



GOVERNMENT OF KERALA

Abstract

Fisheries & Ports Department - Vizhinjam International Seaport project - Execution of Supplementary Concession Agreement for the development of Vizhinjam International Seaport project - Sanctioned and Approved - Orders Issued.

FISHERIES & PORTS (E) DEPARTMENT

G.O.(Ms)No.18/2024/F&P Dated,Thiruvananthapuram, 28-11-2024

Read 1 G.O.(Ms) No.35/2015/F&PD dated, 13-07-2015

2 G.O.(Ms) No. 2/2024/F&PD dated, 15-02-2024

3 Settlement Agreement dated, 23-02- 2024

4 G.O.(Rt)No.802/2024/F&P Dated, 18-11-2024

5 Letter No. VISL/2 5/2024-MD and CEO/471 dated e-mail dated 02 -09-2024 from the Managing Director, Vizhinjam International Seaport Ltd

6 Letter No. SS - GK 7/2023 dated 28-10-2024 & 30-10-2024 from the Advocate General of Kerala, Ernakulam.

ORDER

As per the Government Order read as 1st paper above, Government approved the bid submitted by M/s Adani Ports and Special Economic Zone Ltd. for the development of Vizhinjam International Seaport Project. The letter of award was issued to the selected bidder, Adani Ports and Special Economic Zone Ltd (APSEZ) on 13th July 2015. As per Concession Agreement, the Scheduled Completion Date (SCD) is 03-12-2019 i.e. 1460th day from the Appointed Date.

2. The Concessionaire has not been able to achieve the target on the 270th days from the SCD, which was on 29-08-2020. The Concessionaire had raised 16 numbers of Force Majeure Events which were rejected by Vizhinjam International Seaport Ltd (VISL). Due to the non-completion of the project with in the Scheduled Completion Date and in the Cure Period, Vizhinjam International Seaport Limited has issued notice for levying the liquidated damage charge from the Concessionaire. It was also intimated to the Concessionaire that since further time is required for resolving the disputes raised by the concessionaire, it is premature and irregular on their part in invoking arbitration without completing the steps under Article 45.2 of the Concession Agreement. In spite of this, the Concessionaire moved with arbitration proceedings.

3. As per the Government Order read as 2nd paper above, Government condoned the delay by M/s Adani Vizhinjam Port Private Limited (AVPPL) in completing the

Vizhinjam International Seaport project and sanctioned the extension of Scheduled Completion date for a period of 5 years (i.e from 03-12-2019 to 03-12-2024). The Concession Period is extended for 5 years (i.e from 2055 to 2060), subject to the following conditions:

- (i) AVPPL shall withdraw all the arbitration claims filed before the Arbitral Tribunal;
- (ii) the Revenue sharing should remain the same i.e. the 15th Anniversary (from 2034) as per the Concession Agreement;
- (iii) The capacity augmentation shall be achieved by 2028 itself;

In addition to the above, following financial arrangements shall be made with AVPPL:

- i) An amount of Rs. Two Hundred and Nineteen Crores is withheld as Commitment Fee Deposit from the Equity Support to be given by Government of Kerala to AVPPL.
- ii) From the amount so withheld, an amount of Rs. 175.2 Crores (43.8 x4) shall be released to AVPPL once the 2nd and 3rd phases of the project are completed in 2028.
- iii) An amount of Rs. 43.8 Crores shall be retained by GoK.

Chief Secretary has entrusted to ensure that AVPPL shall comply with the above conditions and also to sign the Tripartite Agreement as Conforming Party once AVPPL takes action to withdraw the arbitration proceedings.

4. Adani Vizhinjam Port Private Limited has withdrawn the arbitration proceedings and the Joint Memo of Settlement of Disputes was signed among the Authority, the Concessionaire, the Counsel for the Claimant/Respondent & the Counsel for the Respondent/Counter Claimant. The settlement agreement was signed between the Authority and the Concessionaire on 23rd February, 2024.

5. As per 2.1. v. of the Settlement Agreement, the Parties agree to execute an Amended Concession Agreement or a Supplementary Concession Agreement to give effect to the terms of this Settlement Agreement within 90 days from the date of the Settlement Agreement.

6. As per the Government Order read as 4th paper above, the time period for execution of the Supplementary Concession Agreement was extended by 281 days from the date of the execution of the Settlement Agreement.

7. As per the letter read as 5th paper above, the M.D. VISL has furnished the draft of the Supplementary Concession Agreement, an amendment to the Concession Agreement.

8. As per the letters read as 6th paper above, the Advocate General of Kerala has reported that there is no legal embargo in executing the Supplementary Concession Agreement.

9. Government have examined the matter in detail and are pleased to approve the Supplementary Concession Agreement appended to this Order and sanction is accorded to execute the Supplementary Concession Agreement between the Authority, GoK and the Concessionaire, AVPPL

(By order of the Governor)
K S SRINIVAS
PRINCIPAL SECRETARY

To:

The Managing Director, Vizhinjam International Seaport Ltd., Thiruvananthapuram

The Advocate General of Kerala, Ernakulam.

The Managing Director & Chief Executive Officer, Adani Vizhinjam Ports Private Ltd.

The Principal Accountant General (Audit), Kerala, Thiruvananthapuram.

The Accountant General (A&E), Kerala, Thiruvananthapuram.

General Administration (SC) Department (Vide Item No. 2517 dated 27-11-2024)

Law Department (Vide file no. CONV-1/78/2024-LAW dated 17-10-2024)

Finance Department

The Information Officer, Web & New Media, Information and Public Relations Department (for uploading in the Government web site.)

SF/OC

Forwarded /By order

Signed by

P Y Usha

Section Officer

Date: 28-11-2024 10:05:48

SUPPLEMENTARY CONCESSION AGREEMENT

THIS SUPPLEMENTARY CONCESSION AGREEMENT (“Agreement”) is entered into on this the [•] day of [•], 2024,

BETWEEN

The Governor of Kerala, represented by the Principal Secretary, Ports, Government of Kerala and having its principal offices at Government Secretariat, Thiruvananthapuram, Kerala, India 695 001 (hereinafter referred to as the “**Authority**”, which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns) of One Part;

AND

Adani Vizhinjam Port Private Limited, a company incorporated under the provisions of the Companies Act, 2013 (Act No. 18 of 2013) and having its registered office at Adani House, Nr. Mithakhali Six Roads, Navrangpura, Ahmedabad – 380009, Gujarat, India (hereinafter referred to as the “**Concessionaire**”, which expression shall, unless repugnant to the context or meaning thereof, include its successors and permitted assigns and substitutes) of the **Other Part**.

Authority and Concessionaire are hereinafter collectively referred to as “**Parties**” and individually as a “**Party**”.

WHEREAS the Parties had entered into the Concession Agreement dated August 17, 2015 (“**Concession Agreement**”) whereby the Authority had granted to the Concessionaire, the concession set forth therein including the exclusive right, license and authority to construct, operate and maintain the Project subject to and in accordance with the provisions of the Concession Agreement, Applicable Laws and the Applicable Permits.

AND WHEREAS, certain disputes arose between the Parties which were referred to arbitration in accordance with the terms of the Concession Agreement.

AND WHEREAS, the Parties, had mutually agreed to settle the disputes (as per Authority’s G.O Ms. 2/2024/F&PD dated 15-02-2024 and the Concessionaire has confirmed its acceptance of the stipulations in the Government Order by its letter of acceptance no: AVPPL/GoK/2023-24/2855 dated 16-02-2024) and subsequently entered into settlement agreement dated February 23, 2024 (“**Settlement Agreement**”) in consideration of the mutual withdrawal of the claims/counterclaims against the other party arising out of the Concession Agreement, and which were in adjudication before the Arbitral tribunal. The terms of the settlement as recorded and agreed under the Settlement Agreement were approved by the Arbitral tribunal and passed a Consent Award under section 30(2) & (3) of the Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996), dated March 8, 2024 (“**Consent Award**”).

AND WHEREAS, as per clause 2.1 of the Settlement Agreement which provides that “the Parties agree to execute an Amended Concession Agreement or a Supplementary Concession Agreement to give effect to the terms of this Settlement Agreement within 90 days from the date of the Settlement Agreement.” Subsequently,

through G.O.(Rt)No.802/2024/F&P dated 18-11-2024, the Parties have agreed to extend the aforesaid period of 90 (ninety) days to 281 (two hundred and eighty one) days.

AND WHEREAS, in furtherance of the provisions of the Settlement Agreement and Consent Award, and as agreed between the Parties, the Parties are entering into this Agreement to record their understanding of the terms and conditions amending the Concession Agreement.

NOW, THEREFORE, in consideration of the foregoing and the respective covenants and agreements set forth in this Concession Agreement, the receipt and sufficiency of which is hereby acknowledged, and intending to be legally bound hereby, the Parties agree as follows.

1. CONCESSION PERIOD

1.1. It is hereby agreed between the Parties that Clause 3.1.1 of the Concession Agreement shall stand substituted and replaced with the following Clause:

*“Subject to and in accordance with the provisions of this Agreement, Applicable Laws and the Applicable Permits, the Authority hereby grants to the Concessionaire the concession set forth herein including the exclusive right, licence and authority to construct, operate and maintain the Project (the “**Concession**”) for a period of 45 (forty-five) years commencing from the Appointed Date, and the Concessionaire hereby accepts the Concession and agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein:*

Provided that the Concessionaire shall, at any time no earlier than 5 (five) years, but not later than 3 (three) years prior to completion of the aforesaid Concession Period of 45 (forty-five) years, upon issuing a notice to this effect to the Authority, be entitled to an extension of 20 (twenty) years in the Concession Period under and in accordance with the provisions of Clause 38.4:

Provided further that at any time no earlier than 5 (five) years prior to completion of the Concession Period extended hereinabove, the Parties may, with mutual agreement, extend the Concession Period for such further period as they may determine, but not exceeding 20 (twenty) years in any case:

Provided also that in the event Capacity Augmentation is not undertaken in accordance with the provisions of this Agreement, the Concession Period shall not be extended under this Clause 3.1.1.”

1.2. The Parties further agree that the amendment to Clause 3.1.1 of the Concession Agreement as set out hereinabove shall be subject to the Concessionaire (i) undertaking Capacity Augmentation in accordance with the provisions of Clause 12.8.1 of the Concession Agreement as amended by this Agreement; and (ii) commencing payment of the Premium in accordance with the provisions of Clause 26.2.1 of the Concession Agreement as amended by this Agreement. If the Concessionaire fails to comply with either of the aforesaid conditions, the Parties hereby confirm and agree that the amendments to Clause 3.1.1 of the Concession Agreement as aforesaid shall not take effect.

1.3. Subject to compliance by Concessionaire with clause 1.2 of this Agreement, in view of the above amendment to clause 3.1.1 of the Concession Agreement, the Parties agree that any reference to the Concession Period or Concession Period of 40 (forty)years, wherever appearing in the Concession Agreement shall be construed to refer to the Concession Period as stated in clause 1.1 of this Agreement.

2. OBLIGATIONS OF THE AUTHORITY

It is hereby agreed between the Parties that Clause 6.2.2 of the Concession Agreement shall stand substituted and replaced with the following Clause:

“The Authority shall no later than the date on which Capacity Augmentation is achieved by the Concessionaire or December 31, 2028, whichever is later, provide or cause to be provided, a railway line connecting the Port to the nearest railway station on the regional railway network.”

3. SCHEDULED COMPLETION DATE

3.1. It is hereby agreed between the Parties that Clause 12.5.1 of the Concession Agreement shall stand substituted and replaced with the following Clause:

“On or after the Appointed Date, the Concessionaire shall undertake construction of the Port as specified in Schedule-B and Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D. December 3, 2024 shall be the scheduled date for completion of the Port (the “**Scheduled Completion Date**”) and the Concessionaire agrees and undertakes that the Port shall be completed on or before the Scheduled Completion Date.

For the avoidance of doubt, it is agreed that the Project Completion Schedule and Scheduled Completion Date shall not apply to Port Estate Development.”

- 3.2. It is hereby agreed between the Parties that Paragraph 5 of Schedule G of the Concession Agreement shall stand substituted and replaced with the following Paragraph:

“5 Scheduled Completion Date

5.1 The Scheduled Completion Date shall be December 3, 2024.

5.2 On or before the Scheduled Completion Date, the Concessionaire shall have completed the Port in accordance with this Agreement.”

4. CAPACITY AUGMENTATION

- 4.1. It is hereby agreed between the Parties that Clause 12.8.1 of the Concession Agreement shall stand substituted and replaced with the following Clause:

“Notwithstanding anything contained hereunder, the Concessionaire shall undertake Capacity Augmentation as specified in Schedule-B and Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D, so that the Project shall have Capacity Augmentation, on or before December 31, 2028 (the “**Scheduled Capacity Augmentation Date**”). The Parties agree and acknowledge that the Project shall be deemed to have achieved Capacity Augmentation when the Completion Certificate or the Provisional Certificate, as the case may be, is issued by the Independent Engineer, in respect of the Capacity Augmentation, in accordance with Article 14.”

- 4.2. It is hereby agreed between the Parties that Clause 12.8.3 of the Concession Agreement shall stand deleted.

- 4.3. It is hereby agreed between the Parties that Paragraph 1.1 of Annex – III, Schedule B of the Concession Agreement shall stand substituted and replaced with the following Paragraph:

The Concessionaire shall undertake construction of Capacity Augmentation, so that the Project shall have Capacity Augmentation on or before December 31, 2028. Capacity Augmentation shall consist of and include 3 (three) Container berths, each having a minimum of 400 (four hundred) metres quay length in continuation with the Phase I in south-east direction and the backup area behind the berth. The backup area for Container yards shall be

reclaimed. The Concessionaire shall develop Container handling facility along with necessary equipment as per Annex-II of Schedule-C. The minimum Capacity of the Port after construction shall be 30,00,000 (thirty lakh) TEUs.

The Concessionaire shall demonstrate to the Independent Engineer by physical modeling that the different length of breakwater extensions being undertaken are sufficient to maintain the tranquility requirements at the harbor basin and berth pocket. Total length of breakwater after Capacity Augmentation shall be a minimum of 4,020 (four thousand and twenty) meters (including 3,100 (three thousand one hundred) meters covered in Funded Works).

In addition to the above, the Concessionaire shall carry out the associated dredging to create the necessary berth pocket and/or harbor basin for the purpose.

For the avoidance of doubt, the Parties agree that the total berth length and total reclaimed area after Capacity Augmentation must match the total berth length of minimum 2,000 (two thousand) meters and reclaimed area of 113 (one hundred and thirteen) Ha respectively.

- 4.4. In view of the above amendment to Paragraph 1 of Annex – III, Schedule B of the Concession Agreement, the Parties agree that any reference to Phases II, III and IV of Capacity Augmentation, wherever appearing in the Concession Agreement, shall be construed to refer to the relevant portion of Capacity Augmentation or Capacity Augmentation as a whole, as applicable.
- 4.5. The Parties agree that in the event Independent Engineer issues a Provisional Certificate (and not the Completion Certificate) in respect of the Capacity Augmentation on or prior to the Scheduled Capacity Augmentation Date, the Concessionaire shall have an additional 90 (ninety) days from the Scheduled Capacity Augmentation Date to complete any outstanding items in the Punch List forming part of the Provisional Certificate issued by the Independent Engineer.
- 4.6. The Concessionaire shall undertake Capacity Augmentation in accordance with Clause 12.8.1 of the Concession Agreement as amended by this agreement so as to achieve Capacity Augmentation by December 31, 2028. Prior to commencement of Construction Works of Capacity Augmentation, the Concessionaire shall submit to the Independent Engineer and Authority its detailed design, construction methodology, quality assurance procedures, and the procurement, engineering and construction time schedule for completion of Capacity Augmentation as per the Scheduled Capacity Augmentation Date.

- 4.7. The Parties agree and acknowledge that if the Port does not have Capacity Augmentation on or before the Scheduled Capacity Augmentation Date, unless the delay is on account of reasons attributable to the Authority or due to Force Majeure, the commitment deposit amount [of Rs. 175.20 crores (Rupees one hundred seventy-five crores and twenty lakhs)] withheld by the Authority from the Equity Support shall stand forfeited by the Authority. The Parties agree that the aforesaid is a mutually agreed genuine pre-estimated loss and damage likely to be suffered and incurred by the Authority and is not by way of penalty.
- 4.8. The Parties agree that if the Port does not have Capacity Augmentation on or before the Scheduled Capacity Augmentation Date, unless the delay is on account of reasons attributable to the Authority or due to Force Majeure, the Concessionaire shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Performance Security for delay of each day until the date Port has Capacity Augmentation.
- 4.9. The Parties hereby expressly acknowledge and agree that the provisions of Article 24 (*Financial Close*) shall apply *mutatis mutandis* to Capacity Augmentation, and the Concessionaire hereby agrees that within a period of 90 days from the date of obtaining the Environmental Clearance in respect of Capacity Augmentation works, the following conditions are required to be satisfied:
- (i) The Concessionaire shall have executed the Financing Agreements in respect of Capacity Augmentation and delivered to the Authority 3 (three) true copies thereof, duly attested by a Director of the Concessionaire;
 - (ii) The Concessionaire shall have delivered to the Authority 3 (three) true copies of the Financial Package and the Financial Model in respect of Capacity Augmentation, duly attested by a Director of the Concessionaire, along with 3 (three) soft copies of the Financial Model (in respect of Capacity Augmentation) in MS Excel version or any substitute thereof, which is acceptable to the Senior Lenders; and
 - (iii) The Concessionaire shall achieve Financial Close in respect of Capacity Augmentation

Provided that upon request in writing by the Concessionaire, the Authority may, in its discretion and with such conditions as it may deem fit, waive any of the above conditions or grant extension of time for fulfilment of any of the above conditions.

5. GRANT

- 5.1. It is hereby agreed between the Parties that after Clause 25.2.5 of the Concession Agreement, the following Clause 25.2.6 shall be inserted:

“Until the Concessionaire achieves Capacity Augmentation as per Clause 12.8.1 of the Concession Agreement, the Authority shall withhold a commitment deposit of Rs. 219 crores (Rupees two hundred and nineteen crores) from the amount of Equity Support. Out of the aforesaid commitment deposit of Rs. 219 crores (Rupees two hundred and nineteen crores), an amount of Rs. 175.20 crores (Rupees one hundred and seventy-five crores and twenty lakhs) shall only be released by the Authority to the Concessionaire simultaneously on the Concessionaire achieving Capacity Augmentation within the Scheduled Capacity Augmentation Date, unless the delay is on account of reasons attributable to the Authority or due to Force Majeure, and the remaining Rs. 43.80 crores (Rupees forty-three crores and eighty lakhs) shall be retained by the Authority. Subject to the withholding and release of commitment deposit in accordance with the aforesaid, the Authority shall unconditionally and unequivocally disburse or cause to be disbursed an amount of Rs. 1,182.90 crores (Rupees one thousand one hundred eighty two crores and ninety lakhs) to the Concessionaire towards Equity Support in terms of Article 25 of this Agreement”

6. PREMIUM

It is hereby agreed between the Parties that Clause 26.2.1 of the Concession Agreement shall stand substituted and replaced with the following Clause:

*“Without prejudice to the provisions of Clause 26.1, the Concessionaire agrees to pay to the Authority for the year commencing from the 15th (fifteenth) anniversary of December 3, 2019, i.e., December 3, 2034, a premium (the “**Premium**”) in the form of an additional Concession Fee equal to 1% (one per cent) of the total Realisable Fee during that year, and for each subsequent year thereafter, the Premium shall be determined by increasing the proportion of Premium to the total Realisable Fee in the respective year by an additional 1% (one per cent) as compared to the immediately preceding year. For the avoidance of doubt, and by way of illustration, the Premium for the 2nd (second) and 3rd (third) years after commencement of the payment of Premium hereunder shall be equal to 2% (two per cent) and 3% (three per cent) respectively of the total Realisable Fee for the respective years.”*

7. MISCELLANEOUS

- 7.1. This Agreement, and the terms and conditions set forth herein, upon execution, shall form an integral part of the Concession Agreement, and shall come into full force and effect as on the date of execution of this Agreement by the Parties. This Agreement shall be co-terminus with the Concession Agreement.
- 7.2. Capitalised words and expressions used but not defined in this Agreement shall, unless repugnant to the context or meaning thereof, have the meaning ascribed to them in the Concession Agreement.
- 7.3. The Concession Agreement is amended only to the extent specifically set forth herein and this Agreement shall not have the effect of changing or amending any other provision of the Concession Agreement. All other provisions, including Clauses and Schedules, of the Concession Agreement and other terms and conditions in the Concession Agreement, to the extent not amended or replaced, shall *mutatis mutandis* be applicable to this Agreement, and shall remain in full force and effect, be binding on the Parties and shall not be superseded by this Agreement. Subject to the foregoing, in the event of any inconsistency between the provisions of this Agreement and the Concession Agreement, the provisions of this Agreement will prevail. Further, in the event of any inconsistency between the provisions of this Agreement and the Settlement Agreement, the provisions of the Settlement Agreement which forms part of the Award passed under S.30(1) and (2) of the Arbitration and conciliation Act, 1996, has to prevail.
- 7.4. Except as set out hereunder, no addition to, variation, or agreed cancellation of any provision of this Agreement shall be binding upon the Parties unless reduced in writing and signed by or on behalf of the Parties.
- 7.5. The Concession Agreement and this Agreement shall be read and construed together and be deemed to constitute one and the same agreement.
- 7.6. This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the courts in the State shall have exclusive jurisdiction over matters arising out of or relating to this Agreement. Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other

Party, shall be resolved in accordance with the provisions of Article 45 (*Dispute Resolution*) of the Concession Agreement.

- 7.7. Recitals to this Agreement form an integral part of the Agreement and will be in full force and effect as though they were expressly set out in the body of this Agreement.
- 7.8. This Agreement may be executed in two counterparts, each of which, when executed and delivered, shall constitute an original of this Agreement.

[signature page follows]

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.

SIGNED, SEALED AND
DELIVERED
For and on behalf of
the AUTHORITY by:

THE COMMON SEAL OF
CONCESSIONAIRE has been affixed
pursuant to the resolution passed by the Board
of Directors of the Concessionaire at its
meeting held on the [] day of [], 2024
hereunto affixed in the presence of
..... who has signed these
presents in token thereof:

Signature

(Name & Address)

Signature

(Name & Address)