



भारतीय राष्ट्रीय राजमार्ग प्राधिकरण
(सड़क परिवहन और राजमार्ग मंत्रालय)
National Highways Authority of India

(Ministry of Road Transport and Highways)

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CGM (FA)/Fin. Close/HAM

Dated: 19.02.2018

CIRCULAR

Subject: - Standard Operating Procedure (SOP) for Financial Close of Road Projects on Hybrid Annuity Model (HAM) - reg.

With the approval of Competent Authority, a Standard Operating Procedure (SOP) for Declaration of Financial Close of Road Projects on Hybrid Annuity Model (HAM) is hereby enclosed for compliance.

Encl.:- As stated.


(Siba Narayan Nayak)
CGM (FA)

Copy to:-

1. PS to all Members
2. All CGMs(T)/GMs(T) at NHAI-HQ
3. Web Admin – for hosting on NHAI website.

Standard Operating Procedure (SOP) for Declaration of Financial Close of Road Projects on Hybrid Annuity Model

1. Background

The declaration of Financial Closure is an important milestone for PPP projects. Currently, the Finance Division of the National Highways Authority of India (hereinafter referred to as “the Authority”) declares this date based on the terms of the Concession Agreement (CA) and guided by Circular NHAI/11033/CGM (Fin)/2011 dated 09.09.2011 for BOT Projects. The provisions of the circular state that the Financial Close date of BOT projects may be declared by the Authority on submission of the following:

- Executed Financing Documents;
- Signing of Escrow & Substitution Agreements by all the parties;
- A letter from the Lender’s Agent that the Concessionaire has satisfied all the Conditions Precedent to initial drawdown as laid down in the Common Loan Agreement and has access to Funds;
- An undertaking from the Concessionaire that he will amend the executed documents incorporating the review/comments, if any furnished by NHAI and will ensure that the Financing Agreements are in line with the provisions of the Concession Agreement, within period of 90 days of Financial Closure date (NHA will be the final Authority to decide whether the Financing Agreements are in line with the Concession Agreement). Failure to do so, may be treated as Concessionaire’s default under Clause 37.1.1 (m) of the Concession Agreement [relevant clause in Hybrid Annuity MCA is 31.1.1(m)] and may attract consequences thereof.

2. Objective

Further streamlining the process of Financial Close and to bring in efficiencies and increase the level of understanding between Banks, Concessionaire and the Authority.

3. Applicability

This SOP is applicable to all Hybrid Annuity projects of the Authority and to all other PPP Projects to the extent applicable. Further, SOP will be applicable to all projects wherein the Concessionaire and Authority have entered into a Concession Agreement and the documents related to Financial Close of the project have not been submitted with NHAI on the date of issue of this SOP.

4. Definitions in the Model Concession Agreement (MCA) for Reference

While the definitions in the project-specific Concession Agreements will prevail, the definitions referred to in this SOP have been adopted from Model Concession Agreement (MCA) for Hybrid Annuity Model.

“**Financial Close**” means the fulfillment of all conditions precedent to the initial availability of funds under the Financing Agreements which shall be communicated by the Lender’s Representative to the Authority in writing. Such communication from Lender’s Representative shall be treated as date on which the Financial Close is achieved.

“**Financial Model**” means the financial model adopted by Senior Lenders, setting forth the capital and operating costs of the Project and revenues therefrom on the basis of which financial viability of the Project has been determined by the Senior Lenders, and includes a description of the assumptions and parameters used for making calculations and projections therein.

“**Financial Package**” means the financing package indicating the total capital cost of the Project and the means of financing thereof, as set forth in the Financial Model and approved by the Senior Lenders, and includes Equity, all financial assistance specified in the Financing Agreements and Subordinated Debt, if any

“**Financing Agreements**” means the agreements executed by the Concessionaire in respect of financial assistance to be provided by the Senior Lenders by way of loans, guarantees, subscription to non-convertible debentures and other debt instruments including loan agreements, guarantees, notes, debentures, bonds and other debt instruments, security agreements, and other documents relating to the financing (including refinancing) of the Total Project Cost, and includes amendments or modifications made in accordance with Clause 5.2.3

“**Lenders’ Representative**” means the person duly authorized by the Senior Lenders to act for and on behalf of the Senior Lenders with regard to matters arising out of or in relation to this Agreement, and includes his successors, assigns and substitutes;

“**Senior Lenders**” means the financial institutions, banks, multilateral lending agencies, trusts, funds and agents or trustees of debenture holders, including their successors and assignees, who have agreed to guarantee or provide finance to the Concessionaire under any of the Financing Agreements for meeting all or any part of the Total Project Cost and who hold pari-passu charge on the assets, rights, title and interests of the Concessionaire;

“**Total Project Cost**” means 60% of the Bid Project Cost specified in Clause 23.1;

5. Other References from the Model Concession Agreement

Clause 31.4.1: ... The Parties also agree that for the purposes of computing Termination Payment, the Debt Due shall at no time exceed 85% (eighty five per cent) of the Total Project Cost.

Clause 5.2.3: The Concessionaire shall not make any addition, replacement or amendments to any of the Financing Agreements without the prior written consent of the Authority if such addition, replacement or amendment has, or may have, the effect of imposing or increasing any financial liability or obligation on the Authority, and in the event that any replacement or amendment is made without such consent, the Concessionaire shall not enforce such

replacement or amendment nor permit enforcement thereof against the Authority. For the avoidance of doubt, the Authority acknowledges and agrees that it shall not unreasonably withhold its consent for restructuring or rescheduling of the debt of the Concessionaire and shall respond to the request for consent no later than 30 days from the receipt of such request from the Concessionaire.

Clause 22.2.1: Notwithstanding anything to the contrary contained in this Agreement, but subject to Clause 28.6.1, in the event that Financial Close does not occur, for any reason whatsoever, within the period set forth in Clause 22.1.1 or the extended period provided thereunder, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties.

Clause 28.6.1: Upon the occurrence of any Force Majeure Event prior to the Appointed Date, the period set forth in Clause 4.1 for fulfillment of Conditions Precedent and in Clause 22.1.1 for achieving Financial Close shall be extended by a period equal in length to the duration of the Force Majeure Event.

6. Key Dates for Financial Close - as per Clause 22.1.1 of the Model Concession Agreement

S. No.	Date	Description	Remarks
1	T ₀	Date of Signing of the Concession Agreement	
2	On or before T ₀ + 150 days	Financial Closure to be achieved.	The CPs to be fulfilled on the part of NHAI is also required within T ₀ + 150 days
3	After T ₀ + 150 days but before T ₀ + 150 + 120 days (i.e., T ₀ + 270 days)	Financial Closure to be achieved	Payment of Damages to the Authority @ 0.05% of the Performance Security for each day of delay. The damages specified <u>shall be payable every week in advance.</u>

4	After $T_0 + 270$ days but before $T_0 + 150 + 120 + 95$ days (i.e., $T_0 + 365$ days)	Financial Closure to be achieved	Payment of Damages to the Authority @ 0.10% of the Performance Security for each day of delay. The damages specified <u>shall be payable every week in advance.</u>
5	After $T_0 + 365$ days or <u>extended period provided</u>	Deemed Termination due to failure to achieve Financial Close	All rights, privileges, claims and entitlements or the Concessionaire shall be deemed to have been waived and to have ceased with the concurrence of the Concessionaire and the Concession <u>Agreement shall be deemed to have been terminated by mutual agreement.</u>

7. Clauses in regard to non-fulfilment of CPs by NHAI/ Concessionaire

- a) As per Concession Agreement, 150 days are provided to both the Authority (NHAI) and the Concessionaire for fulfilment of Conditions Precedents. In addition to Condition Precedents, Concessionaire is also required to achieve Financial Close within the same time period. (Article 4 and 22 of MCA)
- b) If the requirements provided in clause 4.1.2 and clause 4.1.3 are not fulfilled within the given time period, the penalty clauses for both the parties (Clause 4.2 and 22.1.1) come into operation.
- c) Clause 4.5 of the MCA states that in cases Appointed date does not occur, for any reason whatsoever, before the first anniversary of the date of the Agreement or the extended period provided in accordance with this Agreement, all rights, privileges, claims and entitlements of the Concessionaire under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Concessionaire, and the Concession Agreement shall be deemed to have been terminated by mutual agreement of the Parties.

Approach for non-fulfilment of CPs by NHAI/ Concessionaire

- d) The $T_0 + 150$ days' time line must be co-extensive i.e. if both the parties have defaulted, the same date shall be mutually extended, thus exempting penalty for both the parties.
- e) The Concessionaire will be bound to complete the Financial Closure process before the Appointed Date, in cases where the concessionaire has accepted or desires to accept the Appointed Date without fulfillment of all Condition Precedents (CPs) by NHAI. In such cases the concessionaire waives all the penalty applicable on NHAI in respect of such non-fulfillment of CPs.

- f) In case the Condition Precedents have not been fulfilled by either party before the first anniversary of the date of the Concession Agreement, NHAI and Concessionaire shall execute a supplementary agreement before the first anniversary of the date of the Agreement to suitably extend the time period for fulfillment of Condition Precedents and waiving the applicable penalties on both the parties. Further, in such cases the deemed termination of the Concession Agreement on the first anniversary shall not apply.
- g) In order to have continuous information availability, the concerned NHAI Project Director (PD) must submit a status report on fulfilment of CPs every fortnight from the date of signing of Concession Agreement, to the concerned technical division with a copy marked to Member (Finance), duly signed by Concessionaire, PD and the IE (if IE has already been appointed).

8. Guidance for Declaration of Financial Close

- a) The total project cost and the means of finance as assessed by the Bank and mentioned in the Financing Documents (including the Financial Package) must ordinarily be not less than the lower of the following, indexed to the month of expected financial close:
 - i. Total Project Cost as defined in the MCA (60% of Bid Project Cost)
 - ii. Estimated Project Cost as given in the RFP minus construction support payable by the Authority (40% of Bid Project Cost) as specified in Clause 23.4 of the Concession Agreement.
- b) In case, the Concessionaire submits Financial Closure documentation for an amount less than the amount specified in (a) above, then the Banker shall submit a declaration stating that as per Bank/FI due-diligence, the tied up debt and equity is sufficient to take care of the completion of the project and the liabilities towards the O&M expenses has been properly estimated as per the NHAI standards and factored in the cash flow.
NHAI on its satisfaction may accept the financial close; otherwise, concessionaire shall make changes in the Financial Close to the satisfaction of NHAI.
- c) The cost variation between the date of bidding and the date of financial close by the banks may be specifically indicated in the financial model. The cost variation as per the terms of MCA during the construction period may be assumed and the definitive funding pattern must be spelt out in the documents as well as in the financial model.
- d) The equity proposed to be brought in by the promoters through various means to be clearly specified including the nature of equity, quasi-equity, sub-debt, etc.
- e) The Concessionaire will submit the drafts of the following documents duly attested by a Director of the Concessionaire (in accordance with clause 5.2.2 of the MCA)

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- i. Financing Agreements (Common Loan Agreement, Escrow Agreement, Substitution Agreement and any other agreements entered into with the Senior Lenders)
- ii. copies of the Financial Package and the Financial Model in MS Excel version or any substitute thereof
- iii. Any other relevant documents

All the financial agreements shall comply with the terms of the Concession Agreement and in case of any deviation, the terms of Concession Agreement shall prevail and shall not relieve the Concessionaire of its obligations and liabilities under the Concession Agreement. A clause in this regard shall be included in all the Financing Agreements

- f) The Authority, upon receiving the above documents will share the same with the project Financial Consultant for their examination and comments. The Financial Consultant will, as soon as possible but not later than 15 days, submit their report to the Authority as per Appendix-I. Based on the comments of the Financial Consultant and observations of the Authority, if any, the Concessionaire will be asked to amend the documents, as applicable, and execute the same. However, all these reviews and comments shall be limited to ensuring compliance with the terms of the Concession Agreement and failure or omission of the Authority to review and/or comment thereunder shall not be construed or deemed as acceptance of any such agreement or document by the Authority. (Clause 5.2.2 of the MCA)
- g) The Concessionaire will subsequently submit the executed documents with the Finance Division of the Authority and a copy of these documents will also be submitted to the project-specific Technical Division.
- h) The Concessionaire, along with the executed documents (Financial Agreements), will also provide the following:
 - i. Notice from Concessionaire that Financial closure has occurred. (Refer Clause 22.1.2 of Model Concession Agreement)- Draft enclosed as Annexure-I
 - ii. Letter from the Lender's Representative stating that the Concessionaire has fulfilled all conditions precedent to the initial availability of funds under the Financing Agreements (Refer Definition of Financial Close under Article 42 of Model Concession Agreement). Draft enclosed as Annexure-II
 - iii. Undertaking that it will amend the executed documents incorporating the review/comments, if any provided by NHAI and will ensure that the Financing Agreements are in line with the provisions of the Concession Agreement, within a period of 90 days of the Financial Close date (NHAI will be the final Authority to decide whether the Financing Agreements are in line with the Concession Agreement). Failure to do so, may be treated as Concessionaire's default under the relevant provisions of the Concession Agreement and may attract consequences thereof. (EC decision dated 9.8.2011 and circular dated 9.9.2011).

- i) The Financial Consultant will be required to stamp, sign and date (either on the obverse side of single side printed agreements or in case of back to back printed agreements, on each page of a photocopy) all documents those are to be executed by the Authority, including Escrow Agreement and Substitution Agreement, if found in order.

- j) Financial Close will be declared by NHAI (draft as per Annexure-III) on the date of the letter from the Lender's Representative stating that the Concessionaire has fulfilled all conditions precedent to the initial availability of funds under the Financing Agreements. The communication from the Lenders Representative should have been received and acknowledged by NHAI, with in a maximum period of 3 working days, else the date of actual receipt shall be treated as the date of Financial Close.



(Siba Narayan Nayak)
CGM (FA)

Draft letter from concessionaire

On the letter head of the Concessionaire

Date: xx/xx/xxxx

To

Chief General Manager (FA)
National Highways Authority of India
G5&6, Sector 10, Dwarka, New Delhi- 110075

Subject: **[Name of the project]- Intimation of Financial Close reg.**

Dear Sir,

With reference to the captioned subject, this is to inform that, we are in receipt of a copy of letter no [xxxxxx] dated from [xxxx -name of the Bank], being the Lenders Representative addressed to NHAI, indicating fulfilment of all conditions precedent to the initial availability of funds under the Financing Agreements.

It is to confirm that, the company has achieved the Financial Close for the subject project and has access to the initial drawdown of the funds from the lenders.

The Comments of NHAI with regard to the financing documents has already been incorporated/being incorporated. An undertaking is also enclosed herewith declaring that any pending/further changes as suggested shall be incorporated within 90 days from the date of declaration of financial close.

Encl: As above.

Yours sincerely,

For (Name of the Concessionaire)

Signature

Name

Designation: Director



Draft letter from Bank

To

Chief General Manager (FA)
National Highways Authority of India
G5&6, Sector 10, Dwarka, New Delhi- 110075

Subject: [Name of the project]- fulfilment of all conditions precedent to the initial availability of funds under the financing agreements reg.

Dear Sir,

This is to inform that the subject project is being funded by _____ [name of the bank] (in consortium with _____) for a term loan of Rs. _____. The bank has noted the various terms of the Concession Agreement dated _____ and agree that in case of any conflict between financing agreement and Concession Agreement, the provisions of the said Concession Agreement will prevail.

We hereby state that:

1. Equity contribution required for initial drawdown has been confirmed by the Concessionaire to the satisfaction of the lenders.
2. Procedural compliances which is not of financial significance shall be complied with before the drawdown.
3. The conditions precedent to initial availability of funds under the Financing Agreement have been complied with by the concessionaire.

The following points are required to be complied by the Authority:

1. Conditions Precedent to be fulfilled by the Authority as per Concession Agreement.
2. Signing of the Escrow Agreement and Substitution Agreement.

Thanking you.

For (Name of the Bank)

Signature
Name
Designation



Draft letter from NHAI

Annexure III

Date: xx/xx/xxx

To

Concessionaire

Subject: [Name of the project] -Financing Close-reg.

Sir,

NHAI is in receipt of the following documents with regard to the financial close of the subject project:

1. Letter from lender's representative no _____ dated _____
2. Letter from Concessionaire no _____ dated _____ along with the undertaking duly signed by a Director of the concessionaire company.

On the basis of above said letters, NHAI has taken note that the Financial Close for the said project has been achieved on _____.

Thanking you.

For National Highways Authority of India

Signature

Name

Designation

Copy to: Lender's representative.



Appendix-I: Indicative Checklist for Financial Consultants (Part-I to V)

Part-I: Project Information

1.	Project Name	
2.	Type of PPP	Hybrid Annuity
3.	Location	
4.	Bid project Cost	
5.	Total Project Cost	
6.	Estimated Project Cost (as per bidding documents)	
7.	Total Project Cost as per Financing Agreements	
8.	Name of the Concessionaire	
9.	Name of the Bank(s)/ Amount	
10.	Interest Rate	
11.	Concession Period	
12.	Means of Finance	Equity Debt Sub-debt

Part-II: Confirmations

S.No.	Particulars	Yes	No	If no, reasons
1.	Do the Senior Lenders and Lenders' Representative fall into the categories as per the definitions provided in the Concession Agreement (definition under article 42)?			
2.	Have all Lenders confirmed that they are in agreement with the appointment of the Lender's Representative?	Document details i.e. Agency Agreement etc should be provided		
3.	Do the project cost and means of finance as per the Financing Agreements submitted by the Concessionaire cover the lower of the following: a. Total Project Cost as defined in the MCA b. Estimated Project Cost as given in the RFP minus construction support payable by the Authority (40% of BPC) as specified in Clause 23.4 of the Concession Agreement.			
4.	Does the debt drawdown Schedule ensures financial progress of the project as per Schedule G of the Concession Agreement?			
5.	Is the Escrow Agreement in line with the provisions of Model Escrow Agreement as provided as a Schedule "O" of the Concession Agreement?			Details of Deviations, if any should be annexed
6.	Is the Substitution Agreement in line with the provisions Model Substitution Agreement as provided as a Schedule "R" to the Concession Agreement?			Details of Deviations, if any should be annexed
7.	Has the Concessionaire provided the undertaking that it will amend the executed documents incorporating the review/comments, if any furnished by NHAI and will ensure that the Financing Agreements are in line with the provisions of the			

	Concession Agreement, within a period of 90 days of the Financial Close date?			
8.	Is the ownership of the Concessionaire is as per the terms of the Bid Document/ Concession Agreement?			
9.	Does the Financing Agreements contain a clause establishing the primacy of the Concession Agreement i.e in case of conflict between any Financing Agreement and Concession Agreement, the later will prevail.			

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Part-III: Documents received for declaring Financial Close.

S. No.	Description	Document Number	Date
1	Letter from Lender's representative		
2	Letter from Concessionaire		
3	Undertaking from Concessionaire		
4	Common Loan Agreement		
5	Facilities Agreement		
6	Escrow Agreement		
7	Substitution Agreement		
8	----Any other Agreement---- (please provide details)		

Part-IV: Financing Details of the Project

Particulars	Amount	%
Cost of Project		
Cost of Construction(including Variations)		
Interest During Construction		
Contingencies		
other cost and expenses		
Total project cost		
Means of Financing		
NHAI Support		
Promoter's Equity		
Quasi Equity (Compulsorily convertible to equity)		
Interest free unsecured loan from promoters		
Total Equity by the Promoter		
Senior Debt		
Subordinate Debt		
Fund based Working Capital Debt		
Any other means of debt financing		
Total Debt		
Total funds		
Mobilization Advance		

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Part-V: Compliance with Schedule G of the MCA (as per Financial Model)

Date	Milestone 1 (__ th day from Appointed date)	Milestone 2 (__ th day from Appointed date)	Milestone 3 (__ th day from Appointed date)	Milestone 4 (__ th day from Appointed date)
As per CA	Financial Progress> 20% Physical Progress> 20%	Financial Progress> 35% Physical Progress> 35%	Financial Progress> 75% Physical Progress> 75%	Financial Progress> 100% Physical Progress> 100%
As per Financial Model				
Debt				
Equity				
Grant				

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