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Via E.mail

November 25, 2008

To: OPUS Bhd

**RE: PROCUREMENT OF WORKS AND SERVICES UNDER OUTPUT-
AND PERFORMANCE-BASED ROAD CONTRACTS (OPRC)
BETWEEN OPUS AND PRDB- ROAD PROJECT OF 652.02 KMS.**

**SUB: DRAFT PRELIMINARY REPORT ON ISSUES RAISED AND
DISCUSSED ON 26.9.2008 AND 10.11.2008**

The undersigned and the representatives of OPUS had two detailed conferences on the captioned matter and various issues were highlighted and discussed. In order to have clarity on the issues, this report is made to avoid confusions in the conclusions arrived.

1. Right-of-Way (ROW) Issues

The main point raised was in relation to the legal position with regard to (existing and new) access to the road which has been handed over to the OPRC Contractor. It was also pointed out that “law & order” issues may arise if the OPRC Contractor proactively administers such unilateral action by the landowners adjacent to the ROW e.g. cutting off access created ad hoc , remove stored materials, etc. within the ROW.

Response: The OPRC Contractor is supposed primarily to be responsible for maintaining the service level of roads. In case there are issues like blockage of roads due to accidents, access being denied by landowners on the sides of the roads etc.,

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there is a legal process for remedying the situation. For example, in case of a vehicle being stranded on the road on account of an accident, the same calls for an investigation to be done by the police under the law. Therefore, it is the responsibility of the police to remove the vehicles for taking possession of the vehicle in their custody for the legal case. Similarly, if there is a denial by landowners of the land adjacent to the ROW, the Contractor is not empowered under the law to force the landowners to fall in line. Any attempts by the Contractor may lead to scuffles which can result in police action. It is the due process of law by which the wrongdoings can be set right. Therefore, the OPRC Contractor cannot be expected to perform such duties which are law and order issues. Fundamentally, the Contractor's role is limited to maintain service levels. Any responsibilities ancillary to these should be viewed from the point of view as to whether they are the functions of the State or are within the domain of the Contractor.

The philosophy of the sample documents is that at the time of site handing over, the Contractor is presumed to have done the site examination (Clause 11.2) and it is the responsibility of the Employer to hand over clear site (Clause 14.2).

However, for obstructions after the handing over of the site, as per Clauses 18.5.1 and 18.5.2, the site clearances are the duties of the Contractor. It can be clarified by adding Clause 18.5.3 that the Site Clearance Responsibilities of the Contractor will not cover encroachments or other things like vehicles pursuant to accident etc. (and other things which lead to law and order) which will be taken care of as per law or at the end of the Employer as the case may be after the award of the contract. It can also be included in Clause 64 that existence of such conditions as result in delay in execution shall also be a reason for Extension of Time of Completion.

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2. Long-Term Contract

- i. The tenability of Government of Punjab / PRBDB in entering long-term contracts (e.g. 10-15years) beyond the term of the elected government, i.e. whether new legislation needs to be enacted.

Response: Under the Indian Law, the contracts are entered into by a Government and not by “elected political party”. Therefore, the contracts entered into by a Government are binding on the State irrespective of which political party is elected to govern a State. Therefore, for long-term contracts, no new legislation needs to be enacted.

- ii. In relation to the issues that would then relate to the allocation and commitment of funding for such long-term contract tenures, as any uncertainties on funding will detract the interest and also raise the related risk aspects for the OPRC Contractor.

Response: In the light of response in ‘i’ above, this issue is redundant.

3. Existing Contract Interface

- i. The manner to deal with contracts that have an existing maintenance obligation (e.g. PSGMY contracts) within the OPRC network. The possibility of being able to introduce the OPRC Contractor as the “manager” or “employer representative” for these existing maintenance contracts and the related issues of devolving the “powers” of the existing authority agency

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(PWD, PRBDB, etc.) to the OPRC Contractor was to be explored. In this regard, there is a need for review of the common terms of the existing maintenance contracts (in relation to the OPRC Contract Form) to obtain appreciation of the possibilities or manner to deal with this situation.

Response: Yes, the existing terms and conditions of the contracts i.e. PSGMY contracts needs to be studied in order to find a solutions as we cannot unilaterally enforce anything on the existing contractors.

4. Local Agencies & Third-Party Issues

- i. These concerns the rights of local agencies & third parties (public & private sectors) that have existing assets (e.g. power, water, telecommunication, etc.) within the ROW or the legal position of these parties after award of the OPRC Contract for installing new assets & their obligations to deal with defects that will affect the performance obligations of the OPRC Contractor.

Response: Yes, this needs attention. Needless to say, that the agencies/third parties will retain the ROW towards their installations after the award of OPRC Contract.

First of all, the terms of the existing permissions to these local agencies & third parties needs to be examined, particularly from the point of view of their liability for the damages caused to the roads on account of their acts/installations on the roads. This is because, we cannot expect the Contractor to bear the burden on account of acts/installations of these parties/agencies which lead to damage to the roads. Otherwise, it may lead to a stand-off between the Contractor and these agencies/parties. It is most likely that the terms and amount of

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compensation for damage to roads on account of repair work etc. in the existing permissions may not be as per the quality of service levels now expected from the OPRC. For example, in case the agencies/parties are to do the damage caused to roads on account of repairs to their installations as per Quality X and the OPRC Contractor is to maintain Service Levels as per Quality Y (which is of higher standard than Quality X), then, we are expecting Contractor to do extra work than that by the agencies/parties which involve higher cost. Therefore, the existing permissions need to be studied in this regard.

Suggestion: However, in the alternative and without prejudice to the above, sufficient disclosure of all such installations and permissions may be disclosed in the bid documents so that the Contractor may accordingly factor the damages as per its assessment in the bid value. It should also be included in the Bid Documents that the Bidder is aware of the installations and recognizes that the Government is entitled to grant permissions in future also for permissions and has made a detailed assessment of the same. As per the Sample Bid Documents (Section IV), the Contractor has to submit a Bill of Quantities for Maintenance Services, Rehabilitation and Improvement Works and for Emergency Works. Therefore, the Contractor can be provided with the existing installations and there should be a provision that future installations also can be made (This leverage is required depending on future needs). Therefore, for carrying out work on account of such installations by agencies/parties, it needs to be clarified in the Bid Documents that the same will be included in Emergency or Improvement Works. The Contractor can then, include the same in Bill of Quantities for Emergency/Improvement Works. This will avoid any

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confrontations with the agencies/third parties. Once the costing has been fixed, there will not be any problems as in terms of Clause 27 the Improvement and Emergency works shall be executed only on the basis of work orders issued by the Project Manager (of the Employer). It is also to be noted that as per Clause 18.4.1, the access to site to other contractors can be given only on a written request by the Employer to the Contractor. Further, a Clause 18.4.1 can be added to say that access to site to any such agency/party (private or public) can be given only on a written request by the Employer to the Contractor.

- ii. Another aspect was the existing legislation that may obligate the OPRC Contractor to deal with emergency situations and circumstances that need proactive action to ensure safety / traffic flow within the ROW e.g. accidents, removal of “broken down” / abandoned vehicles, etc.

Response: This issue has already been considered at length in Issue No. 1 above. For traffic flow etc. we obviously will need policemen to monitor the situation. Further, dealing with such situations is primarily the responsibility of the State as per existing law (presuming there is no OPRC). However, after entering into OPRC, Clause 29 deals with such situations. The Contractor’s responsibility is to carry out the Emergency Works only once the work is jointly identified by the Employer and the Contractor and a work order is issued by the Project Manager (Employer). However, we may include ‘accidents’ within the definition of ‘Emergency Works’. Moreover it can be clarified in Clause 11 which defines ‘Contractor’s Responsibilities’ that the Contractor shall not be responsible for removal of broken down/abandoned vehicles etc. which needs to be taken care of by the police/as per prevailing law. The Contractor’s responsibility shall be

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limited to carrying out 'works' which shall be in accordance with Clause 29.

Moreover, it is pertinent to note Clause 43 which says that the Contractor cannot be held liable to loss or damages arising out of traffic accidents. Clause 43.2 is also important as is reproduced hereunder:

"43.2 Under no circumstances can the Contractor be held liable for losses or damages of any kind and to anyone arising out of interruptions of traffic or traffic delays on the road included in the Contract, including any indirect or consequential loss or damage, loss of use, loss of production, or loss of profits or interest costs."

- iii. With regard to local agencies, the appreciation to deal with the needs of the Local Village Committees, politicians and invariably the "pressure" to provide beyond their OPRC Contract is to be advised from a legal and local "norm" perspective.

Response: This does not involve any legal issue and hence does not call for any comments.

5. Contract Variations

- i. The OPRC Contractor will be awarded based upon the situation envisaged at the time of tender. Hence, where the future situation changes (e.g. land use, new legislation – allowance for traffic access, etc.) and causes a difference in the traffic patterns and usage of the OPRC road network, the provisions and

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confines of the Contract Form that such situations will cause a Variation is to be clarified.

Response: Clause 37 of the GC titled 'Change in Laws and Regulations' deals with situations of change in legislations and has a provision for adjustment or Contract Price and/or Time of Completion. Regarding other future situations (other than legislative), Clause 36 titled as "Unforeseen Conditions" covers the same.

- ii. Another situation is the extent that the Contract Form needs to be reviewed to address the situation where a section of the awarded network is removed from the OPRC Contractor for an Up-gradation Project. This "removed" section is required to be competitively tendered out and then the role and possibility of involvement of the OPRC Contractor for such a situation is to be dealt with.

Response: Chapter I titled 'Change in Contract Elements' contemplates situations of changes, modifications, addition or deletion to, in or from the Assignments and consequences and modalities thereof. Kindly refer to Clauses 63 to see as to whether your query is covered there or not.

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