



भारतीय राष्ट्रीय राजमार्ग प्राधिकरण
(पोत परिवहन, सड़क परिवहन और राजमार्ग मंत्रालय)
National Highways Authority of India
(Ministry of Shipping, Road Transport and Highways)
जी-5 एवं 6, सेक्टर-10, द्वारका, नई दिल्ली-110 075
G-5 & 6, Sector-10, Dwarka, New Delhi-110075

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No.: 11041/218/2007-Admn.

21.05.2009

POLICY MATTERS – TECHNICAL (29/2009)
(Decision taken on Technical Division File No. NHAI/Coord/5/2009)

Sub: Ensuring uniformity of guidelines and procedure on various issues including on the Dispute Resolution by DRB & Arbitration Award.

With the approval of the Competent Authority, guidelines regarding release of (i) Working Capital Assistance and (ii) Payment against DRB/DRE Awards are issued as below: -

(i) Working Capital Assistance

- (a) Working Capital Assistance may be provided to the performing contractors. For deciding the performance the progress of the previous 3 months will be considered. The cumulative progress of the previous three months (as per the programme approved by the Engineer) shall not be less than 75% of the targeted cumulative progress for that period. For this purpose, the programme/catch up programme of the contractor for completion of work should have been approved by the Engineer.
- (b) The amount of assistance shall be upto 5% of original contract price. This amount will be rolled over quarterly on the basis of the progress of the quarter. If the progress of the work during the quarter is as per the targeted progress, this amount will be rolled in the first month of the next quarter and so on. In case the progress is not as targeted the amount will be recovered and there will be no further rolling on. If the amount of the IPC is not enough to make recovery of the advances, the Bank Guarantee will be encashed without making any reference or intimation to the contractor. The final recovery of the advance will be affected when the achieved financial progress is 90% of the original contract price or before expiry of a period of one year from the date of the advance whichever is earlier. The advance will be against the Bank Guarantee from a bank acceptable to NHAI and in the format prescribed by NHAI. The Bank Guarantee shall be valid for a period of one and a half year. An interest @ prevailing SBI PLR + 1% will be charged on the amount of advance to be calculated for the days it remained outstanding.
- (c) The concerned Technical Division after satisfying and ensuring the above stated pre-requisites would process the proposal of release of Working Capital Advance for the approval of Competent Authority.

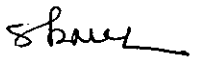
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(ii) **Release of payment against DRB/DRE Awards**

- (a) That payment may be released in DRB matters which are related to the World Bank Funded projects, at this stage, on the condition that a bank guarantee of the amount along with interest at SBI PLR+2% initially for a period of 12 months be obtained, by which time the Arbitration would be expected to be completed.
- (b) In case arbitration proceedings do not conclude within one year then Contractor has to renew the bank guarantee on six monthly basis till the final adjudication of the matter in Arbitration Tribunal or Courts. In such an event the original Bank Guarantee would be got extended for further period and an additional Bank Guarantee for the interest during extended period shall also be given by the Contractor.
- (c) A separate mutual agreement (MoU) for making this payment against the DRB recommendation is required to be executed between NHA1 and the Contractor (copy of the draft MoU is enclosed as **Annex-I**).
- (d) Undertaking and Bank Guarantee are to be obtained from the contractor and the same have been drafted/vetted by the Legal Cell of NHA1 and the empanelled Law firm. Copies are enclosed at **Annex-II & III** respectively.

2. The above guidelines shall be applicable as under:-

- (i) **Working Capital Assistance:** Working Capital Assistance will be provided for projects having physical progress 80% or more. Working Capital Assistance may also be considered for other projects having progress less than 80% in special circumstances.
- (ii) **Release of payment of DRB/DRE Awards:** Presently the guidelines regarding release of payment of DRB/DRE Awards will be applicable for World Bank funded projects only. For other projects reference is being made to the Law Ministry.


(S.K. Nirmal)
General Manager (Coord.)

To:

1. PS to Chairman
2. PS to All Members
3. PS to All CGMs/CVO
4. All GMs/DGMs/Managers
5. All PIUs/CMUs/SPVs
6. Librarian/Hindi Officer

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding is entered into on this the _____ day of _____ at New Delhi.

BETWEEN

The National Highways Authority of India, a statutory body constituted under the National Highways Authority of India Act, 1988 and having its Corporate office at G-5 & G-6, Sector 10, Dwarka, New Delhi-110075, hereinafter referred to as "NHA" (which expression shall unless excluded by or repugnant to the context, be deemed to include its successors and assigns) OF THE ONE PART,

AND

M/s _____, a company incorporated under the provisions of the Companies Act, 1956 having its registered office at _____ hereinafter referred to as the 'Contractor' (which expression shall unless repugnant to the subject or the context include its successors and permitted assigns) OF THE OTHER PART.

WHEREAS:

- A. The NHA has executed a contract dated _____ with the Contractor for a contract amount of Rs. _____ in respect of the works of _____ (hereinafter referred to as "the Contract").
- B. During the execution of the works under the Contract, certain disputes arose between the parties, which were referred to the Dispute Review Board/Dispute Review Expert (DRB/DRE) by the _____ vide letter dated _____ in terms of Clause _____ of the Contract which

provides for settlement of dispute between the parties firstly by referring the said dispute to DRB/DRE.

- C. The DRB/DRE vide letter dated _____ submitted its recommendations. As per the said recommendations, an amount of Rs. _____ is payable by the NHAI to the Contractor as on the date of the recommendations.
- D. The Contract further provides that any party aggrieved by the recommendations of the DRB/DRE may refer the dispute to arbitration under the provisions of Clause _____.
- E. The NHAI being dissatisfied with the recommendations of the DRB/DRE intends to challenge the same as per the legal remedies available to it and has accordingly invoked the arbitration clause by issuing notice dated _____.
- F. The Contractor has requested to the NHAI to release the aforesaid amount as advance until and subject to the final adjudication of the disputes.
- G. The NHAI has acceded to the request of the Contractor and has agreed to make the payment of the aforesaid amount subject to and on the terms appearing hereunder.

**NOW, THEREFORE, THIS MEMORANDUM OF UNDERSTANDING
WITNESSETH AS FOLLOWS:**

1. That the NHAI shall release the amount due and payable in terms of the recommendations calculated upto the date of the recommendations within _____ days from the date of submission of an unconditional and irrevocable bank guarantee and other documents to the satisfaction of the NHAI. The

release of the amount shall be without prejudice and subject to the outcome of the proceedings initiated by the NHAI challenging the recommendations. The advance amount shall carry interest @ SBI PLR +2% compounded annually.

2. That the Contractor shall extend the bank guarantee from time to time and until the matter is finally adjudicated. Failure of the Contractor to renew /extend the Bank Guarantee for the aforesaid amount and interest for a further period of 1 (one) year before 30 days of the expiry of the bank guarantee would confer an unconditional and immediate right to the NHAI to invoke the bank guarantee. Upon such invocation, the Contractor agrees and undertakes that no further claim towards interest during the entire period from the date of submission of recommendation till the final adjudication of the disputes shall be claimed and/or payable to the Contractor.
3. That if the matter is finally adjudicated in favour of the NHAI, the Contractor shall repay the entire amount alongwith interest within 30 days from the date of the final adjudication of the dispute. It is agreed by the parties that the dispute shall stand finally adjudicated for the purpose of this clause if the limitation period prescribed under the applicable law for challenging the award/judgment has expired.
4. Notwithstanding anything to the contrary, in case the Contractor fails to renew the Bank Guarantee for the initial amount plus accrued interest for a further period of 1 (one) year 30 days in advance from the date of expiry of the Bank Guarantee until the dispute is finally adjudicated between the parties or the Contractor fails to repay the entire amount along with interest within the period stipulated in para 3 above, the NHAI shall have the full liberty and absolute right to invoke the Bank Guarantee.

5. That the terms of this MOU shall be independent of the Contract and shall not be a subject matter of arbitration under the Contract. The Contractor further undertakes not to claim any interest/bank charges or any other costs and expenses in respect of the amount covered by this MOU from NHAI irrespective of the final outcome of the proceedings.
6. In case of any dispute arising out of this MOU, the Court at Delhi shall have the exclusive jurisdiction to decide over such dispute.

IN WITNESS WHEREOF the parties hereto have signed and executed this Memorandum of Understanding on the date above mentioned in the presence of witnesses:

For and on behalf of
**NATIONAL HIGHWAYS AUTHORITY
OF INDIA**

For and on behalf of
CONTRACTOR

Witnesses

1.

2.

Witnesses:

1.

2.

BANK GUARANTEE FOR ADVANCE PAYMENT.

To: National Highways Authority of India (NHAI)
G- 5 & 6, Sector -- 10, Dwarka,
New Delhi -- 110075

"CONTRACT DETAILS"

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Gentlemen:

In pursuance of the request for advance payment and subsequent to the Memorandum of Understanding dated _____ (MoU), the National Highways Authority of India (hereinafter called "Authority") requires M/s _____, (hereinafter called "the Contractor") to furnish an unconditional and irrevocable bank guarantee to guarantee proper and faithful performance of its obligations under the MoU in an amount of INR _____ /-(Rupees _____ only) with interest thereon at the rate of SBI PLR prevailing at the time of this Guarantee plus 2% compounded quarterly. The interest to be paid to the NHAI shall be reckoned from the date of advance payment by NHAI to the Contractor.

2. We, the _____ Bank, _____, having our Head Office at _____ as instructed by the Contractor, agree unconditionally and Irrevocably to guarantee as primary obligator, and not merely as a Surety, the payment to the Authority upon its mere first written demand, and without any demur, reservation, recourse, contest or protest, or without any reference to the Contractor, in the amount not exceeding INR _____ /- (Rupees _____ Only) with interest thereon at the rate of SBI PLR prevailing at the time of this Guarantee plus 2% compounded quarterly.
3. We further agree that no change or addition to or other modification of the terms of the Contract/MoU or of Works to be performed there under or of any of the Contract documents which may be made between Authority and the Contractor, shall in any way release us from any liability under this guarantee, and we hereby waive notice of any such change, addition or modification.
4. No underlying dispute, as between the Authority and the Contractor nor any pending application for interim relief or arbitration proceedings or other

legal proceedings shall constitute any ground for prevention, delay or obstruction for making payment to the Authority by the Bank and the existence of any disputes or difference or claims in arbitration or otherwise shall not constitute any ground for non-payment on this Guarantee.

5. This Guarantee shall come into force with immediate effect and shall remain in force and effect for a period of one year or until it is released earlier by the Authority pursuant to the terms of the MOU.
6. This guarantee will not be discharged due to the change in the constitution of the Bank or the Contractor.
7. The Bank undertakes not to revoke this Guarantee during its currency, except with the previous express consent of the Authority in writing, and declares that it has the power to issue this Guarantee and the undersigned has full powers to do so on behalf of the Bank.

NOTWITHSTANDING ANYTHING CONTAINED HEREIN;

- i. Our liability under this Bank Guarantee shall not exceed INR _____/- (Rupees _____ Only) plus interest thereon at the rate of SBI PLR prevailing at the time of this Guarantee plus 2% compounded quarterly.
- ii. This Bank Guarantee shall be valid up to _____ (_____).
- iii. We are liable to pay the guarantee amount or any part thereof under this Bank Guarantee immediately upon written claim or demand being served upon us on or before _____ (_____).
- iv) For the purpose of enforcing legal right/remedy in respect of the Guarantee, we agree that the Courts at Delhi shall have the exclusive jurisdiction

Yours truly,

SIGNATURE AND SEAL

Name of Bank : _____
Address : _____
Date : _____

(TO BE EXECUTED ON Rs. 100/- STAMP PAPER)

UNDERTAKING

This deed of Undertaking given on this ----- day of ----- 2009 by and on behalf of _____, having its office at ----- (hereinafter referred to as Contractor) witnesseth as under:

WHEREAS the Contractor has entered into a Contract dated ----- (hereinafter referred to as the Contract) with the National Highways Authority of India, having its office at ----- (hereinafter referred to as NHAI) for execution of -----

WHEREAS a dispute has arisen between the parties under the Contract in respect of the _____

WHEREAS the Contractor has referred the said dispute to the Disputes Review Board (DRB) for adjudication in accordance with the terms of the Contract

WHEREAS the DRB has submitted its recommendations vide letter dated _____ in terms of which the NHAI may become liable for payment of Rs. _____ to the Contractor.

WHEREAS the NHAI being dissatisfied with the recommendations of the DRB has invoked the arbitration clause by issuing notice dated _____

WHEREAS the Contractor has requested to release the aforesaid amount as advance until and subject to the final adjudication of the disputes.

WHEREAS in view of the aforesaid, NHAI has agreed to release the said amount to the Contractor as interest bearing Advance subject to compliance of certain terms and conditions to which the Contractor is agreeable.

WHEREAS in furtherance thereof, the parties have also executed a Memorandum of Understanding dated _____

IN WITNESS WHEREOF the Contractor, in consideration of NHAI releasing the aforesaid amount, with the intention of being legally bound, irrevocably undertakes and agrees as follows:

1. That to secure payment of Rs. _____ plus interest, the Contractor shall provide separate confirmed, unconditional and irrevocable Bank Guarantee from any of the Nationalized banks to be specified by NHAI on the format approved by NHAI with initial validity upto _____. The Contractor further undertakes to effect renewal of the said Bank Guarantee for a period of _____ months at a time 30 days in advance of the date of expiry of the Bank Guarantee for such periods as provided in para -2 hereinafter.
2. That the Contractor shall keep the aforesaid Bank Guarantee revalidated and in force from time to time till the dispute is finally adjudicated between the parties. The Contractor undertakes that at the time of extension/renewal of the Bank Guarantee, the Guarantee amount shall be so enhanced so as to include the amount accrued towards interest reckoned from the dated _____ of payment of the advance amount.
3. That the terms of this deed of Undertaking shall be independent of the Contract and shall not be a subject matter of arbitration under the Contract. The Contractor further undertakes not to claim any interest/bank charges or any other costs and expenses in respect of the amount covered by this Undertaking from NHAI.
4. That the Contractor further acknowledges that should the Contractor be in breach any of the terms and conditions of this Undertaking, NHAI shall be fully at liberty to invoke the bank guarantee to secure the amount covered by the said Bank Guarantee.

Signed and delivered on behalf of the Contractor under the hand of the Authorized Signatory on this----- day of ----- 2009.

For and on behalf of

AUTHORISED SIGNATORY