

FORMAT FOR ARBITRAL AWARD ESCROW ACCOUNT AGREEMENT

THIS ARBITRAL AWARD ESCROW ACCOUNT AGREEMENT is entered into on this theday of 20..... AMONGST

1. [_____], a company incorporated under the provisions of the Companies Act, 1956 and having its registered office at _____ (hereinafter referred to as the “[Contractor]” which expression shall, unless repugnant to the context or meaning thereof, include its successors, permitted assigns and substitutes);
2. THDC INDIA LTD., a company registered under the Companies Act, 1956 having its registered office at (hereinafter referred to as the “THDCIL” and / or the employer, which expression shall, unless repugnant to the context or meaning thereof, include its administrators, successors and assigns).
3. _____ (insert name and particulars of the Arbitral Award Escrow Bank) and having its registered office at _____ (hereinafter referred to as the “Arbitral Award Escrow Bank” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes); and
4. [_____ (insert name and particulars of Lenders’ Representative) and having its registered office at _____ acting for and on behalf of the Lenders as their duly authorized agent with regard to matters arising out of or in relation to this Agreement (hereinafter referred to as the “Lenders’ Representative” which expression shall, unless repugnant to the context or meaning thereof, include its successors and substitutes);]

WHEREAS:

- (A) The Employer had entered into contract agreement with the Contractor for execution of _____ (Name of work /Project).
- (B) The dispute(s) arose between the Parties to the Contract Agreement in course of implementation of the Project. These disputes were referred to Arbitration Tribunal constituted by the Parties in terms of the contract agreement and the Arbitration and Conciliation Act 1996 amended time to time.
- (C) The Arbitral Tribunal declared the Award including interest as per details enclosed at **Annexure-A** in favour of the Contractor which amounts to Rs. _____.
- (D) The Employer has challenged the Award partly / fully in Court(name of Court) as per details mentioned in the **Annexure-B**.

- (E) NITI Aayog, Government of India vide Office Memorandum No. No-14070/14/2016-PPPAU dated 05.09.2016 has issued directions to the PSUs to release 75% of the Award amount to the contractor against a Bank Guarantee without prejudice to the rights and stand of the Employer and subject to the final order of the Court in the matters for which Arbitral Awards have been challenged. The payment is to be made into a designated Escrow Account with the stipulation that the amount so released will be used in the following order:
- i) for payment of lenders' dues
 - ii) for construction/ completion of THDCIL project
 - iii) For completion of other projects of THDCIL, as mutually agreed/ decided.
 - iv) Any balance remaining in the escrow account subsequent to settlement of lenders dues and completion of projects of the Employer may be allowed to be used by the Contractor with the prior approval of the lenders representative and the Employer.
- (F) Accordingly, the Contractor is required to establish an Escrow Account inter-alia on the terms and conditions stated therein.

Now it is hereby agreed as follows:

1. DEFINITIONS AND INTERPRETATION.

1.1. In this Agreement, the following words and expressions shall, unless repugnant to the context or meaning thereof, have the meaning hereinafter respectively assigned to them:

"Agreement" means this Arbitral Award Escrow Account Agreement and any amendment thereto made in accordance with the provisions contained herein ;

"Arbitral Award" shall have the meaning ascribed thereto in Recital C;

Escrow Account means an **"Arbitral Award Escrow Account"** established in terms of and under this Agreement.

"Lenders" Representative means the person referred to as the Lenders Representative in the foregoing Recitals;

"Parties" means the parties to this Agreement collectively and **"Party"** shall mean any of the Parties to this Agreement individually;

1.2. Interpretation .

1.2.1. References to Lenders' Representative shall, unless repugnant to the context or meaning thereof, mean references to the Lenders' Representative, acting for and on behalf of Lenders.

1.2.2. The words and expressions beginning with capital letters and defined in this Agreement shall have the meaning ascribed thereto herein, and the words and expressions used in this Agreement and not defined herein shall, unless repugnant to the context, have their literal

English meaning. Words importing the singular only also include the plural and vice versa where the context requires.

1.2.3. References to Clauses are, unless stated otherwise, references to Clauses of this Agreement.

2 ARBITRAL AWARD ESCROW ACCOUNT.

2.1. Escrow Bank to act as trustee.

2.1.1. The Contractor hereby appoints the Escrow Bank to act as trustee for the Employer, the Lenders' Representative and the Contractor in connection herewith and authorizes the Escrow Bank to exercise such rights, powers, authorities and discretion as are specifically delegated to the Escrow Bank by the terms hereof, together with all such rights, powers, authorities and discretion as are reasonably incidental hereto, and the Escrow Bank accepts such appointment pursuant to the terms hereof.

2.1.2. The Contractor hereby declares that all rights, title and interest in and to the Arbitral Award Escrow Account shall be vested in the Escrow Bank and held in trust for the Employer, the Lenders' Representative and the Contractor, and applied in accordance with the terms of this Agreement. No person other than the Employer, the Lenders' Representative and the Contractor shall have any rights hereunder as the beneficiaries of or as third party beneficiaries under this Agreement.

2.2. Acceptance of Escrow Bank.

The Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Escrow Bank pursuant to the provisions of this Agreement. The Escrow Bank shall hold and safeguard the Escrow Account during the term of this Agreement and shall treat the amount in the Arbitral Award Escrow Account as monies deposited by the Employer, Lenders or the Contractor with the Escrow Bank. In performing its functions and duties under this Agreement, the Escrow Bank shall act in trust for the benefit of, and as an agent for the Employer, the Lenders' Representative and the Contractor or their nominees, successors or assigns in accordance with the provisions of this agreement.

2.3. Establishment and operation of Arbitral Award Escrow Account.

2.3.1. Immediately after execution of this agreement, the contractor shall open and establish the Arbitral Award Escrow Account with the _____ (name of branch of escrow bank). The Arbitral Award Escrow Account shall be denominated in Indian Rupees.

2.3.2. The Escrow Bank shall maintain the Arbitral Award Escrow Account in accordance with the terms of this Agreement and its usual practices and applicable regulations, and pay the maximum rate of interest payable to similar customers on the balance in the said account from time to time.

2.4 **Escrow Bank's fee.**

The Escrow Bank shall be entitled to receive its fee and expenses in an amount and at such times, as may be agreed between the Escrow Bank and the Contractor. For the avoidance of doubt, such fee and all expenses relating to opening and operation of said account shall be borne by the Contractor. The Contractor shall deposit such fee directly to the Bank from time to time. No amount in this regard shall be debited by the Bank from this Escrow Account.

2.5 **Rights of the Parties.**

The rights of the employer, the lenders' representative and the Contractor in the monies held in the Escrow Account are set forth in their entirety in this Agreement and the employer, the Lenders' Representative and the Contractor shall have no other rights against or to the monies in the Escrow Account.

3 **DEPOSITS INTO ESCROW ACCOUNT.**

3.1 **Deposits by the Employer.**

Without prejudice to the rights and stand of employer and subject to the final order of the court in the matter under challenge, the employer agrees and undertakes that it shall deposit into and/or credit the Escrow Account with 75 % of Arbitral Award amount (As detailed in **Annexure-A**) less Rs..... towards contractual recoveries and statutory recoveries / liabilities, if any, within 30 days after receipt of Bank Guarantee of appropriate amount in the requisite format from the contractor and its verification by the Employer from the Bank.

3.2 **BANK GUARANTEE(S).**

The Contractor shall furnish to the employer the Bank Guarantee(s) of the amount released pursuant to this agreement plus interest amount for the tenure of the BG to secure the arbitral award amount. The amount released shall mean the amount before deductions towards contractual recoveries and statutory recoveries / liabilities etc, if any. The Bank Guarantee shall be valid initially for one year and shall be renewed on annual basis. Failure of the contractor to renew the Bank Guarantee(s) 60 days prior to the expiry may lead to encashment and appropriation of the guarantee(s).

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(s), such Guarantee(s) shall be renewed by the Contractor for a further period of one year and so on and so forth. While renewing the Bank Guarantee(s) for the Second Year, the amount of the Guarantee(s) 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, an appeal is further filed by THDCIL in a 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).

3.3 Interest on Deposits.

The Escrow Bank agrees and undertakes that all interest accruing on the balances of the Escrow Account shall be credited to the Arbitral Award Escrow Account and shall be used to make due payments in the manner as provided in clause 4 of this agreement.

- 3.4 In case the court order requires refund of money paid by the Employer into the Arbitral Award Escrow Account, the amount shall be refunded by the contractor along with interest compounded annually. The applicable rate of interest shall be decided by THDCIL at the time of releasing of funds into Escrow Account 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.

4 WITHDRAWALS FROM ESCROW ACCOUNT

4.1 Withdrawals

The Escrow Bank shall withdraw and appropriate the amounts from the Arbitral Award Escrow Account strictly in accordance with the instructions issued by the Employer to the Contractor, as mutually agreed / decided by Employer, 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/completion of other projects of the Employer under execution by 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 Employer.

The matrix for release of payment will include payments for Debt Service and payment for Project under construction/ completion of Projects of Employer as enclosed at **Annexure-C** is to be followed by the Escrow Bank and provision for same is required to be kept in the Escrow account.

4.2 Debt Service Payment

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

4.3 All payments relating to construction / completion of the Project

- (i) The contractor shall provide the Employer 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 or any other periodic schedule of funds (as agreed with the Employer) required to complete the remaining works.
- (ii) The Project 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 Employer 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 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 Employer as per conditions set forth in this Agreement keeping the progress of work in view.

4.4 All payments relating to construction / completion of other projects of the Employer

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

4.5 Post debt service payments, completion of the Project and completion of other projects of the Employer and subject to availability of funds in the Arbitral Award Escrow Account, balance funds shall be appropriated in accordance with the instruction of the contractor after receiving the prior written approval of the Lender's representative and the Employer in terms of this Agreement.

5. Event 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 the Employer in breach of the terms of Arbitral Award Escrow account Agreement within 5 (five) business days of such refund becoming due;

- (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
- (v) The contractor does not renew the Bank Guarantee(s) submitted to the Employer as security for the 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, the Employer shall be entitled to encash the Bank Guarantee(s) for such Arbitral Award Escrow Default without giving prior notice to the Contractor.

6. OBLIGATIONS OF THE ESCROW BANK

6.1 Segregation of funds

Monies received by the Escrow Bank under this Agreement shall, until used or applied in accordance with this Agreement, be held by the Escrow Bank in trust for the purposes for which they were received, and shall be segregated from other funds of the Escrow Bank.

6.2 No set off

The Escrow Bank agrees not to claim or exercise any right of set off, banker's lien or other right or remedy with respect to amounts standing to the credit of the Escrow Account. For the avoidance of doubt, it is hereby acknowledged and agreed by the Escrow Bank that the monies held by the Escrow Bank in the Arbitral Award Escrow Account shall not be considered as part of the assets of the Escrow Bank and being trust property, shall in the case of bankruptcy or liquidation of the Escrow Bank, be wholly excluded from the assets of the Escrow Bank in such bankruptcy or liquidation.

6.3 Regulatory approvals

The Escrow Bank shall use its best efforts to procure, and thereafter maintain and comply with, all regulatory approvals required for it to establish and operate the Arbitral Award Escrow Account. The Escrow Bank represents and warrants that it is not aware of any reason why such regulatory approvals will not ordinarily be granted to the Escrow Bank.

7 TERMINATION OF ESCROW AGREEMENT

7.1 Duration of Escrow Agreement

This 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 Escrow Bank, unless terminated earlier by consent of all the Parties or otherwise in accordance with the provisions of this agreement. In case, an appeal is further filed by the Employer in higher Bench / higher Court against the decision of Court, the Arbitral Award Escrow Agreement shall remain in full force and effect so long as the said Court(s) decides the Appeal and a certified copy of the final decision of the Court has been submitted to the Arbitral Award Escrow Bank by the Employer.

7.2 Substitution of Escrow Bank.

The Contractor may, by not less than 45 (forty five) days prior notice to the Escrow Bank, the Employer and the Lenders' Representative, terminate this Agreement and appoint a new Escrow Bank, provided that the new Escrow Bank is acceptable to the Lenders' Representative and Employer and arrangements are made satisfactory to the Lenders' Representative and Employer for transfer of amounts deposited in the Arbitral Award Escrow Account to a new Arbitral Award Escrow Account established with the successor Escrow Bank. The termination of this Agreement shall take effect only upon coming into force of an Arbitral Award Escrow Agreement with the new Escrow Bank.

7.3 Closure of Arbitral Escrow Account.

The Escrow Bank shall close the Arbitral Award Escrow account at the request made by the Contractor and the Employer after the decision of the appeal by the Court. In case, an appeal is further filed by the Employer in higher Bench / higher Court against the decision of Court, the Arbitral Award Escrow Account shall remain in full force and effect so long as the said Court(s) decides the Appeal and the Escrow Bank shall close the Arbitral Award Escrow account at the request made by the Contractor and the Employer after the final decision of the appeal by the Court and pay any amount standing to the credit thereof to the Contractor after a certified copy of the final decision of the Court has been submitted to the Arbitral Award Escrow Bank by the Employer. Upon closure of the Arbitral Award Escrow Account, the Escrow agreement shall be deemed to be terminated.

8. MISCELLANEOUS PROVISIONS.

8.1 Governing law and jurisdiction.

This Agreement shall be construed and interpreted in accordance with and governed by the laws of India, and the courts in Delhi shall have jurisdiction over all matters arising out of or relating to this Agreement.

8.2 Waiver of sovereign immunity

The Contractor unconditionally and irrevocably:

- (a) agrees that the execution, delivery and performance by it of this Agreement constitute commercial acts done and performed for commercial purpose;
- (b) agrees that, should any proceedings be brought against it or its assets, property or revenues in any jurisdiction in relation to this Agreement or any transaction contemplated by this Agreement, no immunity (whether by reason of sovereignty or otherwise) from such proceedings shall be claimed by or on behalf of the Contractor with respect to its assets;
- (c) waives any right of immunity which it or its assets, property or revenues now has, may acquire in the future or which may be attributed to it in any jurisdiction; and

(d) consents generally in respect of the enforcement of any judgment or award against it in any such proceedings to the giving of any relief or the issue of any process in any jurisdiction in connection with such proceedings (including the making, enforcement or execution against it or in respect of any assets, property or revenues whatsoever irrespective of their use or intended use of any order or judgment that may be made or given in connection therewith).

8.3 The Arbitral Award Escrow Account shall not be subject to any attachment by orders of Court or otherwise on account of any dispute or litigation between the Contractor and any other Party be it Bank, Lenders, garnishee orders of Court.

8.4 **Alteration of terms.**

All additions, amendments, modifications and variations to this Agreement shall be effectual and binding only if in writing and signed by the duly authorized representatives of the Parties.

8.5 **No third party beneficiaries.**

This Agreement is solely for the benefit of the Parties and no other person or entity shall have any rights hereunder.

8.6 **Successors and assigns**

This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

8.7 **Notices**

All notices or other communications to be given or made under this Agreement shall be in writing and shall either be delivered personally or sent by courier or registered post with an additional copy to be sent by facsimile or e-mail. The address for service of each Party, its facsimile number and email are set out under its name on the signing pages hereto. A notice shall be effective upon actual receipt thereof, save that where it is received after 5.30 (five thirty) p.m. on a business day, or on a day that is not a business day, the notice shall be deemed to be received on the first business day following the date of actual receipt. Without prejudice to the foregoing, a Party giving or making a notice or communication by facsimile or e-mail shall promptly deliver a copy thereof personally, or send it by courier or registered post to the addressee of such notice or communication. It is hereby agreed and acknowledged that any Party may by notice change the address to which such notices and communications to it are to be delivered or mailed. Such change shall be effective when all the Parties have notice of it.

8.8 **Language**

All notices, certificates, correspondences and proceedings under or in connection with this Agreement shall be in English.

8.9 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.

8.10 Original Document.

This Agreement may be executed in four counterparts, each of which when executed and delivered shall constitute an original of this Agreement.

8.11 Severability

If for any reason whatsoever, any provision of this Agreement is or becomes invalid, illegal or unenforceable or is declared by any court of competent jurisdiction or any other instrumentality to be invalid, illegal or unenforceable, the validity, legality or enforceability of the remaining provisions shall not be affected in any manner, and the Parties will negotiate in good faith with a view to agreeing to one or more provisions which may be substituted for such invalid, unenforceable or illegal provisions.

9.0 INDEMNITIES.

9.1 The Contractor will indemnify, defend and hold the Employer, Escrow Bank and the Lenders' Representative, harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of any breach by the Contractor of any of its obligations under this Agreement or on account of failure of the Contractor to comply with the Applicable Laws and Applicable Permits.

9.2 The Escrow Bank will indemnify, defend and hold the Contractor and the Employer harmless against any and all proceedings, actions and third party claims for any loss, damage, cost and expense arising out of failure of the Escrow Bank to fulfil its obligations under this Agreement materially and adversely affecting the performance of the Contractor's and Employer's Obligations under this agreement.

IN WITNESS WHEREOF THE PARTIES HAVE EXECUTED AND DELIVERED THIS AGREEMENT AS OF THE DATE FIRST ABOVE WRITTEN.

SIGNED SEALED AND
DELIVERED
For ad on behalf of
CONTRACTOR by :

SIGNED SEALED AND
DELIVERED
For ad on behalf of
LENDERS by the Lenders'
Representative:

(Signature)

(Name)
(Designation)
(Address)

(Fax No./email)

SIGNED , SEALED AND
DELIVERED
For and on behalf of

ESCROW BANK by :

(Signature)

(Name)
(Designation)
(Address)

(Fax No. / email)

In the presence of :

1.

(Signature)

(Name)
(Designation)
(Address)

(Fax No. / email)

SIGNED, SEALED AND
DELIVERED
For and on behalf of

THDC INDIA LTD. by :

(Signature)

(Name)
(Designation)
(Address)

(Fax No. / email)

2.