



Contractual & Legal Aspects of Private Participation in Infrastructure Projects

**Dr. Ram Chandra Rai,
Sr. Professor (Financial Management)
Railway Staff College, Vadodara**



Contractual & Legal Aspects of Infrastructure Projects

- Development of infrastructure through public-private partnership mode on commercial lines was not envisaged by the country's lawmakers when Acts dealing with infrastructure facilities were passed by the Central and State Governments.
- For private participation to be successful, the private participants shall have to be vested with rights to develop construct, operate and maintain the facility, collect-fees (revenue) and meet debt service obligation.
- Relevant statutes should meet these requirements.



State Infrastructure Development Acts(INDIA)

- Gujarat Infrastructure Development Board Act 1999---provides the framework for participation by private sector in financing, construction, maintenance and operation of infrastructure projects in Gujarat.
- A.P.Infrastructure Development enabling Act, 2001
- Maharashtra Infrastructure Development and Support Act, 2003



Central Govt. Acts

- Section 8 A of National Highways Act, 1956 enables central Govt. to enter into an agreement with any person in relation to the development & maintenance of any part of N. Highway.
- The Central Govt. can consider passing a statute for development of infrastructure through private participation so that individual Central enactments need not be amended.



Railway Acts

- For Railways, the enabling provision flow through the following enactments.
- The Railways Act 1989
- The Indian Railways Board Act, 1905
- The Railway Companies(Emergency) Provisions Act 1951
- The RPF Act 1957 & 1986.
- The RP(UP) Act, 1966
- The RCT Act 1987



Railway Acts--contd

- Section 11 of the Railways Act, 1989 empowering both Govt. Railway and Non-Govt. Railways to execute all necessary works, can be interpreted as the enabling provision for private participation
- Specific provision can be included relating to grant of concessions and other rights in favor of concessionaires (Private sector developers) for the development of railway infrastructure by suitably amending the Railways Act, 1989, if need be.



Legal Requirements

- The statute in relation to development of infrastructure should deal with the following aspects.
- Participation-Any person(or company) with prescribed credential, has right to participate in design, construction, operation and maintenance of an infrastructure project.
- Concession Agreement-Provides for grant of concession rights to the developer and execution of concession agreement specifying types of concession agreements and period of concession.



Legal Requirements--contd

- Identification of Infrastructure Projects
- Selection of Developer-Specify the clear procedure for selection of a developer.
- Constitution of Board or infrastructure authority and grant of development rights to developer.
- Appointment of Regulator-to determine and regulate tariff and standard of services to be provided and to ensure that concessionaire discharges its obligations towards users and has power to take remedial measures for default by the concessionaire.



Legal Requirements--contd

- Assistance through grant of state or its agency by way of resting the right over the project site in the developer through lease/license applicable permits and clearances required for the project; equity, subsidy, guarantees; conferment of development rights and incentives by way of exemption from payment of taxes, stamp duties, registration fees etc.



Legal Requirements--contd

- Total cost of project-Methodology to determine the same.
- Apportionment of Independent engineer(IE) and Independent Auditor- principal obligation of concessionaire.
- Right of user fees for goods and services enable developer to determine, levy, collect fees from users of infrastructure with profit to recover the investment.
- Protection of rights of lenders in case of default by concessionaire of any material provisions.



Legal Requirements-- contd

- Project Agreement and Financing Agreement and the penalty if the default is not cured within the cure period.
- Transfer of facilities - Mode of valuation and transfer of facilities upon expiration of concession period or termination of concession if occurs early.
- Termination - Conditions leading to termination of concession rights and consequences of termination
-



Legal Requirements-- contd

- Lenders rights to be protected and grants to pay back the dues of lenders before taking over projects.
- Dispute resolution mechanism such as Arbitration Conciliation Act 1996 can be adopted.



Legal Requirements--contd

- Constitution of an authority(with full powers) to appraise the proposals (including alternative proposals) for projects and grant right to develop, own, finance, construct, operate/maintain the projects to the developer during the concession period, approve designs for construction, grant applicable permits, determine and authorize user fees for operation and maintenance of infrastructure facilities.
- This authority should also have power to enter into concession agreement or authorize concerned agency to execute concession agreement with the developer.

Special Purpose Vehicle(SPVs)

- Infrastructure project is domiciled in an SPVs, a company under the company Act 1956..
- Object clause of memorandum of association of SPV enables it to execute the infrastructure projects selected.
- SPV acquires concession rights from grants (State) for design, financing, construction, O&M and has right to levy, collect appropriate fees for services provided.
- Govt. grants concession/approvals entailing certain rights, executes concession agreement or state support agreement, with the concessionaire.



Special Purpose Vehicle(SPVs)--contd

- SPVs, in turn, will enter into Financing, Construction and O&M Agreements.
- EPC and O&M contractor selected through clear process.
- EPC contract provides for bonus/penalty for early/delayed completion.



Appraisal of Legal Issues

Legal review of the applicable statutes, laws essential before finalising concession agreement and other project agreements.

- Power of SPV company under its Memorandum and Article of Association to undertake and implement the project, to execute project and financing agreements and to create securities in favour of lenders over its movable and immovable assets including receivables, insurance policies, bank guarantees, assignment of rights.



Legal Appraisal contd

- Legal provisions which entitles grant of concession for development of a project. Who is concession granting authority? Who are the necessary parties to the concession agreement to enable project company to assume rights and obligations to complete the project?
- Feasibility of lease of project sites. Is there any prohibition in development plan regarding use of land with specific reference to the project.



Legal Appraisal contd

- What are the applicable land ceiling laws(urban/agriculture)and laws relating to forest lands/tribal lands/assigned lands which have a bearing on the project and their implications?
- Is Govt. empowered to grant exemption from the land ceiling Act, If so, procedures and conditions required to be completed for the same.
- Examine the power,scope and rights of Govt. agencies involved in relation to the project and other implications?



Legal Appraisal contd

- Examine provisions of Municipal/Gram Panchayat Laws having bearing on the project sites.
- Examine applicable laws in relation to mining and use of explosives having bearing on the projects and their implications.
- Are there any restrictions/prohibitions under any applicable laws regarding constructions and operation of project facilities? Their implications?
- Approach required and procedure to be followed for clearance of forest trees/cutting of trees if there is any forest law in project area.



Legal Appraisal contd

- Applicable tax laws, implications and exemptions available for infrastructure projects under various accounts.
- Implications of sales tax, works contract tax on project contracts.
- Tax exemptions available for infrastructure projects under various account and competent authorities who can grant the same. Whether infrastructure facility proposed to be developed is a “New Infrastructure facility” within the meaning of clause 4 of section 80 IA Tax Act 1961.



Legal Appraisal contd

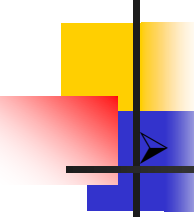
- What are the environmental/pollution control clearance required for the project?
Implication of the water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution) Act, 1981, the Environment (Protection) Act, 1986.
- Whether Coastal zone(CRZ) regulations have any impact on the project? Specific permission required and from which authority?



Legal Appraisal contd

- Capacities and powers of parties entering into various project agreements. Who is competent to sign project agreement on behalf of respective contracting party?
- Procedural requirements/formalities to be complied with before contract with Project Company could be signed.
- Prevailing rates of stamp duty at proposed place of execution for various project and financing agreements including the following instruments.

Legal Appraisal contd

- 
- Lease Deed : Registered Legal mortgage
 - Power of Attorney: Deed of assignment; deed of hypothecation
 - Deed of guarantee: Pledge agreement.
 - Fees payable for registration of lease deeds/sale deeds/mortgage deed?
 - Any local labour law provisions having a bearing on the project?



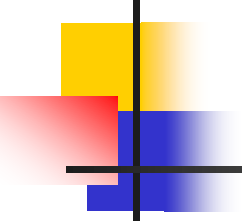
Legal Appraisal contd

- Permission, approvals and applicable permits required by SPV for the project under various Accounts, Rules or regulations including those required for creation of security and for realization of the security by lenders to the company (SPV) and authorities to whom the applications have to be made.
- Legal implications and precautions regarding acquisition of ownership/lease hold rights over project accounts and mortgage securities thereon.



Legal Appraisal contd

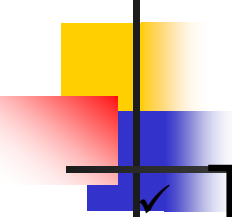
- When pipelines are to be laid within the Municipal limits, right of way to be granted by appropriate authorities (Municipal Corporation) continuous to be property of the company (SPV) in view of vesting provisions under Municipal law for the purpose of creation of security.



Other important issues involve in infrastructure Projects

- Principal rights of the concessionaire are:
 - ✓ To develop, design, finance, construct, own operate and maintain the project facilities and regulate use of project facilities during the concession period.
 - ✓ To enjoy complete and uninterrupted possession, ownership and control of the lands, identified as constituting the project sites.

Other Issues contd

- 
- ✓ To own all or any part of the project assets
 - ✓ To determine, demand, collect, retain and appropriate user fee from users of project facilities to recover cost of investment with profit.
 - ✓ Restrict use of project facilities to specified class of users.
 - ✓ Enforce the collection of user fee from delinquent users of project facilities.
 - ✓ Appoint agents or contractors on its behalf to assist it in fulfilling its obligations under concession agreement.



Other Issues contd

- Principal obligations of the concessionaire
- ✓ Appoint EPC contractor, O&M operator, IE and IA by entering into appropriate contracts.
- ✓ Supervising, monitoring and control construction operation and maintenance of project facilities in accordance with terms and conditions.



Other Issues contd

- Conditions of clearance
- Prudent utility practices
- Design and construction requirements
- Performance standards as specified in concession agreement.
- ✓ Comply with environmental and social obligations as stipulated under concession agreement(CA)
- Reporting obligations during construction, O&M period as per C.A.

State support agreements



- The state Govts. may enter into State Support Agreement(SSA) agreeing for grant of clearances, approvals, leases, rights as may be required for the construction, O&M of project facilities



Shareholders' Agreement

- It is executed between SPV(Concessionaire) key promoters and investors.
- Key promoters/consortium members shall have to maintain share holding as stipulated in the concession Agreement.

IE & IA Contracts



- Responsibility of independent engineers ensure quality, standards and impartial advice on disputes.
- Independent Auditors responsible for impartial audit and certification of accounts etc.

Escrow Agreement.



- Concession Agreement must stipulate execution of escrow agreement, providing for appointment of escrow agent, establishment of escrow accounts, priorities of payments and modalities for operation of this accounts.

EPC contract



- Responsibilities of EPC contractor includes
 - ✓ Detailed engg. drawing and design of project facilities, procurement of all essential equipments and construction material and to obtain all applicable permits, clearances and compliance with conditions of clearances, construction management, project start up and performance testing of project facilities, remedy all defects and performance guarantees,penalty/ bonus for delayed/early completion



EPC contract--contd

- Responsibilities of concessionaire under EPC contract .
- ✓ To provide project sites free of encumbrances including owner consents and clearance as required, maintain sufficient financing and resolve all issues with constructor for smooth progress of project work

O&M Contract

- Defines minimum performance standard for
 - Maintenance
 - Service quality
 - Schedule of penalties in case of deviation from minimum standard.
 - Force majeure risks like earth quake, insurance package for the same.



O&M Contract-contd

- Operators responsibilities include
- ✓ Advising concessionaire on specification and material selection with reference to O&M Standards, provide full facilities during testing and commissioning phase and operator responsible for maintaining agreed performance standard. Operator provides performance security(in form of BG bond) and concessionaire is entitled to enforce performance security besides L.D.upon failure to maintain the performance standards.



Project Site Lease Deed

- The grant or (entity or state) shall have to execute a lease deed demising all project sites in favour of concessionaire and it will permit creation of mortgage of leasehold properties in favour of lenders during concession period.
- **Substitution agreement**---will provide for appointment of substitute Entity in case of default by concessionaire under C.A.



Insurance contracts

- Concessionaire shall have to procure appropriate insurance cover during construction and O&M Phase to cover contractors. All Risks (Escalation, workmen's compensation, third party liabilities, removal of defects, debris professional indemnities, civil engg, completed risk insurance(CECR)etc) should be covered.

Purchase Agreements

- Take or Pay type
 - Purchaser obliged to pay for the output regardless of whether he takes delivery or not
 - Purchase has option to take delivery
 - Purchaser not obliged to pay if project is unable to deliver

Purchase Agreements--contd

- Take it offered
 - About plus the purchaser has obligation to take decking.
- Hell or high water contract
 - Purchaser has to pay whether delivered or not (More useful to lenders)

Throughput agreement (for pipe lines)

- If other company does not make sufficient use of pipe line, then sponsor themselves shall ship enough oil through the said pipe line to ensure the cash flows to service the loan.