

## **SoP for Escrow Account Mechanism**

### **Background:**

1. Pursuant to NITI Aayog's OM No. 14070/14/2016-PPPAU dated 5<sup>th</sup> 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

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.

(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.
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