In order to engage with our readers and simplify the legal complexities of the infrastructure sector, EPC World has partnered with Rajani Associates, a full-service law firm for a series of legal Q&As. Through this Legal Q&A column, **SHISHAM PRIYADARSHINI**, Partner, Rajani Associates and **AMISH SHROFF**, Associate Partner, Rajani Associates, will endeavour to address the queries and challenges faced by our readers.


Shisham Priyadarshini


Amish Shroff

What is the Model Concession Agreement?

The Model Concession Agreement popularly refereed to as the 'MCA' with the provisions of model clauses forms the core of the projects undertaken through public private partnership in India. It sets out a comprehensive regulatory and policy framework to build and implement a PPP. The MCA amongst other provisions covers the terms and conditions for financing of infrastructure projects, financial support from the Government, allocation of risks and rewards, obligations of the principal parties, costs, commercialisation of the project, liquidated damages, indemnity, force majeure, termination, etc. The MCAs are prepared by various sectors like railways, roadways, airways, power, port, with a view to standardize the documents and processes for the PPP framework in the country and to ensure uniformity, transparency and quality in the work undertaken.

What is the recent development in the major ports sector?

In January 2018, the Union Cabinet has approved amendments in the MCA in order to make the Port Projects more investor-friendly and make investment climate in the Port Sector more attractive. The new MCA has been finalized after taken into consideration the experience gained in managing PPP projects in the port sector in the last few years; the suggestions provided in various reports by Member Planning Commission (2010), Indian Ports Association (IPA-2015) and Kelkar Committee Report (2015) and; extensive consultation with the stakeholders. It will be applicable for new projects where bidding takes place in the future including the ambitious Sagarmala programme under which the Government plans to construct new ports and cargo terminals at major ports. While the new MCA will be applicable for future projects, the Government has also appointed a committee to examine whether the new MCA can be applied to the 12 stalled port projects with an estimated project cost of ₹ 20,000 crores.

What are the major changes in the new Model Concession Agreement?

In the old MCA, the Concessionaire was required to hold 51% equity until 3 years after Commercial Operation Date (COD) (ie, date on which the concessionaire receives the project completion certificate) and 26% thereafter for another 3 years, making the complete exit of the concessionaire difficult for a period of 6 years from the COD. Now, as per the new MCA, the developers can have early exit by divesting their equity up to 100 per cent, after completion of 2 years from the COD. This amendment is similar to the model concession agreement provisions in the highway sector and aims to simplify merger and acquisition transactions. The MCA has provisions with regard to the additional land to be made available to the Concessionaire. As regard to the land rent for such additional land is concerned, the same has been reduced from 200% to 120% of the applicable scale of rates. As per the terms of the new MCA, the developer will now be required to pay royalty on "per million tonne of cargo/TEU handled" basis which would be indexed to the Wholesale Price Index annually. (Twenty feet equivalent unit (TEU) is the average container size.). This

will replace the present procedure of charging royalty equal to the percentage of gross revenue, quoted during bidding, calculated on the basis of tariff ceiling prescribed by the erstwhile regulator. Besides resolving the long-pending grievances of operators that revenue share is payable on ceiling tariff (ie, on notional income and not on actual income), the changes aim to address the problems associated with fixing storage charges by Tariff Authority for major ports and collection of revenue share on storage charges.

In order to improve the rate of utilization of the port assets and to raise productivity the new MCA has specified that the concessionaire will now be free to deploy higher capacity equipment, facilities, technology and carry out value engineering for higher productivity.

The definition of "change in law" has been revised. The defined term will now include imposition of conditions arising out of TAMP guidelines and/or orders, environmental law and labour laws. As per the new MCA, the Concessionaire will now be compensated for the increase and imposition of new taxes, duties etc. except in respect of imposition and/or increase of a direct tax both by Central and State Government.

Another significant change is with regard to the provision that allows commencement of operations before commercial operation date. This will lead to better utilisation of assets provided by the port and the concessionaire will be able to generate revenue even before the issue of completion certificate for the project.

In order to track the progress of the work being undertaken at the port and to ensure timely execution of the project, a monitoring arrangement has also been introduced. The other important change introduced in the new MCA is to include provision of refinancing which aims to facilitate availability of low-cost, long-term funds to concessionaire. This will improve the financial viability of projects. The amendments in the MCA also envisage constitution of the Society for Affordable Redressal of Disputes — Ports (SAROD-PORTS) as dispute resolution mechanism between the parties to the MCA. These provisions are similar to the ones available in highways sector.

What are the objectives of the new MCA?

Besides removing ambiguity in the provisions of the old MCA and to obviate the problems being faced on account of certain provisions therein, the new MCA aims to revitalize the port sector and boost port construction in India. It also aims to attract more private sector investments in this sector.

Is there any other change which is proposed in the port sector?

In a move to spruce up investments in the port sector, the Union Cabinet has approved the Major Port Authorities Bill, 2016. The Bill proposes to increase autonomy of the Boards of the major ports and to allow the Boards or committees appointed by the Boards to fix the tariff based on the market conditions. This Bill when passed by both the houses of the Parliament and assented by the President will become an Act and will repeal the Major Port Trusts Act, 1963. EPC World