

Delhi- Gurgaon Expressway Takeover by IDFC

(By Jatinder Cheema* & Meghna Rao**)

1 BACKGROUND

The Delhi Gurgaon Expressway (the “**Expressway**”) is one of the largest Build Operate Transfer (“**BOT**”) road project on the national highway of India, executed on public private partnership framework (the “**Project**”). The Expressway connects national capital Delhi to Gurgaon, the satellite city of Haryana and is a part of National Highway Development Project. The Project was awarded to the consortium of Jaiprakash Industries Limited and DS Construction Limited (the “**Selected Bidder**”) by National Highway Authority of India (“**NHAI**”) for a period of 20 years (the “**Concession Period**”). The Selected Bidder offered to pay Rs. 61.06 Crore upfront as negative grant to NHAI.

The Selected Bidder, created a Special Purpose Vehicle (“**SPV**”) viz. Jaypee - DSC Ventures Limited, for implementation of the Project. At the time of execution of the Concession Agreement, Jaiprakash Industries Limited had a controlling stake of 51% and DS Construction Limited held 49%. However, during the course of Project implementation, Jaiprakash Industries Limited reduced its stake in the SPV to about 1.2%. Thus, upon dilution of the equity stake by Jaiprakash Industries Limited, DS construction Limited held 98.8 % in the Project.

On dilution of the stake by Jaiprakash Industries, Jaypee-DSC Ventures Ltd was renamed as Delhi Gurgaon Super Connectivity Limited (herein after referred to as “**DGSCL**” / “**Concessionaire**”). The Concessionaire was required to design, construct, operate and maintain the Expressway in accordance with the specifications as approved by NHAI. The Concession Period included the construction period to encourage the Concessionaire to complete the construction early. The Concessionaire entered into a fixed time-fixed price Engineering, Procurement & Construction (“**EPC**”) contract with DS Constructions Limited for the Project. The lenders to the Project include consortium of IDFC Limited (“**Lead Lender**”), Punjab National Bank and Bank of India (“**Lenders**”).

The Project was completed and the Concessionaire commenced the commercial operations of the Project, on 25th January 2008. The Expressway has 11 flyovers and overpasses. The vehicle users have to pay toll tax for using the expressway which is collected at three points, near the Indira Gandhi International Airport, Delhi- Gurgaon Border and 42nd milestone. The Expressway is the busiest inter-city route in India and handles more than 180,000 PCUs per day. At present, the Concessionaire collects around Rs.160 Crore annually from toll and there is about 12-15 per-cent escalation in toll rate every year. The Expressway has been facing a lot of commuter woes owing to the traffic mismanagement at the toll plaza and high density traffic flow on the route.

Further, the toll is charged on a road which actually serves the purpose as an intra-city road.

2 THE CONTOURS OF THE PROJECT COMPRISE THE FOLLOWING:

Project Name	Delhi Gurgaon Expressway
Project type	BOT
Project Length	27.7 Km
Project Owner	NHAI
Concessionaire	DGSCL
Concession Period	20 years including Construction Period
Lenders to the Project	IDFC Limited (Lead Lender), Punjab National Bank and Bank of India.

3 CHRONOLOGICAL EVENTS WHICH LED TO THE TRANSFER OF EQUITY STAKE IN DGSCL to IDFC:

NHAI had issued a preliminary termination notice to the Concessionaire on 7th December, 2011, and subsequently issued a final termination notice (the “Termination Notice”) on 18th February, 2012. The said Termination Notice was issued to the Concessionaire by NHAI for the following three reasons:

- Failing to decongest the Expressway;
- Failing to finalize the operation and maintenance plan (O&M Plan); and
- Committing fraud in the form of re-financing the Project without getting NHAI’s approval the Project.

The Lenders of the Project had requested NHAI through a letter to withdraw the Termination Notice issued to DGSCL and contended that, NHAI had not informed the Lenders about the said Termination Notice. Further, IDFC stated that, as per the provision of the Concession Agreement, NHAI was required to inform the Lenders' Representative of its intention to issue a Termination Notice to the Concessionaire. The right of the Lenders to such information is relevant as the Termination Notice is interalia on account of the alleged failure of the financial document to comply with the requirements of the Concession Agreement.

However, NHAI in its reply to the letter issued by Lenders clarified that, it never recognized the new set of lenders which were replaced by DGSCL to refinance the Project. NHAI further clarified that, it never approved Lenders role to finance the Project and hence there is no scope of informing them about Termination Notice.

On receiving the said Termination Notice from NHAI, DGSCCL approached the High Court of Delhi, which stayed the execution of the said Termination Notice. High Court of Delhi, advised the Parties to settle the matter through conciliation, as termination may cause huge loss to the lenders of the Project. Subsequently, NHAI withdrew the preliminary Termination Notice vide dated 7th December, 2011 and Termination Notice vide dated 18th February, 2012, pursuant to the Memorandum of Understanding (MoU) signed between NHAI , DGSCCL and IDFC to settle the dispute.

In the series of events that had taken place before takeover of stake of DGSCCL by IDFC, the order restraining the DGSCCL from collecting toll is of significant importance. In the month of September 2012, the Punjab and Haryana High Court restrained DGSCCL, from collecting toll at the toll barrier for 15 days, the court observed that toll barrier was designed to save both fuel and time, but neither fuel, nor time was being saved, long queues of vehicle on either side of the road were a common sight to view and DGSCCL has failed to avert traffic snarls and to ensure smooth flow of traffic on the expressway.

The Court issued further directions after the Gurgaon traffic police submitted before the Punjab and Haryana High Court that DGSCCL was responsible for the chaos. The submission was made by the Gurgaon traffic police that the cause of snarl at expressway was mismanagement and shortage of staff required to deal with traffic. They alleged that the Concessionaire wanted to make money and did not intent to spend any of it on adequate personnel to ensure free flow of traffic. The Concessionaire had also not paid security money for availing the services of police personnel of Haryana Government.

4 PRESENT STATUS OF THE PROJECT

On December 18, 2012, DGSCCL and IDFC had signed a Memorandum of Understanding (“MoU”), according to which all liabilities including the debt and investment for relaying the road will be passed on to IDFC. As per the terms of the said MoU, it was decided that IDFC will hold 74% stake in the Project, DS Construction and Jaiprakash Industries Ltd will retain 24.8% and 1.02% respectively.

When proposal to buy out the 74% stake equity in the Project was placed before NHAI board for consideration, NHAI recommended IDFC to submit a proposal for buying 100% stake in the Project. However, NHAI needed the approval of the board for complete takeover of the project by IDFC, since prevailing provisions of Concession Agreement provided that the Concessionaire is required to hold 26% of equity shares for the entire Concession Period.

Hence, the dilution of the equity share by the Concessionaire in favour of IDFC Limited is according to the model concession agreement (MCA) that governs a public – private partnership projects. As per the terms of MCA, the, shareholding pattern shall be as follows:

“the aggregate holding of the {selected bidder/Consortium Members} together with {its/their} Associates in the total Equity to decline below (i) 51% (fifty one per cent) thereof during Construction Period, (ii) 33% (thirty three per cent) thereof during a period of 3 (three) years following COD, and (iii) 26% (twenty six per cent) thereof, or such lower proportion as may be permitted by the Government during the remaining Concession Period; provided that any material variation (as compared to the representations made by the Concessionaire during the bidding process) in the proportion of the equity holding of the selected bidder/any Consortium Member to the total Equity if it occurs prior to COD, shall constitute Change in Ownership”.

It's reported in one section of the media, that the Ministry of Road Transport and Highways is seeking cabinet approval for a policy for road developers which would permit the concessionaire or the project developer to make a complete exit immediately after the commencement of the commercial operations.

Paving the way for IDFC to acquire control over the Project, NHAI board has approved the transfer of 74% equity to IDFC, DGSCCL will continue to hold 26% stake in the Expressway, till such time that any further decision is taken by the Government. Hence, Commuters are expecting relief from massive traffic snarls with the change in management.

The NHAI board approval may turn out to be a big relief to the Lenders, which had extended financial assistance to DGSCCL. IDFC will take over the debt of Rs. 1,600 Crore debt of DGSCCL and will get the rights to collect the toll until 2023 to recoup the funds.

IDFC has declared that they will be outsourcing the operation and maintenance of the Project. Until such time that the new management is appointed, to manage the Expressway, the traffic woes are likely to continue. But it seems that some solution may be in sight with change of stakeholders.

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