

Shardul Amarchand Mangaldas

CENTURY of EXCELLENCE

**MEMORANDUM**

**Date:** February 12, 2018

**Client:** M/s Indian Railway Stations Development Corporation Limited

**Re:** Proposed Modification to the Project pursuant to request of the Developer

**1. BACKGROUND**

1.1 We understand that Indian Railways Development Corporation Limited (“**IRSDC**”) has been entrusted with redevelopment of railway stations by the Ministry of Railways (“**MoR**”). In this regard, IRSDC has been entrusted with the redevelopment of Habibganj Railway Station (the “**Project**”) to be undertaken on a public private partnership basis.

1.2 Thereafter, pursuant to a tender process conducted by IRSDC the consortium of Bansal Construction Works Private Limited and M/s Prakash Asphaltings & Toll Highways (India) Limited (“**Developer**”) was awarded the contract for the Project. Consequently, IRSDC and the Developer entered into a Development Agreement dated July 14, 2016 (“**Development Agreement**”), for the Project which *inter-alia* consists of a Station Development Project and Commercial Development Project besides station facility management.

Prior to floating the said tender for the Project, IRSDC had obtained the approval of the concept and master plan for the Project from the Zonal Railways (*such approved plan being the “**Master Plan**”*) and in principle approval from the local bodies.

1.3 Thereafter, the Developer has proposed deviations/modifications (“**Proposed Modifications**”) in the overall Project and the Master Plan, vide its proposal dated September 5, 2017. The Proposed Modifications *inter-alia* contemplates the following:

(a) Construction of an elevated podium: The Developer has proposed construction of an elevated podium which would require usage of additional built up area of 40,544 sq. mt. This is envisaged as modification to the Station Development Project (*as defined under the Development Agreement*), and proposed to form a part of the Station Development Project, for which the Developer has not requested any separate consideration (other than (b) below).

(b) Increase in built up area of commercial plots: the Developer has proposed additional built up area of 10,477 sq.mt and 16,008 sq. mt through construction of additional basement levels and additional floors, in commercial plots CW -1 and

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CW-2 plots, i.e. as a modification to the Commercial Development Project (*as defined under the Development Agreement*), and proposed to form part thereof.

We understand that IRSDC has already evaluated the proposal technically, and the proposal from a technical standpoint meets all requirements of the stakeholders.

- 1.4 In light of the above, IRSDC is desirous of understanding the treatment of the construction of the elevated podium and the increase in built up area of commercial plots under the Development Agreement as referred to us vide their Letter No. IRSDC-11/2014/HABIBGANJ/4736 dated December 26, 2017.

## 2. OBSERVATIONS

### 2.1 Treatment of the modification to the Station Development Project

- 2.1.1 In terms of Article 23.1 of the Development Agreement, any amendments, modifications, alterations, deletions or additions to the Mandatory Project (which includes Station Development Project)<sup>1</sup> by the Developer (“**Variations**”), would be governed by the terms of Article 23 of the Development Agreement, and be subject to approval process contemplated thereunder.

As the proposal for construction of an elevated podium and other Proposed Modifications to the Station Development Project consequent thereto, would be an addition/modification to the Mandatory Project and, thus, amount to a Variation to the Mandatory Project. Consequently this would fall within the ambit of Article 23 of the Development Agreement, and require the Developer to conform to the approval process as laid out in Article 23 of the Development Agreement. This entails the following process:

- (a) The Developer would be required to submit a written proposal, for approval, to IRSDC, in accordance with Article 23.3.
- (b) The said proposal would need to sufficiently explain the expected reduction in costs, improvement in efficiency or any benefit to IRSDC through the proposed Variation, which, in the instant case, would be the construction and development of the elevated podium, without any additional cost to IRSDC.

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<sup>1</sup> Note: Please refer to the definition of ‘Mandatory Project’ under Article 1.1.70 of the Development Agreement.



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The proposal would also need to be accompanied by (i) a preliminary change order prepared in accordance with Article 23.4, as also (ii) an express confirmation that the said proposal would not result reduction to the standard/ quality of the Project and performance of the Developer's obligations with respect thereto (the "**Confirmation**").

- (c) The Developer's preliminary change order prepared in accordance with Article 23.4, would need to provide all information and data required by IRSDC to evaluate the proposal, including :
- (i) The description of the proposed design and its execution;
  - (ii) The Developer's proposal with respect to the modification of work programme of the Mandatory Project (including the Station Development Project, and the proposed Variation), and the adjustment, if any, contemplated to the overall Project schedule;
  - (iii) The Developer's proposal for modifications to the Commercial Development Plan, including, in the present case, the Proposed Modifications including enhancement in the built up area to the Commercial Development Project;
  - (iv) The adjustment to the consideration consequent to the change in the Mandatory Project, which in the instant case, would be *nil* (and not be represented as any separate amount), given that there is no downward adjustment of the consideration or the Mandatory Project cost (the modification to the Commercial Development Project, which, as discussed in paragraph 2.2 below, would be separately evaluated).
- (d) Upon such change order being approved by IRSDC in accordance with Article 23.5, a written change order would need to be executed between the parties, whereupon the same would be binding on the parties.

2.1.2 It is pertinent to note that while the Developer has as a part of its communications on the Proposed Modification provided a large portion of the information contemplated in Article 23 (including technical information that has already been evaluated by IRSDC), however, certain key elements, including specifically a formal preliminary change order, and the Confirmation (as contemplated in Article 23.1), have not expressly been provided.



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Towards this, while potentially IRSDC could seek to evaluate the Proposed Modifications as such, in order to ensure due compliance with Article 23, and for the Change Order to be binding in accordance with Article 23, it would be advisable to procure a formal change order proposal from the Developer and evaluate the said proposal in accordance with Article 23.

### 2.1.3 *In light of the foregoing we note that:*

- (a) The proposal of the developer, would have to be evaluated on the terms set forth in Article 23, inter-alia on the basis of the improvement to the efficiency and value of the overall Project, upon the Developer consolidating its Proposed Modification in the form of a specific preliminary change order consistent with the requirements of Article 23; *and*
- (a) Given that no separate cost is being attributed by the Developer for this modification to the Station Development Project, nor has the Developer sought any exclusion from any other development obligation regarding the Mandatory Project, this would not affect the prescribed estimated mandatory cost under the Development Agreement.

## 2.2 **Treatment of the modification to the Commercial Development Project**

### 2.2.1 *Submission of Commercial Development Plan as a part of the Change Order proposal*

2.2.1.1 We may note that Article 19.2 and 19.3 of the Development Agreement prescribes an obligation on the Developer to ensure strict compliance with the Commercial Development Plan (as prepared by the Developer and approved by the nodal officer in accordance with Article 19.2), and the Design and Drawings. As a part of the overall change order proposal for the Proposed Modification to the Station Development Project, the Developer would be required to provide its proposal for the change to the Commercial Development Plan, which is required to be approved as a part of the overall Change Order as issued by IRSDC in terms of Article 23 (given that the enhanced built up area, and additional floors/ basement, would need to be accounted for in the overall phasing under the Commercial Development Plan).

### 2.2.2 *Requirement of Master Plan Amendment/ Modification*

2.2.2.1 Master Plan under the Agreement is understood as the



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*“master plan for the Project land showing various Project components including the Commercial Development, Redevelopment, Station Development, temporary works areas, reserved areas, Interfacing Areas, etc. as annexed in the Schedules thereof.”*

In terms of Schedule 1G, and Schedule 32 of the Development Agreement, the Developer is as a part of the development control norms, required to adhere to the Master Plan of the Project. This Master Plan, inter-alia contemplates specific elevations for the CW-1 and CW-2 plots (as also the specific built up area and utilized FAR/FSI thereof)<sup>2</sup>, and consequently creation of new basement levels and new floors, for these portions of the Commercial Development Project, would necessarily involve a deviation from the Master Plan.

2.2.2.2 A change to the phasing of the Commercial Development Project to incorporate new elements, cannot be permitted where the new elements would be in breach of the requirements regarding compliance with the Master Plan. Thus, given the deviation in the Master Plan inherent in the revised Commercial Development Plan, a modification to the Master Plan would also be required for the purposes of the effectuating any change to the Commercial Development Plan.

Further, as the Master Plan does not similarly also contemplate a podium level for the Station Development Project, any implementation of the Proposed Modification for the Station Development Project, would equally attract the requirement of a modification to the Master Plan.

2.2.2.3 Accordingly, prior the final approval or implementation of Proposed Modification, the Developer would need to procure that the Master Plan is appropriately modified, so as to take into account the changes contemplated in the Proposed Modification.

2.2.2.4 In this regard we note that the original Master Plan, was approved by the designated government authority, being at that relevant juncture, the zonal railway administration for the West Central Railway.

Subsequently, the MoR has in terms of the directions dated December 6, 2017, on reorganization/restructuring of the IRSDC and RLDA<sup>3</sup> (“**MoR Directions**”), specifically stated that for the purposes of finalisation of plans of station or land development, IRSDC

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<sup>2</sup> Note: Please refer Master Plan, in particular section on page 967 of the Development Agreement.

<sup>3</sup> Note: Refer letter dated December 6, 2017 of the MoR, bearing reference no. 2017/LMB/WCS/22/07/24



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will be considered equivalent to a Zonal Railway Administration, and that these plans would be developed in consultation with the zonal railway and urban local bodies.

Thus, pursuant to the MoR Directions, the MoR has recognised that the ultimate (planning) authority for the preparation of the master plan for the Project (and by a necessary corollary, any amendment or modifications thereto) would be IRSDC, in substitution of the zonal railway administration.

2.2.2.5 Further, Article 1.1.57 of the Development Agreement defines ‘**Government Authority**’ to mean:

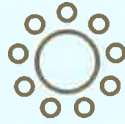
*“the Government of India, the respective State Governments and any other Government authority, statutory authority, government department, agency, commission, board, tribunal or court, any other judicial or quasi-judicial body, or other law, rule or regulation-making entity having or purporting to have jurisdiction on behalf of the Republic of India, having jurisdiction over all or any portion of the Project Land and/or the Developer and/ or the Project. Without prejudice to the generality of the foregoing, the term Government Authority shall include RLDA;”*

The MoR Directions vest in IRSDC ‘*full executive powers to redevelop/develop Railway stations and maintain non-core facilities of the Railway stations*’ while imparting authority akin to a Zonal Railway with respect to finalization of plans for station and land development.

This would imply that in developing and/or amending/ modifying a master plan, IRSDC is in effect acting in the same regulatory capacity as the zonal railway administration had previously acted, i.e. IRSDC would be acting as entity having jurisdiction over the planning related rights for the Project Land, or in other words, a Government Authority within the meaning of the term ‘Government Authority’ under Article 1.1.57.

### 2.2.3 *Consequence of Amendment/Modification of the Master Plan*

2.2.3.1 Any modification of the Master Plan to permit the Proposed Modification (given the express elevations and built up area for CW-1 and CW-2, and utilized FAR, as presently stated in the Master Plan, and the absence of the podium level for the Station Development Project), would necessarily result in a change in the built up area contemplated in the Master Plan, and also the extent of FAR/ FSI, as previously permitted to be utilized under the Master Plan by the zonal railway administration / local bodies on the said land.



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2.2.3.2 We may also note that in terms of Article 30.2 of the Development Agreement in the event of the Developer proposed to utilize an increase in the built up area on the site caused due to revision of FAR/FSI by any Government Authority, the Developer is required to pay additional Lease Premium and increased Annual Lease Rent, as per formulae specified in Article 30.2.3.

2.2.3.3 Given that IRSDC is, in any approval of an amendment/ modification to the Master Plan, acting in the capacity of a 'Government Authority', any modifications to the said Master Plan by IRSDC which results in an enhancement of the built up area contemplated in the Master Plan, as also the enhancement extent of FAR/ FSI, as previously permitted (to be utilized) under the Master Plan, would in effect constitute 'additional built up area on the Project Land due to a revision of the FAR/FSI on the Project land permitted by a Governmental Authority for the purposes of Article 30.2.3.

Consequently, where IRSDC approves any amendment/ modification of the Master Plan in furtherance of the Proposed Modification, and in terms thereof the approves a change to the permissible FAR/ FSI for the relevant portion of the Project land (which would include the site of the Commercial Development Project), as also the increase in built up area for CW-1 and CW-2, the same would trigger the consequences under Article 30.2.3.

This in turn would make it incumbent on the Developer to pay the additional Lease Premium and increased Annual Lease Rent, where it seeks to utilize such additional built up area.

2.2.4 *Therefore:*

- (a) In a scenario where IRSDC approves any change in the applicable built up area and the permissible FSI/FAR under the Master Plan, the same would be a revision of the built up area pursuant to the revision of the permissible FSI/FAR by a Government Authority for the site of the Commercial Development Project for the purposes of Article 30.2; *and*
- (b) Where the Developer proposes to utilise such additional built up area, it would be required to pay the additional Lease Premium and increased Annual Lease Rent as determined in accordance with Article 30.2.

### 3. QUALIFICATIONS AND ASSUMPTIONS

3.1. This Memorandum is based solely on the background set forth herein above and query made by IRSDC, vide their Letter No. IRSDC-11/2014/HABIBGANJ/4736 dated



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December 26, 2017. In the event of any change therein, this Memorandum would need to be appropriately revisited.

- 3.2. The implications in this Memorandum are purely a matter of interpretation and are not binding on any court of law or regulatory authority. Our comments are based on our interpretation of the present provisions of laws of India and the documents mentioned herein, and may need review upon any further change in law, issue of clarification, notification, any decision of judicial/ quasi-judicial authorities, or any amendment/ variation to said documents.
- 3.3. In no circumstances shall the liability of Shardul Amarchand Mangaldas & Co., its partners, associates, consultants, or employees, related to the services provided in connection with this Memorandum, exceed the professional fees received by us for preparing this Memorandum.

We hope the above clarifies your queries. Should you have any further clarifications, please do not hesitate to contact us.

Yours sincerely,

  
For Shardul Amarchand Mangaldas & Co.

