

Subject: Suggested format of the 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 Arbitral 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 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.
3. **Applicability in case of Agency projects:**

Applicable to all Agency projects, where the Concessionaire/ Contractor and the Works Agency 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 Agency 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 Agency 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/ Concessionaries 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/ Concessionaries 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 a 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) Works Executing Agency (the Ministry/ Department/ PSU), (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 said 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'. The Agency is liable to pay 75% of such 'Payout amount' against the Bank Guarantee of the equivalent amount.

- (ii) The Agency 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. This Bank Guarantee shall roll over annually and renewed on annual basis.
- (iii) The Agency shall release and credit an amount equivalent to 75% of the Arbitral Award Payout amount to the designated Escrow Account opened by the Contractor/ Concessionaire against the Bank Guarantee furnished by the Concessionaire/ Contractor for the amount mentioned under (ii) above;
- (iv) The process for renewal of the Bank Guarantee shall be initiated by the Agency 90 days prior to the validity and shall be done by the Contractor/ Concessionaire 60 days prior to the 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 Guarantee shall be calculated based on: (a) 75% amount paid out plus the appropriate interest on such amount for one year, and (b) appropriate interest on (a) for the second year and so on and so forth.
- (v) In cases where the appeal of the Agency is allowed by the Court, the Agency would be entitled to recover such amount together with appropriate interest (as specified in the OM dated 5.09.2016) on the amount paid to the Concessionaire/ Contractor. 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 Guarantee.
- (vii) In case the Court allows the appeal of the Agency against the Arbitral Award, the Agency 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 Deposits and withdrawal of funds from Escrow Account:

- (i) After opening of the designated 'Arbitral Award Escrow Account' and receipt of the Bank Guarantee, the Agency shall deposit 75% of the payout amount in the 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 Agency to the Concessionaire/Contractor, as mutually agreed/decided by Agency, 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 Agency 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 Agency.

5.4 Debt Service Payments:

- (i) The Concessionaire/ Contractor shall provide the Agency with the details of Lender/s and their dues specific to the Project.
- (ii) After withdrawal and payment of Lender's dues, the Concessionaire/ Contractor shall provide the Agency, with a copy to the escrow banker, 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 Agency 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 Agency's Technical division), required to complete the remaining works.
- (ii) The Independent Engineer (IE) or equivalent authority for the project and the Agency 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 Agency and subject to availability of funds in the designated Escrow Account, the total requirement of funds shall be earmarked for payment of the outstanding dues and completion of the remaining works of the Projects.
- (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 project.

- (v) Balance amounts in the Arbitral Award Escrow Account, if available, shall be earmarked and concurrently used for the completion of other projects of Agency, 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 Agency

- (i) Shall be applicable to other projects of the Agency 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 the debt service payments, completion of the Project and completion of other projects of Agency, 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 Agency or the Lender's 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 Bank Guarantee submitted to the Agency as security for the 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 the 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 Agency, the Agency 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 such decision of the Court.

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 Agency after the 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 Agency against Bank Guarantee. A consolidated list of all such cases will be tracked by the nominated Department/ Unit/ Cell of the Agency with requisite inputs from the concerned Technical Divisions, Finance etc.
- (ii) Disbursement of funds into Arbitral Award Escrow Accounts shall be tracked and consolidated.
- (iii) The finance wing of the Agency will be provided requisite information for budgeting and release of funds.
- (iv) The Agency will have the right to impose any further condition/ monitoring mechanism to ensure Agency interests are protected such as appointment of concurrent Auditor(s).
- (v) Since release of funds may be across various projects, hence, a Programme Management Unit (PMU) under a senior level officer 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 designated wings at the HQ and the project Implementations Units (PIU) at the field level.
- (vii) Validity and renewal of Bank Guarantee shall be meticulously tracked by the nominated personnel/ units/ cell within the Agency.

Illustration on realisation of appropriate interest

Suppose the Award amount given by the Arbitral Tribunal as on 01.01.2015 is Rs. 100 crore. It is also awarded that if the Award amount is not paid within 60 days, it shall be payable along with 15% interest from the date of Award.

Now, assuming the cost of Capital for the PSU is 12%
Rate of Interest awarded by the arbitrator: 15%
Hence, the appropriate interest will be calculated @ 15%

1. The total payout in terms of above Award as on 01.09.2016 is: Rs. 100 cr. + Rs. 26.25 crore (on account of Interest) = **Rs. 126.25 crore**

2. **Bank Guarantee for Year 1:**

Bank Guarantee to be taken for the amount = 75% of 126.25 crore = Rs. 94.69 cr. (P) + Interest @ 15% on this amount for a period of one year = 14.20 cr (P¹). Total amount of bank Guarantee for **Year 1 = Rs. 108.89 crore (P²)**

3. **Bank Guarantee for Year 2:**

P¹+P² becomes 'P' now i.e. Rs. 108.89 cr;
Interest @ 15% on P for one year = Rs. 16.33 cr
Total amount for which bank Guarantee is to be taken for year 2 = Rs. 108.89+ 16.33 = **Rs. 125.22 cr. (P³)**

4. **Bank Guarantee for Year 3:**

P³ becomes P here = Rs. 125.22 cr.
Add Interest @ 15% for one year = Rs. 18.78 cr.
Total amount of Bank Guarantee for Year 3 = Rs. 125.22+Rs.18.78 = **Rs. 144.00 cr.**

Standard Template for Bank Guarantee for Payment of Arbitral Award Amount

The Chairman,

WHEREAS:

- (A) [name and address of contractor] (hereinafter called the "**Contractor**") has executed a contract (hereinafter called the "**Contract**") with the [name and address of the Govt. Department/PSU], (hereinafter called the "**Employer**") for the execution of the ***** project/ work, subject to and in accordance with the provisions of the Contract.
- (B) In accordance with Clause ----- of the Contract, the Contractor/ Employer referred a dispute with the Employer/ Contractor to the arbitration and the arbitration have made and arbitral award dated ----- for an amount of Rs. ----- in favour of the Contractor.
- (C) The Employer has challenged the aforesaid arbitral award in a court of law. However, the Employer has to pay 75% of this arbitral award amount, along with the interest amount, to the Contractor against a Bank Guarantee without prejudice to the final order of the court in the matter under challenge in terms of NITI Aayog O.M No. N-14070/14/2016-PPPAU dated Sept 5, 2016.
- (D) In consideration of the above, the Contractor has approached the Bank with a request to issue a guarantee in favour of the employer and We, _____ through our branch at _____ (the "**Bank** ") have agreed to furnish this bank guarantee (herein after called the "**Guarantee**") for an amount of Rs. _____ (the "**Guarantee Amount**"), which is 75% of the arbitral award along with the interest amount.

NOW, THEREFORE, the Bank hereby unconditionally and irrevocably guarantees and affirms as follows:

1. The Bank hereby unconditionally and irrevocably undertakes to pay to the Employer, upon its first written demands, and without any demur, reservation, recourse, contest or protest or any dispute/litigation between the Contractor and the employer, and without any reference to the Contractor, such sum or sums up to an aggregate sum not exceeding Guarantee Amount as the Employer shall claim.
2. A written demand shall be a letter from the Authority, under the hand of an officer not below the rank of _____, stating that the arbitral award dated _____ has been set aside/modified by the court or has been decided at an amount less than 75% of the arbitral award inclusive of interest shall be conclusive, final and binding on the Bank.

3. Any change in the constitution of the Contractor and/or the Bank, whether by their absorption with any other body or corporation or otherwise, shall not in any way or manner affect the liability or obligation of the Bank under the Guarantee.
4. It shall not be necessary, and the Bank hereby waives any necessity, for the Employer to proceed against the Contractor before presenting to the Bank its demand under this Guarantee.
5. Notwithstanding anything contained hereinbefore, the liability of the Bank under this Guarantee is restricted to the Guarantee Amount and this Guarantee will remain in force for the period specified in paragraph 6 below and unless a demand or claim in writing is made by the Employer on the Bank and received by the Bank within the validity of this Guarantee, all rights of the Employer under this Guarantee shall be forfeited and the Bank shall be relieved from its liabilities hereunder.
6. The Guarantee shall cease to be in force and effect after _____ irrespective of the fact whether the Bank Guarantee is returned or not by the Employer.
7. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Employer in writing, and declares and warrants that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.
8. This Guarantee shall come into force with immediate effect and shall remain in force and effect for up the end _____ month in the year _____ or until it is released earlier by the Employer pursuant to the provisions of the Contract.
9. Notwithstanding anything contained herein,
 - i. Bank's liability under the Bank Guarantee shall not exceed Rs. _____ (Rupees _____ only).
 - ii. The Bank Guarantee shall be valid upto _____.
 - iii. The Bank is liable to pay the guarantee amount or any part thereof under this Bank Guarantee only and only on compliance of Para no. 2 above and also if a written claim or demand from the Employer is served upon and received by the Bank on or before _____ (Expiry date of Bank Guarantee).

Signed and sealed this _____ day of _____, 20 _____ at _____

SIGNED, SEALED AND DELIVERED

For and on behalf of the Bank by:

(Signature)

(Name)

(Designation)

(Code Number)

(Address)

NOTES:

- i. The bank guarantee should contain the name, designation and code number of the officer(s) signing the guarantee.
- ii. The address, telephone number and other details of the head office of the Bank as well as of the issuing branch should be mentioned on the covering letter of issuing branch.
- iii. In case of a Concession Agreement for a Public Private Partnership (PPP) project, the words "Contract", "Contractor" and "Employer" may be substituted by "Agreement", "Concessionaire" and "Authority" respectively.

SOP for Escrow Account Mechanism

Background:

1. Pursuant to NITI Aayog's OM No. -14070/14/2016-PPPAU dated 5th September, 2016, in case of claims where the Arbitration Tribunal has passed an arbitral award (the "Arbitral Award") and Govt. Department/PSU has challenged the Arbitral Award, an amount equal to 75% (seventy five percent) of the Arbitral Award awarded in favour of the Concessionaire/Contractor may be paid to the Concessionaire/Contractor against Bank Guarantee without prejudice to the rights and stand of Govt. Department/PSU and subject to the final order of the court in the matter under challenge.

Arbitral Award Escrow Account:

2. Prior to making an application to the Govt. Department/PSU for payment of 75% of the Arbitral Award a separate designated Escrow Account (hereinafter "the Arbitral Award Escrow Account"), shall be opened and established by the Concessionaire/Contractor with the Lead Bank in accordance with the Arbitral Award Escrow Account Agreement.
3. The Concessionaire/Contractor shall bear all fees and expenses with respect to opening and operation of such account.

Arbitral Award Escrow Account Agreement:

4. Arbitral Award Escrow Account agreement (hereinafter 'Agreement') shall include 3 (three) parties viz. the Concessionaire/Contractor, Govt. Department/PSU & the Lead Bank (hereinafter Escrow Banker") laying out the terms and conditions governing the agreement.

Bank Guarantees:

5. The Govt. Department/PSU shall pay an amount equivalent to 75% of the Arbitral Award against a Bank Guarantee (hereinafter "BG"), issued by any bank, submitted by the Concessionaire/Contractor for 75% amount of the Arbitral Award along with interest amount for the tenure of the BG.
6. The BG will be effective from the date of deposit of the 75% of the Arbitral Award by the Govt. Department/PSU in the Escrow Account. The Govt. Department/PSU shall deposit the Arbitral Award Amount within 15 days of the receipt of the Bank Guarantee.
7. In case the subsequent court order requires refund of money paid by Govt. Department/PSU into the Escrow Account, the amount shall be refunded by the Concessionaire/Contractor along with appropriate interest to be decided at the time of releasing funds into Escrow Account.

Interest Rate:

8. The rate of interest chargeable on the refund will be decided in the following manner:
- i. The rate of interest may be decided by the Govt. Department/PSU keeping in view their cost of capital or the rate of interest provided for in the contract agreement or the rate of interest awarded under the Arbitral Award.
 - ii. The cost of capital for a Govt. Department shall be the higher of the Weighted Average Coupon Rate of outstanding stock of Central Govt. securities for the period ending in the preceding quarter, or the Weighted Average Coupon rate of Central Govt. securities issued during the preceding quarter.
 - iii. PSUs shall either calculate their own cost of capital or take State Bank of India's One Year Marginal cost of funds-based Lending Rate plus 2%.
9. Simple interest shall be charged on refund of Escrowed amount to Govt. department/PSU.
10. The Bank Guarantee shall be valid for 1 (one) year or 2 (two) months from the date of decision of the court, whichever is earlier. If required, the Concessionaire/Contractor shall extend the validity of the Guarantee for a period of at least 1 (one) year at least 60 days prior to the expiry. The BG will be revalidated as many times as required till the time the Court has decided the appeal.
11. In case where Govt. Department/PSU wins the appeal in the Court against the Arbitral Award, Govt. Department/PSU shall be entitled to encash the BG by making a claim in writing to the guarantee issuing bank duly supported with the final court order.

Mechanism for Withdrawal of funds from Escrow Account:

12. The Escrow Banker shall withdraw and appropriate the amounts from the Arbitral Award Escrow Account strictly in the following order in consultation with the Govt. Department/PSU:
- a) Payment of Lender's Dues.
 - b) Payments for completion of the Project.
 - c) Payments for completion of other projects of the same Govt. Department/PSU, as mutually agreed decided.
 - d) Any balance remaining in the Escrow account subsequent to the settlement of lenders dues and completion of projects of the Govt. Department/PSU may be allowed to be used by the

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Contractor/Concessionaire with the prior approval of the lead banker and Govt. Department/PSU.

Events of Arbitral Award Escrow Default:

13. In the event of an Arbitral Award Escrow Default, the Govt. Department/PSU shall be entitled to encash and appropriate the BG. The 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 of omission of Govt. Department/PSU or the Escrow banker:
- i. The Concessionaire/Contractor causes the Escrow banker 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 doesn't extend the validity of Guarantees submitted to Govt. Department/PSU as security for principal as well as for interest thereon, in cases where such extension is required.

Closure/Termination of Arbitral Award Escrow Account/Agreement:

14. The Arbitral Award Escrow Agreement will be in effect till the closure of Escrow account.
15. In case the Court's decision is in favour of Govt. Department/PSU, the Govt. Department/PSU shall invoke the Bank Guarantee. The rate of interest shall be as per point 8 & 9 above.
16. The Escrow banker shall, at the request of the Concessionaire/Contractor and Govt. Department/PSU made after the Court's decision close the Arbitral Award Escrow Account and pay any amount standing to the credit thereof to the Concessionaire/Contractor.

Monitoring Mechanism:

17. A robust monitoring mechanism is put in place where funds have been disbursed by Govt. Department/PSU against the Bank guarantee. Each Govt. Department/PSU may devise its own procedure for such monitoring.
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