

**BHARAT PETROLEUM CORPN. LTD.**

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

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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 5<sup>th</sup> 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 Arbitral 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 (**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.

2. **APPLICABILITY IN CASE OF BPCL PROJECTS:**

Applicable to all BPCL projects, where the Concessionaire / Contractor and BPCL 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 Concessionaire/ Contractor and BPCL has challenged the Arbitral Award.

3. **STEPS REQUIRED FOR RELEASE OF 75% OF THE TOTAL ELIGIBLE PAYOUT AMOUNT :**

Send a communication (under acknowledgement) to the eligible Contractor/ Concessionaire 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/ Concessionaires 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:**

- (i) A separate designated Escrow Account (hereinafter referred to as "**the Arbitral Award Escrow Account**"), shall be opened and established by the Concessionaire / Contractor in accordance with Arbitral Award Escrow Account Agreement.
- (ii) Arbitral Award Escrow Account Agreement shall include 4 (four) parties viz. (a) the Concessionaire / Contractor, (b)

BPCL, (c) Arbitral Award Escrow Bank and (d) Lenders' Representative.

- (iii) The Concessionaire / 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 with the Award amount shall constitute the total eligible 'Payout Amount'. BPCL is liable to pay 75% of such 'Payout Amount' against the Bank Guarantee of the equivalent amount.
- (ii) BPCL shall require the Contractor/ Concessionaire to furnish the Bank Guarantee for the 75% of the Payout Amount and appropriate interest amount on such amount for a period of one year. This Bank Guarantee shall roll over annually and renewed on annual basis.
- (iii) BPCL shall release and credit an amount equivalent to 75% of the Arbitral Award Payout Amount to the designated Escrow Account opened by the Contractor/ Concessionaire against the Bank Guarantee furnished by the Concessionaire/ Contractor for the amount under (ii) above;
- (iv) The process for renewal of the Bank Guarantee shall be initiated by BPCL 90 days prior to the validity and shall

be done by the Contractor/ Concessionaire 60 days prior to the 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% amount paid out plus the appropriate interest on such amount for one year, and
  - (b) appropriate interest on (a) for the second year and so on and so forth.
- (v) In cases where the appeal of BPCL is allowed by the Court, BPCL would be entitled to recover such amount together with appropriate interest (as specified in the OM dated 05.09.2016) on the amount paid to the Concessionaire / Contractor. The Concessionaire/ 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 Concessionaire / 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 Guarantee.
- (vii) In case the Court allows the appeal of BPCL against the Arbitral Award, BPCL shall be entitled to encash the Bank Guarantee furnished by the Concessionaire/ Contractor of the amount equivalent to 75% of the paid out amount

along with appropriate interest 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' and receipt of the Bank Guarantee, BPCL shall deposit 75% of the Payout Amount in the Escrow Account within a period of no more than 7 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 BPCL to the Concessionaire / Contractor, as mutually agreed/ decided by BPCL, Lenders' Representative and the Concessionaire / 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 BPCL under execution by the Concessionaire / Contractor; and
  - d) Balance, if any, in accordance with the instructions of the Concessionaire/ Contractor after receiving the prior written approval of the Lenders' Representative and BPCL.

4.4 **DEBT SERVICE PAYMENTS**

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

4.5 **All payments relating to construction of other projects of BPCL :**

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

4.6 Post the debt service payments, completion of the Project and completion of other projects of BPCL, and subject to availability of funds in the Arbitral Award Escrow Account, balance funds shall be appropriated in accordance with the instructions of the Concessionaire / 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 Concessionaire / Contractor unless such event of default has occurred as a result of Force Majeure or any act or omission of BPCL or the Lenders' Representative:

- (i) The Concessionaire/ Contractor causes the Arbitral Award Escrow Bank 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 BPCL 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 does not extend the validity of the Bank Guarantee submitted to BPCL as security for principal as well as for interest thereon, in cases where such extension is required.

5.2 Upon occurrence of an Arbitral Award Escrow Default, BPCL shall be entitled to encash and appropriate the relevant amounts from the Bank Guarantee as Damages for such Arbitral Award Escrow Default

## 6. Termination of Arbitral Award Escrow Account Agreement

- (i) Arbitral Award Escrow Agreement shall remain in full force and effect so long as 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 BPCL, BPCL shall suo motu encash the Bank Guarantee against

refunds from the Concessionaire/ Contractor of an amount equivalent to 75% of the Arbitral Award amount along with appropriate interest till the date of such decision of the Court.

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 Concessionaire / Contractor and BPCL after the decision of the Appeal by the Court and pay any amount standing to the credit thereof to the Concessionaire / Contractor.

8. **Monitoring Mechanism**

- (i) There will be a robust monitoring mechanism for all cases where funds have been disbursed by BPCL against Bank Guarantee. A consolidated list of all such cases will be tracked by the Finance Department of BPCL with requisite inputs from the concerned Project/Technical/Finance Divisions, etc.
- (ii) Disbursement of funds into Arbitral Award Escrow Accounts shall be tracked and consolidated.
- (iii) The Finance Department of BPCL will be provided requisite information for budgeting and release of funds.
- (iv) BPCL will have the right to impose any further condition/ monitoring mechanism to ensure that BPCL's interest is protected, such as appointment of concurrent Auditor(s).
- (v) The embedded Finance of SBUs/Entities will coordinate and regulate the 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 designated departments at the HQ and Project Implementation Units (PIU) at the field level.
- (vii) Validity and renewal of Bank Guarantee shall be meticulously tracked by the nominated personnel/ units/cells within BPCL.

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