

Standard Operating Procedure (SOP) for release of payments to the Contractors in terms of CCEA decisions – NITI O.M. dated 05.09.2016

Background:

- 1 Pursuant to the decisions taken by the Cabinet Committee on Economic Affairs (CCEA) for revival of the Construction Sector, the NITI Aayog had issued OM No. 14070/14/2016- PPPAU dated 5th September 2016 titled **“Measures to revive the Construction Sector – reg.”** containing the decisions for implementation by all the concerned Ministries / Departments / PSUs. As per the decision taken by the CCEA, cases where the Arbitration Tribunals have passed orders in favour of the Contractors/ Concessionaires in arbitral proceedings and such awards/ orders have been further challenged by the government agencies in courts of law, all the works executing agencies are required to pay an amount equal to 75% of the total pay-out (i.e. Arbitral Award amount including the interest payable as per such Award, if any) should be released to the Contractors/ Concessionaires against a Bank Guarantee without prejudice to the rights and stand of the Agency and subject to the final order of the court in the matter under challenge. The OM further stipulates that in case the matter under legal challenge is decided in favour of the works executing agency (the Departments/ PSUs are referred to as the ‘Agency’ throughout the SOP), it would be entitled to recover the said amount along with appropriate interest.
- 2 The process of implementation of the above decision of the CCEA needs to be laid down through a Standard Operating Procedure. While each of the Ministries/ Departments/ PSUs is free to evolve its own SOP for smooth implementation of the decision taken by the CCEA, a suggested framework of the SOP is given hereinafter, which may be used by the Ministries/ Departments/ PSUs with or without any amendments therein. The following paragraphs detail out the Standard Operating Procedure (SOP) to be followed by # h u (hereinafter referred to as **“the Authority”**).

3 Applicability in case of projects of the Authority:

Applicable to all projects of the Authority, where the Concessionaire / Contractor and the Authority have entered into a Concession Agreement/ Construction Contract/ Engineering Procurement Commissioning Contract for a PPP/ EPC project (hereinafter referred to as **“the Project”**), in which the Arbitral Tribunal has passed the Arbitral Award in favour of the Concessionaire/ Contractor and the Authority has challenged the Arbitral Award.

4 Steps required to be taken regarding switching over to the amended Arbitration Act:

- 4.1 In cases where the Arbitration proceedings are still under process (unless the same are at final stages) under the provisions of the pre-amended Arbitration Act, the Authority would send a communication (under acknowledgement) to the Contractor/ Concessionaire to give their consent within the period specified therein to switch over to the amended provisions of the Arbitration Act;
- 4.2 Where the Contractor/ Concessionaire gives his consent to such a proposal, take up the matter with the Arbitration Tribunal for switching over to the conduct of proceedings under the amended Arbitration Act.

4.3 In matters where the Contractor/ Concessionaire do not respond to such a communication within the specified period or decline to give their consent, a list of all such parties shall be maintained for reporting under the Action taken report (ATR).

5 Steps required for release of 75% of the total eligible Payout amount:

Send a communication (under acknowledgement) to the eligible Contractor/ Concessionaire informing him about the details of the total payout obligation in terms of the CCEA decision, and requiring him to open an Escrow account and furnish Bank Guarantee for the purpose within a period specified in such communication. Since completion of these formalities may take some time, the Contractors/ Concessionaires may be initially given time of 30 days to do the needful, which may be considered for extension based on requests/ merits of each case.

5.1 Arbitral Award Escrow Account:

- (i) A separate designated Escrow Account (hereinafter referred to as **“the Arbitral Award Escrow Account”**), shall be opened and established by the Concessionaire / Contractor in accordance with Arbitral Award Escrow Account Agreement.
- (ii) Arbitral Award Escrow Account Agreement shall include 4 (four) parties viz. (a) the Concessionaire / Contractor, (b) the Authority, (c) Arbitral Award Escrow Bank and (d) Lenders’ Representative.
- (iii) The Concessionaire / Contractor shall bear all expenses on establishment of the Arbitral Award Escrow Account with respect to opening and operation of the Arbitral Award Escrow Account.

5.2 Bank Guarantee:

- (i) Arbitral Award amount is the amount for which the Award has been announced by the Arbitral Tribunal. In case the Tribunal has also awarded payment of interest on such amount till the date of payment, such interest amount together with the Award amount shall constitute the total eligible **‘Payout Amount’**. The Authority is liable to pay 75% of such ‘Payout Amount’ against the Bank Guarantee of the equivalent amount.
- (ii) The Authority shall require the Contractor/ Concessionaire to furnish the Bank Guarantee for the 75% of the Payout Amount and appropriate interest amount on such amount for a period of one year. These Bank Guarantee shall roll over annually and renewed on annual basis.
- (iii) The Authority shall release and credit an amount equivalent to 75% of the Payout Amount to the designated Arbitral Award Escrow Account opened by the Contractor/ Concessionaire against the Bank Guarantee furnished by the Concessionaire/ Contractor for the amount under (ii) above;
- (iv) The process for renewal of the Bank Guarantee shall be initiated by the Authority 90 days prior to the expiry of validity and shall be done by the Contractor/ Concessionaire 60 days prior to the expiry of validity of the Bank Guarantee. In case the settlement of the legal

challenge to the Arbitral Award before the Court is not resolved within the validity period of the Bank Guarantee, such Guarantee shall be renewed for a further period of one year and so on and so forth. While renewing the Bank Guarantee for the Second Year, the amount of the Guarantee shall be calculated based on: (a) 75% of the Payout Amount plus the interest on such amount for one year, and (b) appropriate interest on (a) for the second year and so on and so forth. For preparation of the Bank Guarantee, the applicable interest rate in such cases shall be the rate of interest awarded under the Arbitral Award under challenge.

- (v) In cases where the appeal of the Authority is allowed by the Court, the Authority would be entitled to recover such amount together with appropriate interest (as specified in the OM dated 05.09.2016) on the amount paid to the Concessionaire / Contractor. For recovery of the interest amount, the applicable interest rate in such cases shall be the rate of interest awarded under the Arbitral Award under challenge. The interest rate shall be compounded annually from the date of deposit of monies in Arbitral Award Escrow Account by the Authority till the date of encashment. For the purposes of such compounding of interest rates, the rate of interest awarded under the Arbitral Award under challenge shall be considered. The Concessionaire/Contractor will have to confirm its unqualified acceptance of this condition obtained at the time of release of the amount. This would be in addition to any order of the Hon'ble Court in the appeal proceedings.
- (vi) Failure of the Concessionaire / Contractor to extend the validity of the Bank Guarantee 60 days prior to the expiry of the Guarantee may lead to encashment and appropriation of the Bank Guarantee.
- (vii) In case the Court allows the appeal of the Authority against the Arbitral Award, the Authority shall be entitled to encash the Bank Guarantee furnished by the Concessionaire / Contractor of the amount equivalent to 75% of the paid out amount along with appropriate interest till the date of such encashment.

5.3 Deposit and withdrawal of funds from Escrow Account:

- (i) After opening of the designated 'Arbitral Award Escrow Account and receipt of the Bank Guarantee, the Authority shall deposit 75% of the Payout Amount in the Arbitral Award Escrow Account within a period of no more than 7 working days.
- (ii) The Arbitral Award Escrow Bank shall withdraw and appropriate the amounts from the Arbitral Award Escrow Account strictly in accordance with the instructions issued by the Authority to the Concessionaire / Contractor, as mutually agreed/ decided by the Authority, Lenders' Representative and the Concessionaire / Contractor; provided that such amounts shall be appropriated in the following order:
 - a) Debt service payments;
 - b) All payments relating to construction/completion of the Project;

- c) All payments relating to construction of other projects of the Authority under execution by the Concessionaire / Contractor; and
- d) Balance, if any, in accordance with the instructions of the Concessionaire/ Contractor after receiving the prior written approval of the Lenders' Representative and the Authority.

5.4 Debt Service Payments

- (i) The Concessionaire / Contractor shall provide the Authority with the details of Lender/s and their dues specific to the Project.
- (ii) After withdrawal and payment of Lenders' dues, the Concessionaire / Contractor shall provide the Authority with a copy to the Arbitral Award Escrow Bank, the acknowledgement receipts of payment of dues from all the applicable lenders.

5.5 All payments relating to construction of the Project

- (i) The Concessionaire / Contractor shall provide the Authority with the following details:
 - (a) The amounts due for payment to the suppliers/sub-contractors in respect of the work already completed;
 - (b) The remaining works in the Project along with the estimated costs of the respective works and the schedule for completion of such remaining works.
 - (c) The monthly/ bi-annual/ annual or any other periodic schedule of funds, (as agreed with the Authority's Technical division), required to complete the remaining works.
- (ii) The Independent Engineer (IE) or equivalent authority for the project and the Authority shall verify the genuineness in respect of the above overdue payments/ remaining works, the associated costs, the schedule and the (periodic) requirement of funds.
- (iii) On approval of the Authority and subject to availability of funds in the designated Arbitral Award Escrow Account, the total requirement of funds shall be earmarked for the completion of the remaining works of the Project.
- (iv) The Concessionaire/ Contractor shall then be allowed to withdraw the funds required to meet his obligations in the order mentioned under (i) above for completion of the work.
- (v) Balance amounts in the Arbitral Award Escrow Account, if available, shall be earmarked and concurrently used for the completion of other projects of the Authority, as per conditions set forth in this SOP keeping the physical progress work in view.

5.6 All payments relating to construction of other projects of the Authority

- (i) Shall be applicable to other projects of the Authority being executed by the Concessionaire / Contractor

- (ii) For each of the other projects, provisions applicable to the main project shall be applicable.

5.7 Post debt service payments, completion of the Project and completion of other projects of the Authority, and subject to availability of funds in the Arbitral Award Escrow Account, balance funds shall be appropriated in accordance with the instructions of the Concessionaire / Contractor in terms of the Agreement executed among the parties in terms of para 5.1 above.

6 Events of Arbitral Award Escrow Default

6.1 Following events shall constitute an 'event of default' by the Concessionaire / Contractor unless such event of default has occurred as a result of Force Majeure or any act or omission of the Authority or the Lenders' Representative:

- (i) The Concessionaire/ Contractor causes the Arbitral Award Escrow Bank to transfer funds to any account of the Concessionaire/ Contractor in breach of the terms of Arbitral Award Escrow Account Agreement;
- (ii) The Concessionaire / Contractor fails to make any refund due to the Authority in breach of the terms of Arbitral Award Escrow Account Agreement within 5 (five) business days of such refund becoming due;
- (iii) The Concessionaire / Contractor commits or causes any other breach of the provisions of Arbitral Award Escrow Account Agreement and fails to cure the same within a Cure Period of 5 (five) business days; or
- (iv) The Concessionaire / Contractor does not extend the validity of the Bank Guarantee submitted to the Authority as security for principal as well as for interest thereon, in cases where such extension is required.

6.2 Upon occurrence of an Arbitral Award Escrow Default, the Authority shall be entitled to encash and appropriate the relevant amounts from the Bank Guarantee as Damages for such Arbitral Award Escrow Default

7 Termination of Arbitral Award Escrow Account Agreement

- (i) Arbitral Award Escrow Agreement shall remain in full force and effect so long as Court decides the Appeal and a certified copy of the decision of the Court has been submitted to the Arbitral Award Escrow Bank.
- (ii) In case the Court's decision is in favour of the Authority, the Authority shall suo motu encash the Bank Guarantee against refunds from the Concessionaire/ Contractor of an amount equivalent to 75% of the Arbitral Award amount along with appropriate interest till the date of encashment.

8 Closure of Arbitral Award Escrow Account

The Arbitral Award Escrow Bank shall close the Arbitral Award Escrow Account at the request made by the Concessionaire / Contractor and the Authority after decision of the Appeal by the Court and pay any amount standing to the credit thereof to the Concessionaire / Contractor.

9 Monitoring Mechanism

- (i) There will be a robust monitoring mechanism for all cases where funds have been disbursed by the Authority against Bank Guarantee. A consolidated list of all such cases will be tracked by the Legal Department of the Authority with requisite inputs from the concerned Technical Divisions, Finance Divisions, etc.
- (ii) Disbursement of funds into Arbitral Award Escrow Accounts shall be tracked and consolidated.
- (iii) The finance wing of the Authority will be provided requisite information for budgeting and release of funds.
- (iv) The Authority will have the right to impose any further condition/monitoring mechanism to ensure the Authority interests are protected such as appointment of concurrent Auditor(s).
- (v) Since release of funds may be across various projects, hence, a Program Management Unit (PMU) under Member (P) (to be nominated) may be set up to coordinate release of funds for utilization in accordance with the provisions under this SOP.
- (vi) Disbursement of funds from Arbitral Award Escrow Accounts will be tracked and monthly statements/ MIS reports shall be prepared by the Technical Divisions at the HQ and Project Implementation Units (PIU) under RO at field level.
- (vii) Validity and renewal of Bank Guarantee shall be meticulously tracked by the Technical Divisions / Project Implementation Units (PIU) and PMU in the Authority's HQ.