POLICY FOR AWARD OF WATERFRONT AND ASSOCIATED LAND TO PORT DEPENDENT INDUSTRIES IN MAJOR PORTS

Background

1. The Government of India is committed to improving the level and quality of physical and social infrastructure in the country in pursuit of its goal of achieving national economic prosperity. In pursuance of this goal, the Government has envisaged a substantial role for Public Private Partnerships (PPPs) as a means for harnessing private sector investment and operational efficiencies in the provision of public utilities and services. Allocation of waterfront and associated land to Port based Industries on PPP/captive basis is one of the areas which have been identified for participation/investment by the private sector in Major Ports.

Existing Guidelines

2. Under the existing guidelines for private sector participation in Major Ports issued by the Ministry of Shipping(MoS) in 1996 and 1998, provisions have been made, inter alia, for allotment of waterfront and land on a captive basis to Port Based Industries including Central/State Public Sector Undertakings(PSUs) which fulfil the prescribed eligibility criteria. As per these guidelines, cases where 100% captive facilities(land/waterfront) including captive oil jetties, platforms or Single Buoy Moorings (SBM) are sought to be created by Port Based Industries may be considered without recourse to a tender, if they do not conflict with the Master Plan of the Port, are port specific, are approved by the concerned Administrative Ministries and the industry is willing to pay the maximum realization which the port may determine taking into account all relevant factors. For this purpose, a Port Based Industry has been defined in the Guidelines as one which requires 100% captive berths/back up area for the purpose of import of raw material and/or export of finished products and/or transportation of raw materials/finished products. General guidelines of BOT, wherever applicable, are being applied to cases of captive facilities also.

3. Though, some berths and facilities have been set up in some Major Ports following these Guidelines, the potential for development of such facilities is not yet

fully realized. This is attributable, mainly, to the absence of clearly defined benchmarks for price discovery for the proposed allotment and lack of clarity in the existing guidelines about the processes to be followed. Based on the experience gained and the developments in the field of Public Private Partnerships(PPPs) which have taken place over the years, a need has been felt for formulating a structured policy for facilitating the process of allotment of waterfront and associated land for development and operation of port facilities/services by any industry substantially dependent on a Major Port for import and/or export of cargo for carrying out their legitimate business operations within the larger PPP framework which could replace the existing guidelines for allotment of land and waterfront for port based industries.

Objective

4. Govt. of India has focussed on Port led development through the Sagarmala program as a key enabler for economic growth. Optimal utilization of land and waterfront at the disposal of the Major Ports is of critical importance in this context. The objective of this Policy is to ensure uniformity and transparency in the procedure for awarding captive facilities. The policy will help generate committed business for the Major Ports on a long term basis by facilitating the development and operation of dedicated port facilities by industries which are substantially dependent on a particular Major Port for import and/or export of their cargo and thus play a catalytic role in the eventual realization of the objectives of Port led development.

Scope and Applicability

5. The Policy envisages the grant of concession to Port Dependent Industries (PDI) for setting up dedicated facilities in Major Ports for import and/or export of cargo and their storage before transportation to their destination, for a period not exceeding 30 years. Extension of concession period on conditions including under utilization of asset as per the Concession Agreement may be allowed.

6. Post a maximum of 30 years of operation, the waterfront and associated land in a Major Port will be allotted for construction of berths, offshore anchorages, transhipment jetties, single point moorings etc. as per the terms and conditions mentioned in the Concession Agreement (CA) which will be required to be entered

into between the Port Authority and the PDI concerned. The ambit of the Policy includes creation of new assets as well as utilization of currently unutilised existing assets such as vacant berths. The Policy will be applicable to all the Major Ports.

Date of Effect

7. This Policy shall come into effect immediately.

Definitions

8. For the purpose of this Policy:

(i) "**Captive Cargo**" means cargo handled by a Port Dependent Industry at a Facility for its own use;

(ii) **'Designed Capacity' means the capacity of the envisaged Facility as indicated in the Feasibility Report prepared for the Facility and accepted by the Major Port concerned.**

(iii) "**Facility**" means the dedicated facilities as envisaged in para 5 of this Policy;

(iv) **"Gross Revenue"** means the aggregate of all revenues chargeable from handling cargo other than Captive Cargo at a Facility and the notional revenue from Captive Cargo to be calculated on the basis of the notified tariff being charged at the Facility for cargo other than Captive Cargo;

(v) **"Minimum Guaranteed Cargo"** means the minimum cargo handling levels for a Facility fixed in terms of this Policy;

(vi) **"Policy"** means the policy for 'Award of Waterfront and Associated Land to Port Dependent Industries in Major Ports' as set out in this document;

(vii**)** **"Port Dependent Industry**" means, with reference to a particular Major Port, any entity (including any of its Affiliates) which is dependent on that Major Port for import and/or export of at least 70% of the Designed Capacity of the proposed Facility for Captive Cargo. Such entity includes a Special Economic Zone (SEZ) and Free Trade Warehousing Zone(FTWZ) established under the SEZ Act. For determining the extent of dependence for import/export as indicated above, the average actual import/export by the said

Port Dependent Industry (PDI) through the said Major Port during the three financial years immediately preceding the date of application for a Facility will be taken into account. Alternatively, the PDI may provide actual import/export details through some other Port in the last 3 years which is proposed to be shifted to the Facility. For, entities yet to commence operations or entities in operation for less than 3years the cargo projections will be considered for determining whether the entity can be classified as a PDI. The entity would need to furnish to the port the cargo requirement projections as part of the feasibility report. The port shall examine the projections either in-house or have it evaluated by engaging Consultants. If the projected cargo requirement for the entity for a period of 3 years starting from no later than 3rd year of the expected COD is at least 70% of the Designed Capacity of the proposed Facility for Captive Cargo, the entity will be classified as a PDI.

Note: The terms ‘import’ and ‘export’ as used in this document refer to unloading/loading of cargo from/to any port irrespective of whether the origin/destination port is in India or overseas.

(viii) **“Royalty”** means the charge per Metric Tonne payable by the Concessionaire to the Port Authority in terms of this Policy.

(ix) Terms not specifically defined in this document, unless the context otherwise requires, shall have the same meaning assigned/ ascribed to them in the Model Concession Agreement for Private Sector Projects in Major Ports issued by the Ministry of Shipping(MCA).

Methodology

9. Any PDI, desirous of setting up a Facility shall have a feasibility report prepared for the same and submit the report to the Major Port concerned. The feasibility report should inter alia, indicate the Designed Capacity envisaged and the land and waterfront required for setting up the Facility. The designed capacity as worked out by PDI should not be less than the capacity as worked out by the TAMP-2008 guidelines and the Berthing Policy 2016 for all commodities**.** The Major Port

shall evaluate the feasibility report either in-house or have it evaluated by engaging Consultants for the purpose within a period of three months. On evaluation and acceptance of the need for a Facility for the PDI or PDIs in question, the Major Port will examine the proposal keeping in view the availability of waterfront/land and surplus capacity, if any, available for the particular commodity for which a Facility is desired. Once a decision is taken to set up the Facility, the Major Port Authority will initiate the process for selection of a PDI for award of the Facility. Selection of the successful PDI will be made through open competitive bidding, comprising the RFQ and RFP stages.

10. PDIs as defined in Para 8 above and having a minimum Net Worth equivalent to 50% of the Estimated Project Cost of the Project will be eligible for submitting the Request for Qualification and, on prequalification, participate in the Request For Proposal (RFP) stage for the Facility. The procedures as laid down by the Government from time to time for appraisal and approval of PPP projects will be followed after making suitable modifications in the eligibility criteria for participation in the bidding for the Facility. In case of new entities who are covered under the definition of PDIs as per para 8 above, the promoters of the said new entity will need to have a minimum net worth equivalent to50% of the Estimated Project Cost of the Project.

11. **Selection of the successful Bidder will be made on the basis of the royalty rate to be shared with the concessioning authority by the bidders.** The royalty rate is to be expressed as **Rs per Metric Tonne rate** and will be the bidding criteria.

12. The Port Authority shall fix a floor level for royalty per Metric Tonne to be offered by the Bidders.

12.1 Royalty from comparable captive berths either in the same Port or comparable captive berths from some other Major Ports.

12.2 Wharfage for the commodity fixed for the Port.

The Port may decide the Reserve Royalty per tonne by taking the above factors into consideration.

13. Floor royalty rate is to be adjusted based on whether the concessionaire or the port is investing in developing the berth. In case the port is investing in developing the berth, the floor royalty rate should ensure a fair rate of return on investment through the projected cargo volumes.

14. Bid offers which are below the floor royalty rate fixed by the Major Port Authority shall be rejected.

15. The Bidder (from amongst those whose offer is either equal to or above the floor level royalty rate) who offers the highest royalty rate from the Facility to the Port Authority will be declared as the selected Bidder. Single bids may also be considered if they are equal to or above the floor level royalty rate.

16. The newly incorporated Special Purpose Vehicle by the selected Bidder for award of the Facility will sign a Concession Agreement with the Major Port. For this purpose, the Port shall adopt the MCA. The respective Port Authority shall ensure that Facility specific deviations as may be necessitated by the terms and conditions envisaged under the Policy are incorporated in the Concession Agreement to be signed with the selected Bidder.

Minimum Guaranteed Cargo

17. Minimum Guaranteed Cargo (MGC) will be fixed for a Facility by the Port on a project specific basis before calling for RFP. **The Minimum Guaranteed Cargo (MGC) will set at a minimum of 70% of the designed capacity including both captive cargo and other cargo. The concessionaire will need to pay royalty commensurate of the MGC irrespective of the actual volume handled by the**

berth. The MGC will be applicable within four years of award of the facility to the concessionaire or two years from COD whichever is earlier.

18. The concessionaire shall be allowed to handle non-captive cargo upto 30% of the designed capacity of the berth. Cargo other than captive cargo handled by the concessionaire shall meet norms relating to environments issued from time to time. Further no change in cargo profile shall be allowed except with the prior approval of the Concessioning Authority. The concessionaire would need to submit monthly report to the port. on captive and non-captive cargo handled in the facility.

19. The cap on non-captive cargo volumes at 30% of the designed capacity can be relaxed under exceptional circumstances by the port authority. The cap is recommended to be relaxed only in the scenario of low utilization of the captive berth and concurrent shortage of handling facilities in the port for other non-captive cargo.

Performance criteria

20. The Berthing Policy 2016 shall be applicable for both captive and non-captive cargo handled in the facility by the concessionaire. The productivity levels, that the concessionaire shall need to meet, is to be estimated basis guidelines laid down in the Berthing Policy and calculated specifically for the equipments installed in the respective facility & type of vessels expected in the berth.

21. The Concessionaire would need to pay a penalty for failing to meet the productivity standards set by the port as per the Berthing Policy.

22. Failure to meet the performance norms on an average for a period of 12 months shall be treated as an event of default.

Designed capacity

23. The designed capacity for the facility should not be less than the capacity as worked out by the TAMP-2008 guidelines and the Berthing Policy 2016 in respect of all commodities.

24. The designed capacity shall be revised by the Port Authority on occurrence of the following events

- Addition or upgradation of berth, yard, evacuation equipments
- Increase in draft of the berth
- Change in vessel profile
- Any breakthrough in technology with potential to improve productivity for the respective cargo
- Any other event that can substantially increase the capacity of the facility

25. The Minimum Cargo Guarantee (MCG) will be re-evaluated on revision of the designed capacity.

Priority and Preferential Berthing

26. Captive Cargo will have preferential and priority berthing over any other cargo.

27. The Concessionaire may offer preferential or priority berthing to any one or more shipping lines or vessel owners/operators to optimize the use of the project facilities and services subject to the ceiling indicated i below for handling cargo other than Captive Cargo. Such preferential or priority berthing shall be subject to the priority berthing norms as may be mutually determined by the Parties in accordance with Applicable Laws or guidelines issued by the Government from time to time in respect thereof, if any.

28. In case of others, the Facility will be available on a first come-first serve, common-user basis open to any and all shipping lines, importers, exporters, shippers, consignees and receivers, and the Concessionaire shall refrain from indulging in any unfair or discriminatory practice against any user or potential user of the Facility.

Tariff

29. For cargo other than Captive Cargo handled, the Concessionaire shall be entitled to recover from the users of the Facility, Tariff as notified by the Competent

Authority in accordance with the Revised guidelines for Determination of Tariff for Projects. At present, Tariff Authority for Major Ports (TAMP), a statutory authority constituted under Major Port Trusts Act, 1963 is the Competent Authority for notifying Tariff in Major Port Trusts. In case of any change in Role for TAMP in future, new guidelines on tariff fixation fixed by the authority will be applicable on the non-Captive cargo.

Payments to the Concessioning Authority

30. The Concessionaire will make payments to the Concessioning (Port) Authority towards License Fee, Royalty and rent and other charges for additional utilities or services made available to them by the Port Authority in the following manner:

a) License Fee as fixed by the Port Authority concerned, as consideration for the use, in its capacity as a bare licensee of the Project Site and equipment comprised in the Port's Assets, if any, made available to it as per the Concession Agreement. Such amount shall be paid by the Concessionaire as agreed upon in lump sum or in half yearly/yearly instalments. Where the fee is paid in half yearly/yearly basis, it will contain an annual escalation as may be stipulated by the Port Authority. In addition, in cases where an existing facility is being given under the Concession, the value of assets including berth, back up area created by the Port (other than those covered by the term "Port's Assets" as defined in the Concession Agreement) and handed over to the Concessionaire shall be determined on replacement cost basis and recovered from the Concessionaire upfront at the time of award of the Concession.

b) Royalty per month for the volume handled by the Concessionaire will be **payable for both captive & non-captive cargo handled at the Facility**. **Royalty rate will get escalated year on year basis WPI.** It is clarified in this connection that in the event of failure of the Concessionaire to achieve the Minimum Guaranteed Cargo levels (MGC) in a year as prescribed in the Concession Agreement, the Concessionaire is obligated to pay royalty amount for the Minimum Guaranteed Cargo.

c) Rent or other charges for any premises (other than the Project Site/Project Assets) or additional utilities or services, made available by the Port Authority to the said entity as per rates specified in the Concession Agreement. Such rates shall be twice the Scale of Rates as notified by the competent authority in respect thereof from time to time.

31. Occurrence of the following events will be treated as Events of Default:

i) Failure to achieve MGC as stipulated above for three consecutive years by the Concessionaire;

ii) Failure to meet performance norms set by the Port Authority on an average over a period of 12 months

However, the Concessionaire shall not be deemed to be in default if such non achievement of either of the two levels of cargo handling is due to substantial change in economic policies including the policy regarding import/export of a particular commodity as a result of which the throughput could not be achieved and the Concession is liable to be terminated following due procedure as laid down in the Concession Agreement.

32. Any delay in payment of Royalty for two consecutive months or more than five times in the aggregate during the Concession period shall be treated as a Concessionaire Event of Default and the Concession is liable to be terminated following due procedure as laid down in the Concession Agreement.

Note: Liability for termination on occurrence of the above Events of Default is without any prejudice to the liability including termination on account of any other Event of Default as may be specified in the Project Concession Agreement.

Concessioning Authority's Rights to Step-in

33. In the event a Termination Notice due to a Concessionaire Event of Default is issued by the Concessioning Authority to the Concessionaire, the Concessioning Authority shall have the rights to re-enter upon and take possession and control of

the Project Site and the Facility and also assume such of the rights and obligations of the Concessionaire as may be specified in the Project Concession Agreement and reuse the Facility in accordance with the Project Concession Agreement from the date of Termination of Contract.

Compensation

34. Upon termination of a Concession Agreement due to a Force Majeure Event or an Event of Default by the Concessioning Authority/Concessionaire, Compensation as per provisions of the Project Concession Agreement shall be paid to the Concessionaire. However, in the Event of expiry of Concession by efflux of time, the Concessionaire shall hand over/transfer peaceful possession of the Project site, Port's Assets, the Facility etc. free of cost and Encumbrance to the Concessioning Authority.

Escrow Account

35. The Concessionaire shall maintain an Escrow Account for the period, purpose and in the format as provided for in the Concession Agreement.

Process timelines

36. Port authorities shall ensure timely processing of bids and awarding of contract. The process steps from the submission of proposal by the PDI to the signing of concession agreement shall be completed within the timelines specified in the following schedule:

- Submission of Proposal with Feasibility Report - T
- Evaluation of proposal and providing response to proposal - T + 3 months
- Bidding process commences - T + 5 months
- Identification of concessionaire T+8
- Signing of concession agreement T+12 months

General

37. Other terms and conditions will, in general, be as per the provisions in the MCA subject to deviations as approved by the Competent Authority.

38. The existing guidelines referred to in para 2 above stands withdrawn with immediate effect.

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Source : The policy is available at

http://shipping.nic.in/writereaddata/l892s/captivepolicy29072016-13879005.pdf