proposal with recommendations of Board shall be submitted to the Ministry for necessary approval.
- (xiii) On receipt of approval from Ministry the changes in concession agreement may be implemented as well as terms and conditions, if any, to be complied with.
- (xiv) Board shall obtain Yearly outcome/Progress Report and review the same to assess whether the envisaged benefit is being achieved and stress getting removed and for ensuring that changes in concession agreement are made for required period only and to the extent necessary for removal of the stress. Any changes arising as per the review may also be carried out after obtaining approval from the Ministry.

Annexure 1

Guidelines for Migration of BoT operators covered under Guidelines for Regulation of Tariff at Major Ports, 2004 notified on 31 March 2005 (2005 Guidelines) to Guidelines for Determination of Tariff for Projects at Major Ports, 2013 notified on 30 September 2013 (2013 Guidelines)

(i) The existing Concessionaire can choose to express its intent to the concerned Port Trust to migrate from 2005 Guidelines to 2013 Guidelines for determination of his tariff. The Concessionaire has to choose and express his intent to migrate within 4 months from the date of issue of these guidelines. The Concessionaire shall also take consent of the lenders, wherever applicable and submit to the concessioning authority'.

(ii)(a) Open re-bidding of the project will be done to determine a suitable new revenue share in an open and transparent manner' The existing BOT operator shall be deemed to be qualified for bidding and can participate in the bidding process. Tariff for the rebid project will be notified upfront by Tariff Authority for Major Ports or any other Competent Authority authorised for the purpose based on the proposal filed by the concerned Port Trust. Clauses like MGT, cargo profile, project requirement etc which are part of existing Concession Agreement cannot be changed during the tendering process. Time line for depositing replacement value of asset by the successful bidder and any other relevant issue should be clearly mentioned in the bid document by the Port Trust.

(iii) The open re-bidding is for the existing functional projects. Accordingly, re-bidding will be for the remaining period of the Concession Agreement already entered by the existing concessionaire and the Port Trust'

(iv)(a) The existing royalty or revenue share converted to royalty of the relevant project would be the Reserve Royalty for the purpose of bidding of the relevant project to protect the existing revenue share or royalty. Present Value (PV) of future revenue shares may be used to convert existing revenue share-based mechanism to royalty-based mechanism by adopting the discounting factor. The discounting factor will be the longest G-Sec rate as per the latest RBI Bulletin, as adopted in the Land Policy Guidelines, 2014 as amended in July 2015 to determine reserve price while leasing out land on upfront basis by the Port Trusts.

(iv)(b) The existing assets would be valued by adopting the replacement value of assets by an independent valuer, appointed by the Port Trust in consultation with existing concessionaire. The cost of revaluation of assets shall be initially borne by the Concerned Port Trust and shall be recovered subsequently from the successful bidder. The replacement value of the assets so determined would be the Reserve Price for the assets'

(v)(a) Prior to making an Application for bidding, the bidder shall pay to the Port Trust towards the cost of the bidding process calculated at the rate of Rs. 10,000 for every Rs. 100 Crore or part thereof comprising the replacement value of the assets of the Project.

(v)(b) The Earnest Money Deposit (EMD), calculated as per the norms set forth in the Model Bidding Document, shall be deposited by all the Bidders, including the existing concessionaire along with the bid. The EMD shall be refunded to all the unsuccessful bidders. If a bidder withdraws the bid either before or after the deadline for submission of bids, then the Port Trust will be at liberty to forfeit whole of the EMD absolutely.

(vi) If the existing concessionaire, after choosing and expressing his interest to migrate to 2013 Guidelines for determination of tariff for projects at Major Ports, withdraws the Bid either before or after the deadline for submission of bids, it shall result in the concessionaire's forfeiture of EMD. No bids shall be processed further. This shall be made very clear in the Bid Documents. The tariff of the existing concessionaire shall continue to be regulated under 2005 Guidelines'

(vii) In such re-bidding, the existing Concessionaire will be given a Right of First Refusal (ROFR) in the bidding process, wherein the existing Concessionaire will have to match the revenue share quoted by the highest bidder'

(viii) If the existing Concessionaire exercises ROFR, when another entity emerges as the highest bidder the project shall be awarded to the existing Concessionaire, provided the bid of the existing concessionaire is within 10% of the winning bid. If the bid of the existing concessionaire is not within 10% of the winning bid' the project shall be awarded to the highest bidder'

(ix) If the existing Concessionaire is the highest bidder or the sole bidder, the project may be awarded to the existing Concessionaire in this scenario also.

(x) If the existing Concessionaire does not opt to match the highest bidder, the project may be awarded to the highest bidder. The replacement value of the assets so determined has to be paid by the successful bidder to the concerned Port Trust'. The replacement value of the assets would be used only for the purpose of bidding.

(xi) The Termination payment to the existing concessionaire shall be as provided in the Concession Agreement or mutually agreed between existing Concessionaire and the Port Trust.

(xii) The existing Concessionaire would continue to operate the project till the time the new Concessionaire is appointed. The Port Trust shall ensure that the existing Concessionaire complies with conditions in the existing Concession Agreement to ensure maintenance of assets and its performance during the concession period till the assets are handed over by the existing Concessionaire. The Port Trust shall also ensure that there is no wilful deterioration of service quality or asset performance or asset stripping by the existing Concessionaire during the transition period. The Port Trust shall obtain an undertaking from the existing concessionaire for maintenance of existing assets and asset performance as per the concession Agreement till the assets are handed over to the new concessionaire with a suitable clause for penalization of the existing concessionaire, if any significant deterioration of service quality or asset performance due to his wilful act is reported / observed any time during the transition period.

(xiii) The eligibility conditions for bidders shall be as per the Model RFQ for PPP Projects.

(xiv) The existing Concessionaire shall settle all disputes before the Port Trust invites bids for the existing project. The litigation pending before any court of Law including Arbitration cases initiated by the existing Concessionaire against the Port Trusts / Tariff Authority for Major Ports / Union of India shall be withdrawn by him unconditionally before the Port Trust invites bids for the existing project' Disputed amount arising out of operation of Stay Orders

passed by Courts of Law shall be kept in an Escrow Account while the existing concessionaire withdraws the litigations' The application seeking withdrawal of the litigation from the Courts should also seek the manner of utilization of the disputed amount'

(xv) The project proposed for migration should be free of all encumbrances and liabilities' All outstanding dues to the Major Port Trusts and all liabilities arising out of litigation or otherwise shall be settled mutually by the existing concessionaire and the Port Trust.

(xvi) The man power of the existing concessionaire in the event of the new concessionaire taking over the project will be taken over by the new concessionaire at his option' Or otherwise, the existing concessionaire shall settle the severance liability following the due process of Law. There should not be any liability to the Major Port Trusts arising on account of the manpower of the existing concessionaire.

(xvii) Change in shareholding pattern, if any, shall be as per provisions of the Concession Agreement.

(xviii) The Guidelines for Determination of Tariff for Projects at Major Ports' 2013 notified on 30 September 2013 (2013 Guidelines) apply to the projects to be awarded for which RFPs are issued after date of issue of the said guidelines. Therefore' the relevant clause of the said guidelines shall be amended suitably by the Ministry of Shipping for the application of the guidelines to the existing projects which are taken up for re-bidding'.
