

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

1. Background:

Pursuant to the decision 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 decisions taken by the CCEA, cases where the Arbitral Tribunals have passed orders in favor of Contractors/s 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 payout (i.e. Arbitral Award amount including interest payable as per such award, if any) should be released to the Contractors/s 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 O.M. further stipulates that in case the matter under legal challenge is decided in the favor of 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.

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 Indian Oil Corporation Limited (hereinafter referred to as “**the Corporation**”).

2. Applicability

SOP shall be applicable to all projects of the Corporation, where the Contractor and the Corporation have entered into a Construction Contract/Engineering, Procurement, Commissioning Contract for a project (hereinafter referred to as “**the Project**”), in which the Arbitral Tribunal has passed the Arbitral Award in favour of the Contractor and the Corporation has challenged the Award. It is clarified that Construction Contract could be of buildings, infrastructure or industrial and may involve civil works, procurement of equipment etc.

3. SOP Procedure

The Corporation shall send a communication (under acknowledgement) as per attached draft (**Schedule A**) to the eligible Contractor 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 of 30 days. Extension of time period can be considered based on requests/merits of each case by an Officer of the Corporation of the relevant functional Department not below the rank of H Grade (Chief General Manager).

3.1 Arbitral Award Escrow Account and Arbitral Award Escrow Account Agreement:

- (i) A separate designated Escrow Account (hereinafter referred to as “**the Arbitral Award Escrow Account**”), shall be opened and established by the Contractor in accordance with an **Arbitral Award Escrow Account Agreement**.
- (ii) Arbitral Award Escrow Account Agreement shall include four (4) parties viz. (a) the Contractor, (b) the Corporation, (c) Arbitral Award Escrow Bank (d) Lender(s). In cases where in the Contractor has not availed of loan from bank in respect of the Project and no Lender payments are due and payable by the Contractor, Lender(s) may not be a Party to the Arbitral Award Escrow Account Agreement.
- (iii) The Contractor shall bear all expenses on establishment of the Arbitral Award Escrow Account with respect to opening, operation and closure of the Arbitral Award Escrow Account.

3.2 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**”.
- (ii) The Contractor shall furnish a Bank Guarantee for the 75% of the Payout Amount and appropriate interest on such amount for a period of one year to the Corporation with in time period stipulated under para 3 above. This Bank Guarantee shall roll over annually and renewed on annual basis by the Contractor.
- (iii) The Corporation shall release and credit an amount equivalent to 75% of the Payout Amount to the designated Arbitral Award Escrow Account opened by the Contractor against the Bank Guarantee furnished by the Contractor for the amount under (ii) above.
- (iv) The process for renewal of the Bank Guarantee shall be initiated by the Corporation 90 days prior to the expiry of validity by making a request to the Contractor and shall be done by the Contractor 60 days prior to the expiry of validity of the Bank Guarantee.

- (v) 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 Bank 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) and so on and so forth.
- (vi) In cases where the appeal of the Corporation is allowed by the Court, the Corporation would be entitled to recover such amount together with appropriate interest on the amount paid to the Contractor. The 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 and without prejudice to any order of the Hon'ble Court in the appeal proceedings.
- (vii) Failure of the 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.
- (viii) In case the Court allows the appeal of the Corporation against the Arbitral Award, the Corporation shall be entitled to encash the Bank Guarantee furnished by the Contractor by making a claim in writing to the guarantee issuing bank duly supported with the final court order.

3.3 Interest Rate

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 Corporation at the time of signing of Escrow Agreement /releasing the funds into Escrow Account keeping in view its cost of capital or the rate of interest provided in the contract agreement or the rate of interest awarded under the Arbitral award.
- ii) The Corporation shall either calculate its own cost of capital or take SBI's one year Marginal Cost of funds based Lending Rate plus 2% , whichever is higher.

3.4 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 Corporation shall deposit 75% of the Payout Amount (limited to BG Value) in the Arbitral Award Escrow Account within a period of not more than fifteen (15) 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 Corporation to the bank; 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 Corporation under execution of the Contractor; and
- d) Balance, if any, in accordance with the instructions of the Contractor after receiving the prior written approval of the Lenders' Representative and the Corporation.

3.5 Debt Service Payments

- (i) The Contractor shall provide the Corporation with the details of Lender(s) and their dues specific to the Project.
- (ii) The Corporation shall be entitled to ask for any documents in support or to verify the genuineness of the information provided by the Contractor.
- (iii) After withdrawal and payment of Lenders' dues, the Contractor shall provide the Corporation with a copy to the Arbitral Award Escrow Bank, the acknowledgement receipts of payment of dues from all the applicable lenders.

3.6 All payments relating to construction of the Project

- (i) The Contractor shall provide the Corporation 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 specific periodic schedule of funds, (as agreed with the Corporation's Technical Division) required to complete the remaining works;
- (ii) The Engineer-in-Charge (EIC) or equivalent authority for the project and the Corporation 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 Corporation 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 Contractor shall then be allowed to withdraw the funds required to meet his obligations in the order mentioned under para i) above for the completion of the work.

3.7 All payments relating to construction of other projects of the Corporation

Balance amounts in the Arbitral Award Escrow Account, if available, shall be earmarked and concurrently used for the completion of other projects of the Corporation, as per the conditions set forth in this SOP keeping the physical progress work in view. All payments relating to construction of other projects of the Corporation:

- (i) Shall be applicable to other projects of the Corporation being executed by the Contractor.

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

The Engineer-in-Charge (EIC) or equivalent authority for the project and the Corporation shall verify the genuineness in respect of the information provided by the Contractor in respect of the other Projects of the Corporation.

3.8 Post debt service payments, completion of the Project and completion of other projects of the Corporation, and subject to availability of funds in the Arbitral Award Escrow Account, balance funds shall be appropriated in accordance with the instructions of the Contractor in terms of the Arbitral Amount Escrow Account Agreement, upon prior written approval of the Corporation.

4. Events of Arbitral Award Escrow Default

4.1 Following events shall constitute an ‘event of default’ by the Contractor unless such event of default has occurred as a result of Force Majeure or any act or omission of the Corporation or the Lenders’ Representative:

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

4.2 Upon occurrence of an Arbitral Award Escrow Default, the Corporation shall be entitled to encash and appropriate the relevant amounts from the Bank Guarantee as damages for such Arbitral Award Escrow Default.

5. 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 favor of the Corporation, the Corporation shall *suo motu* encash the Bank Guarantee against refunds from the Contractor of an amount

equivalent to 75% of the Arbitral Award amount along with appropriate interest till the date of encashment.

6. Closure of Arbitral Award Escrow Account

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

7. Monitoring Mechanism

- (i) There will be a robust monitoring mechanism for all cases where funds have been disbursed by the Corporation against Bank Guarantee. A consolidated list of all such cases will be maintained and tracked by the concerned functional department of the Corporation with requisite inputs from the finance Department and legal department.
- (ii) Disbursement of funds into Arbitral Award Escrow Accounts shall be tracked and consolidated by the concerned functional department.
- (iii) The finance department of the Division concerned of the Corporation will be provided requisite information for budgeting and release of funds.
- (iv) The Corporation will have the right to impose any further condition/monitoring mechanism to ensure the Corporation's interests are protected.
- (v) Disbursement of funds from Arbitral Award Escrow Accounts will be tracked and monthly statements/ MIS reports shall be prepared by the concerned functional department(s).
- (vi) Validity and renewal of Bank Guarantee shall be meticulously tracked by the functional departments in consultation with finance department.
- (vii) The amount released against the Bank guarantee shall be treated as contingent liability in the books of accounts of the Corporation.
- (viii) The Corporation shall appoint Nodal Officer(s) in each division for implementation of the SOP.

Illustration on realization 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 crore + Rs. 26.25 crore (on account of Interest) = Rs. 126.25 crore
2. **Bank Guarantee for First Year:**
Bank Guarantee to be taken for the amount = 75% of 126.25 crore = Rs. 94.69 crore
(P) + Interest @ 15% on this amount for a period of one year (P1) is 14.20 crore =
Total amount of Bank Guarantee for First Year is Rs. 108.89 crore (P2)
3. **Bank Guarantee for Second Year:**
P1+P2 becomes 'P' now i.e. Rs. 108.89 crore;
Interest @ 15% on P for one year = Rs. 16.33 crore;
Total amount for which Bank Guarantee is to be taken for second year =
Rs. 108.89 Cr + Rs. 16.33 Cr = Rs. 125.22 Cr (P3)
4. **Bank Guarantee for Third Year**
P3 becomes 'P' here = Rs. 125.22 Cr
Add interest @ 15% for one year = Rs. 18.78 Cr
Total amount of Bank Guarantee for Third Year = Rs. 125.22 + Rs. 18.78 Cr =
Rs. 144.00 Cr

Ref:
Dated:
To,

.....

Sub: Appeal No / ... pending before entitled "....."

Re: Measures to Revive Construction Sector - OM No. 14070/14/2016-PPPAU dated 5th September, 2016 from NITI Aayog

Dear Sir(s)

1. Reference may please be drawn to above mentioned court case wherein the Corporation has challenged the Award dated passed by Arbitral Tribunal in the matter of (arbitration case) thereby awarding an amount of Rs in favour of along with interest @ from ... till ... (if applicable).
2. The Appeal pending before is listed for
3. Pursuant to the decision 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."** (copy attached). As per it, cases where the Arbitral Tribunals have passed orders in favor of Contractors/s 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 payout (i.e. Arbitral Award amount including interest payable as per such award, if any) to the Contractors/s against a Bank Guarantee.
4. IndianOil intends to implement the decision of CCEA and has accordingly devised a Standard Operating Procedure for the same. A copy of SOP along with activity and timelines can be accessed on IndianOil website.
5. As per the SOP, the payment by the Corporation has to be made into a designated Escrow Account, without prejudice to Corporation's rights and final order of the Court in the matter, to be opened by you with the stipulation that the amount so released will be used, first, for payment of lenders' dues, second, for completion of the project and then for completion of other projects of the Corporation, as mutually agreed/ decided. Any balance remaining in the escrow account subsequent to settlement of lenders' dues and completion of projects of the Corporation may be allowed to be used by you with the prior approval of the lead banker and the Corporation.
6. Accordingly, if you intend to avail the same, you are requested to submit a bank guarantee (format attached (subject to bankers consent)) for an amount of Rs and open an Escrow Account (draft Agreement attached) so that necessary action to release the 75% of award amount (along with relevant interest) may be taken by IndianOil, without prejudice to the final order of the Court.
7. Kindly send back duly signed copy of this communication as a token of your acceptance of the SOP and undertaking the requisite steps there under.

Yours faithfully,

For and on behalf of Indian Oil Corporation Limited

.....

Accepted

For and on Behalf of

.....

(kindly annex relevant document evidencing authority to sign)

Ann. F.

No. N-14070/14/2016-PPPAU
Government of India
National Institution for Transforming India (NITI Aayog)

NITI Bhawan, New Delhi
September 05, 2016

Office Memorandum |

Subject: Measures to revive the Construction Sector - reg.

The construction sector has been facing a number of problems, mainly arising from the liquidity constraints caused on account of their payments not being released by the Government Departments/ Public Sector Undertakings (PSUs) pursuant to the arbitral awards. To discuss the problems of the construction sector, detailed deliberations/ consultations were held with the representatives of the construction industry, banks, major government PSUs and concerned Ministries/ Departments. Based on the above deliberations/ consultations, the NITI Aayog placed a proposal before the Cabinet Committee on Economic Affairs (CCEA) for its consideration suggesting various short-term and long-term measures required for addressing the issues ailing the construction sector. The CCEA, chaired by the Hon'ble Prime Minister, has considered the proposals of NITI Aayog in its meeting held on 31st August 2016 and approved the same for the revival of construction sector.

2. Accordingly, following instructions are hereby issued for compliance and necessary action by all concerned i.e. the Government Departments/ Ministries/ Public Sector Undertakings awarding the public contracts/ implementing various projects involving construction activities:

- 2.1 In case of contracts/ concessions where the process of arbitration was initiated under the pre-amended Arbitration Act, the PSUs/ Departments may seek the consent of the contractors/ concessionaires to transfer the pending cases under the amended Arbitration Act, wherever possible. The shift to amended Arbitration Act is expected to make the arbitration process more cost effective and help in settlement of the disputes in a timely manner;
- 2.2 In case of claims where the PSU/ Department has challenged the Arbitral Award already announced, 75% of the award may be paid by the PSU/ Department to the contractor/ concessionaire against Bank Guarantee without prejudice to the final order of the Court in the matter under challenge. The payment may be made into a designated Escrow Account with the stipulation that the amount so released will be used, first, for payment of lenders' dues, second, for completion of the project and then for completion of other projects of the same PSU/ Department, as mutually agreed/ decided. Any balance remaining in the escrow account subsequent to settlement of lenders' dues and completion of projects of the PSU/ Department may be allowed to be used by the contractor/ concessionaire with the prior approval of

the lead banker and the Department/PSU.

- 2.3 In case the subsequent court order requires refund of the money paid by a PSU/ Department against a Bank Guarantee, the amount shall be refunded by the contractor/ concessionaire along with appropriate interest. The rate of interest on such refund amount may be decided by the PSU/ Department keeping in view the cost of capital to the PSU/ Department or the rate of interest provided for in the Contract Agreement or the rate of interest awarded under the Arbitral Award under challenge.

Notes:

- (i) For Departments, cost of capital shall be taken as Weighted Average Coupon rate of outstanding stock of Central Government securities for the period ending in the preceding quarter, or Weighted Average Coupon rate of Central Government securities issued during the preceding quarter (whichever is higher);
 - (ii) PSUs shall either calculate their own cost of capital or take State Bank of India's One Year Marginal Cost of fund-based Lending Rate plus 2%;
 - (iii) The appropriate interest rate on such refund shall be decided at the time of releasing funds to the Escrow Account;
 - (iv) If otherwise eligible and subject to contractual provisions, retention money and other amounts withheld may also be released against bank guarantee as per the laid down criteria.
3. All the concerned Ministries/ Departments shall also issue instructions to their respective PSUs for taking necessary action accordingly.

(A. Muthuvezhappan)
Director (PPPAU)

To

1. Secretaries of all the Ministries/Departments of Government of India.
2. Chairpersons/ CMDs/ MDs of all the Central Government PSUs.
3. Chairpersons/ CMDs/MDs/CEOs of all the Scheduled Commercial Banks.
4. Chief Executive, Indian Banks Association, Mumbai.
5. Shri Alok Tandon, Additional Secretary, Cabinet Secretariat, Rashtrapati Bhavan, New Delhi - 110001.
6. Dr. T. V. Somanathan, Joint Secretary, PMO, South Block, New Delhi - 110001.

Copy for information to:

1. PS to Vice Chairman/ PS to MoS/ PS to all Members
2. Sr. PPS to CEO/ PPS to Special Secretary