

Standard Operating Procedure (SOP) for release of payment to contractors in terms of CCEA decisions-NITI Aayog OM No. 14070/14/2016-PPPAU dtd 5th Sept, 2016 & Ministry of Power, Govt. of India, Letter No. 28/3/2016-Coord (Pt-III), dtd 29th Sept, 2016 and the subsequent amendment vide NITI Aayogs OM No. N-14070/14/2016-PPPAU, dated. 28.11.2019, circulated vide Ministry of Power, Govt. of India, Letter No.5/3/2016-P&P, dtd. 13.12.2019

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, dtd. 5th Sept, 2016 titled **“Measures to revive the Construction Sector-reg”** and thereafter, amended vide **its OM No. N-14070/14/2016-PPPAU, dated. 28.11.2019**, 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 awards, if any) 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 OMs 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. *However*, with respect to the interest payable to the works executing agency, should the subsequent court order require refund of the said 75%, payment of the same will be as per the court order, non-compliance of which by the contractor/concessionaire would be a contempt of court. And the concerned works executing

agency will have the right to recover the said interest by way of legal /judicial remedies.

2. The process of implementation of the above decision of the CCEA needs to be laid down through a **Standard Operating Procedure (SOP)**. 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 frame work of the SOP is given hereinafter, which may be used by the Ministries/Departments/PSUs with or without any amendments herein. The following paragraphs detail out the **Standard Operating Procedure (SOP)** to be followed by the **North Eastern Electric Power Corporation Ltd** (hereinafter referred to as “the Corporation”)

3. **Applicability in case of projects of the Corporation:**

Applicable to all NEEPCO Projects, where the Contractor and NEEPCO 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 Contractor and NEEPCO has challenged the Arbitral Award.

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

- 4.1 In case 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 Corporation would send a communication (under acknowledgement) to the Contractor to give their consent within the period specified therein to switch over to the amended provisions of the Arbitration Act;
- 4.2 Where Contractor 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 matter where the Contractor 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 acknowledgment) 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 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.

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 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) the Corporation, (c) the Arbitral Award Escrow Bank and (d) Lenders’ Representative.
- iii) 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.

5.2 **Bank Guarantee:**

- i) Arbitral Award Amount is the amount for which the Award has been announced by the Arbitral Tribunal. In case the Tribunal has also awarded payment of interest on such amount till the date of payment, such interest amount together with the Award amount shall constitute the total eligible “**Payout amount**”. The Corporation is liable to pay 75% of such “Payout Amount” against the Bank Guarantee of the equivalent amount.

- ii) The Corporation shall require the Contractor to furnish the Bank Guarantee for 75% of the Payout Amount only for a period for one year. This Bank Guarantee shall roll over annually and renewed on annual basis.
- 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 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 challenged 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.
- v) In cases where the appeal of the Corporation is allowed by the Court, the Corporation would be entitled to recover such amount paid to the Contractor (as specified in the OM dated 05/09/2016 and its amendment vide OM dated 28/11/2019). For recovery of the interest amount, the same shall be governed by the court order, non-compliance of which by the contractor would be a contempt of court. And the concerned works executing agency will have the right to recover the said interest by way of legal /judicial remedies. 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 extend the validity of the Bank Guarantee 60 days prior to the expiry of the Guarantee may lead to encashment and appropriation of the Bank Guarantee.
- vii) In case the Court allows the appeal of the Corporation against the Arbitral Award, the Corporation shall be entitled to encash the Bank Guarantee furnished by the Contractor.

5.3 Deposit and withdrawal of funds from Escrow Account:

- i) After opening of the designated 'Arbitral Award Escrow Account' and receipt of the Bank Guarantee, the Corporation shall deposit 75% of the Payout Amount in the Arbitral Award Escrow Account within a period of no more than 10 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 Contractor, as mutually agreed/decided by the Corporation, 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 the Corporation 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 Corporation.

5.4 Debt Service Payments:

- i) The Contractor shall provide the Corporation 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 the Corporation with a copy to the Arbitral Award Escrow Bank, the acknowledgment receipt of the payment of dues from all the applicable lenders.

5.5 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 periodic schedule of funds, (as agreed with the Corporation's Technical division), required to complete the remaining works.
- ii) The Independent Engineer (IE) 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 (i) above for completion of the work.
- v) Balance amounts in the Arbitral Award Escrow Account, if available, shall be earmarked and concurrently used for the completion of other projects of the Corporation, 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 Corporation:

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

5.7 Post debt service payments, completion of the Project and completion of other projects of the 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 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 and '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 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
 - iv) The Contractor does not extend the validity of the Bank Guarantee submitted to the Corporation as security, in cases where such extension is required.
- 6.2 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.
7. **Termination of Arbitral Award Escrow Account Agreement:**
- i) Arbitral Award Escrow Account Agreement shall remain in full force and effect so long as Court decided 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 Corporation, the Corporation shall suo motu encash the Bank Guarantee against refunds from the Contractor
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 Contractor and the Corporation after decision of the Appeal by the Court and pay any amount standing to the credit thereof to the Contractor.
9. **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 tracked by the Legal

Department of the Corporation with requisite inputs from the concerned Technical divisions, Finance divisions, etc.

- ii) Disbursement of funds into Arbitral Award Escrow Account shall be tracked and consolidated.
- iii) The Finance Wing 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 interests are protected such as appointment of concurrent Auditor(s).
- v) Since release of funds may be across various projects, hence, a Program Management Unit (PMU) under CPM Wing of the Corporation 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 Account will be tracked and monthly statements/MIS reports shall be prepared by the Technical Divisions at the HQ and Project Implementation Units (PIU) under Head of Project at field level.
- vii) Validity and renewal of Bank Guarantee shall be meticulously tracked by the technical Divisions/Corporate Finance/Project Implementation Units (PIU) under Head of Project and Corporate Project Monitoring (CPM Wing) in the Authority's HQ.