

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 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 (herein after agency mean THDC India Limited), it would be entitled to recover the said amount along with appropriate interest.

2. The following paragraphs list the key assumptions/structure to be followed by THDC India Ltd. for implementing the above mentioned directions.

3. Applicability in case of projects of THDC India Ltd.:

Applicable to all Projects of THDC India Ltd., where the Contractor and THDC India Ltd. have entered into a 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 Contractor and THDC India Ltd. has challenged the Arbitral Award.

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

Send a communication 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 specified in such communication. Since completion of these formalities may take some time, the Contractors 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.

4.1. Arbitral Award Escrow Account & 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 Arbitral Award Escrow Account Agreement.
- (ii) Arbitral Award Escrow Account Agreement shall include 4 (four) parties viz. (a) the Contractor, (b) THDC India Ltd., (c) Arbitral Award Escrow Bank and (d) Lenders' Representative.
- (iii) The Arbitral Award Escrow Account Agreement shall be executed in four counterparts, each of which when executed and delivered to each party shall constitute an original of this Agreement. The Arbitral Award Escrow Account Agreement shall be executed on non-judicial stamp paper of the appropriate value in accordance with Stamp duty Act, to be purchased by Contractor. The Contractor shall bear all expenses related to purchase of Stamp Paper and signing of Escrow account Agreement.
- (iv) The 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.

4.2. 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'. THDC India Ltd. is liable to pay 75% of such 'Payout Amount' against the Bank Guarantee of the equivalent amount.
Hon'ble Supreme Court Judgement dated 25.09.2012 in CA No: 3682 of 2007 bars the pendente lite / pre-award interest because of existence of barring clauses in the contract agreement. In view of this judgement, pendente lite / pre-award interest shall not be considered wherever barring clause for the interest exists in the contract agreement.
- (ii) THDC India Ltd. shall require from the Contractor to furnish the Bank Guarantee for the 75% of the Payout Amount and interest amount on such amount for a minimum period of one year. The applicable rate of interest shall be taken keeping in view the cost of capital to the THDCIL or rate of interest provided for in the contract agreement or the rate of interest awarded under the Arbitral Award under challenge whichever is higher. The Bank Guarantee(s) shall roll over annually and renewed on annual basis.
- (iii) THDC India Ltd. 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 THDC India Ltd. 90 days prior to the expiry of validity and shall be done by the Contractor 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) interest on (a) for the second year and so on and so forth.

In case the appeal is further filed by THDCIL in higher Bench / higher Court , the Bank Guarantee(s) shall be renewed for a further period till the appeal of THDCIL is finally decided by said Court(s).

- (v) In cases where the appeal of THDC India Ltd. is allowed by the Court, THDC India Ltd. would be entitled to recover such amount together with appropriate interest (as specified in sub-para-ii above) on the amount paid to the Contractor. The interest rate shall be compounded annually from the date of deposit of monies in Arbitral Award Escrow Account by THDC India Ltd. till the date of encashment. 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 to any order of the Hon'ble Court in the appeal proceedings.
- (vi) Failure of the Contractor to renew the Bank Guarantee(s) 60 days prior to the expiry of the Guarantee may lead to encashment and appropriation of the Bank Guarantee(s).
- (vii) In case the Court allows the appeal of THDC India Ltd. against the Arbitral Award, THDC India Ltd. shall be entitled to encash the Bank Guarantee(s) furnished by the Contractor of the amount equivalent to 75% of the payout amount along with appropriate interest compounded annually till the date of such encashment.

4.3. Deposit and withdrawal of funds from Escrow Account:

- i) After opening of the designated 'Arbitral Award Escrow Account', receipt of the Bank Guarantee and verification of Bank Guarantee from the issuing bank, THDC India Ltd. shall deposit 75% of the Payout Amount in the Arbitral Award Escrow Account within a period of 30 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 THDC India Ltd. to the Contractor, as mutually agreed/ decided by THDC India Ltd., Lenders' Representative and the 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 THDC India Ltd. under execution by the Contractor; and
 - d) Balance, if any, may be allowed to be used by the Contractor with the prior written approval of the Lenders' Representative and THDC India Ltd..

4.4. Debt Service Payments

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

4.5. All payments relating to construction of the Project:

- (i) The Contractor shall provide THDC India Ltd. 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 THDC India Ltd.), required to complete the remaining works.
- (ii) The Engineer-in-Charge of works or equivalent authority for the project from THDC India Ltd. 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 THDC India Ltd. and subject to availability of funds in the designated Arbitral Award Escrow Account, the total requirement of funds shall be earmarked for payment of the outstanding dues and completion of 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 (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 THDC India Ltd., as per conditions set forth in this SOP keeping in view the physical progress of work.

4.6. All payments relating to construction of other projects of THDC India Ltd.:

- (i) Shall be applicable to other projects of THDC India Ltd. being executed by the Contractor
- (ii) For each of the other projects, provisions applicable to the main project shall be applicable.

4.7 Post debt service payments, completion of the Project and completion of other projects of THDC India Ltd., 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 Agreement executed among the parties in terms of para 4.1 above.

5. Events of Arbitral Award Escrow Default:

5.1. Following events shall constitute an 'event of default' by the Contractor:

- (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 THDC India Ltd. in breach of the terms of Arbitral Award Escrow Account Agreement within 5(five) business days of such refund becoming due to THDC India Ltd..
- (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 5 (five) business days; or
- (iv) The Contractor does not renew the Bank Guarantee(s) submitted to THDC India Ltd. as security for principal as well as for interest thereon 60 days prior to the expiry of the Guarantee, in cases where such renewal is required.

5.2. Upon occurrence of an Arbitral Award Escrow Default, THDC India Ltd. shall be entitled to encash the Bank Guarantee(s) for such Arbitral Award Escrow Default without giving prior notice to the Contractor.

6. 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. In case the appeal is further filed by THDCIL in higher Bench / higher Court, the Arbitral Award Escrow Agreement shall remain in full force and effect so long as the said 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 THDC India Ltd., THDC India Ltd. shall suo-moto 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. In such a case the Arbitral Award Escrow account Agreement shall be deemed terminated on encashment of Bank Guarantee by THDC India Ltd.

7. 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 THDC India Ltd. after the decision of the Appeal by the Court and pay any amount standing to the credit thereof to the Contractor.

8. Monitoring Mechanism:

- (i) There will be a robust monitoring mechanism for all cases where funds have been disbursed by THDC India Ltd. against Bank Guarantee. A consolidated list of all such

- cases will be tracked by the nominated Department of THDC India Ltd. with requisite inputs from Execution Department / Finance Department of the Project.
- (ii) Disbursement of funds into Arbitral Award Escrow Accounts shall be tracked and consolidated.
 - (iii) The finance wing of THDC India Ltd. will be provided requisite information for budgeting and release of funds.
 - (iv) THDC India Ltd. will have the right to impose any further condition/monitoring mechanism to ensure THDC India Ltd. interests are protected such as appointment of concurrent Auditor(s).
 - (v) Since release of funds may be across various projects, hence, a Program Management team under a Senior Level Officer may be setup 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 nominated Department of THDCIL in association with Project Implementation Units (PIU) at the field level.
 - (vii) Validity and renewal of Bank Guarantee shall be meticulously tracked by the nominated personnel/ units / Cell within THDC India Ltd.

9. Authorized representatives:

Each of the Parties shall, in writing, designate their respective authorized representatives for signing of Escrow Account agreement and its operation. In the case of Employer / Contractor, the authorised representative shall be notified in accordance with the Contract Agreement and in respect of other parties of the Escrow Account agreement, the authorised representatives shall be as per legally valid Power of Attorney. All the communications to the respective parties entering into Escrow Account Agreement shall be made through their authorised representatives. A Party hereto shall be entitled to remove and/or substitute or make fresh appointment of such authorized representative by similar notice.

- 10.** THDCIL reserves its right to add, alter or to amend this SOP, Format for BG as well as Format for Escrow Account Agreement at any point of time as per the requirement. The decision of THDCIL in this regard shall be final and binding on the Contractor / concerned parties.