

No.F.1/7/2022-PPD
Government of India
Ministry of Finance
Department of Expenditure
Procurement Policy Division
264-C, North Block, New Delhi.
8th February, 2023.

OFFICE MEMORANDUM

Subject: Vivad se Vishwas II (Contractual Disputes).

In the Budget speech 2023-24, following announcement has been made by the Finance Minister:

Para 67: To settle contractual disputes of government and government undertakings, wherein arbitral award is under challenge in a court, a voluntary settlement scheme with standardized terms will be introduced. This will be done by offering graded settlement terms depending on pendency level of the dispute.

2. In this context, a draft scheme is attached as **Annexure I** for comments by the stakeholders including Ministries/ Departments/ Organisations/ Contractors/ Public etc.

3. Comments on the draft scheme may kindly be forwarded in the format attached as **Annexure-II**. The comments may kindly be sent to undersigned as well as to sanjay.aggarwal68@nic.in latest by **08.03.2023**. The copy of this OM is also available on the website of Department of Expenditure.

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08/02/2023

(Kanwalpreet)
Director (PPD)

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To

1. Secretaries of all Ministries/ Departments of Government of India. They are also requested to give wide publicity of this OM to all including industry associations etc.
2. Chief Secretaries/ Administrators of Union Territories/ National Capital Territory of Delhi.
3. CEO/ GeM.

No.F.XXXXXXXXXX
 Government of India
 Ministry of Finance
 Department of Expenditure
 Procurement Policy Division

XX.XX.2023.

DRAFT SCHEME

Subject: Vivad se Vishwas II (Contractual Disputes).

The undersigned is directed to refer to this Department's OM No. F.1/9/2021-PPD dated 29.10.2021 whereby Rule 227A was inserted into the General Financial Rules (GFRs), 2017. The Rule 227A was intended to improve liquidity in the economy especially in construction sector. Further, reference is also drawn to Department of Expenditure's (DoE's) OM No. F. 1/1/2021-PPD dated 29.10.2021, wherein specific instructions were issued (specifically para 16 of the OM) to deal with dispute cases, with a clear intention to bring finality to the litigation process. Para 16.4 of the said guidelines is reproduced below:

Statistics have shown that in cases where the arbitration award is challenged, a large majority of cases are decided in favour of the contractor. In such cases, the amount becomes payable with interest, at a rate which is often far higher than the Government's cost of funds. This results in huge financial losses to the Government. Hence, in aggregate, it is in public interest to take the risk of paying a substantial part of the award amount subject to the result of the litigation, even if in some rare cases of insolvency etc. recovery of the amount in case of success may become difficult. Instructions have been issued in this matter in the past but have not been fully complied with.

2. NITI Aayog had also established a Task Force on Conciliation Mechanism, and had circulated the final report of the Task Force through OM No. N-14070/04/2021-PPAU dated 09.12.2021. Following excerpts from the final report are highlighted:

2.1 As per the Doing Business Report 2020, World Bank's annual report on the Ease of Doing Business (EODB), India's ranking in EODB Index has shown a marginal improvement from the 77th position in 2018 to 69th in 2019. While this rise in the ranking indicates improvement on certain parameters, India still lags behind on critical aspects such as that of 'enforcing contracts', at the core of which lies the effective resolution of disputes arising out of contracts.

2.2 A consideration of even more importance with respect to contracts between Government and Private entities. The same being critical not only to facilitate an overall pro-business environment but also to attract private investment in the country, to encourage private investors to establish and continue short-term and long-term contractual association with the Government, and not be wary of it.

2.3 Recognising the extreme need and significance of an efficient and time bound dispute resolution mechanism vis-a-vis such government contracts, the Hon'ble Minister of Finance, in the Budget speech of 2021-2022 announced as under:

"To have ease of doing business for those who deal with Government or CPSEs, and carry out contracts, I propose to set up a Conciliation Mechanism and mandate its use for quick resolution of contractual disputes. This will instil confidence in private investors and contractors."

3. It is understood, however, that special efforts are required to clear the backlog of old litigation cases. Such cases are not only holding back fresh investment but are also reducing the ease of doing business with the Government. In this context, after due study of the past cases, Government has decided to bring one time settlement scheme called "**Vivad se Vishwas II (Contractual Disputes)**" to effectively settle pending disputes.

Applicability:

4. The scheme will apply to disputes where one of the parties is either the Government of India or an organisation detailed below. Apart from Ministries/ Departments, attached and subordinate bodies, notwithstanding anything contained in Rule 1 of the GFRs 2017, the scheme shall also be applicable

- a) to all Autonomous Bodies of the Government of India;
- b) to public sector banks and public sector financial institutions;
- c) to all Central Public Sector Enterprises;
- d) to Union Territories, National Capital Territory of Delhi and all agencies/ undertakings thereof; and
- e) to all organizations, where Central Government like Metro Corporations, where Government of India has shareholding of 50%; however, these bodies can opt out of the scheme at their discretion, with approval of the Board of Directors.

The above mentioned entities shall hereinafter be referred to as "procuring entities." The other party lodging claim against the procuring entity shall be referred to as contractor hereinafter.

Disputes, where claims are raised against procuring entities as above along with some other party (State Government or the private party), shall **not** be eligible under the scheme.

5. Disputes having only financial claims against the procuring entities will be settled through this scheme. In case the dispute relates to or claim seeks specific performance of contract (either fully or partially), then such disputes will not be eligible for settlement through this scheme.

6. Only disputes involving procuring entities where the claim for proceedings (either to Court or for Arbitration or Conciliation) were submitted by the contractor on or before 30.09.2022 and Arbitral Tribunal/ Committee for Conciliation etc. for the specific case has been already notified by the procuring entity shall be eligible for settlement through this scheme. It is clarified that even in these cases, counter claims submitted by the procuring entity upto 31.12.2022 will be considered.

7. The Scheme will be applicable to all contractors/ suppliers who wish to participate. In case Central Public Sector Enterprises (CPSEs) etc. are the contractors/ suppliers in a particular contract, they are also eligible to submit their claims under the scheme.

Amount payable to the Contractor

8. The settlement amount that shall be offered to Contractors for various categories of disputes is as under:

Sl. No.	Status of dispute	Settlement Amount
(a)	Court Order passed. Award with net amount payable to the contractor.	80% of the net "Amount awarded by the court".

	<p>Note:</p> <ul style="list-style-type: none"> i. Case may or may not be under further appeal. ii. Court order will include the cases where the parties have approached the courts directly or approached the court subsequent to arbitral award. 	<p>Note:</p> <ol style="list-style-type: none"> 1. In case, court has directed 'X' to be paid to contractor and 'Y' to be paid to procuring entity by the contractor, then the amount payable in such will be 80% of (X-Y) 2. In case court upheld the Arbitral Award, fully or partially, as the case may be, interest as stipulated in the Arbitral award will also be included till the date of the court order in "Amount awarded by court." 3. In case no payment is made or only partial payment is made within 30 days of the date of award by the court, additional simple interest at the rate of 6% per annum will be payable for time period beyond such 30 days till date of acceptance of claim under the scheme by the procuring entity. It is further clarified that such 6% interest will be paid only on 80% of the net amount awarded by the court minus payments already made
(b)	<p>Arbitral Award passed. Award with net amount payable to the contractor.</p> <p>Note: Case may or may not be under appeal before a Court.</p>	<p>60% of the amount awarded by the Arbitral Tribunal. The award amount shall include any interest awarded by the tribunal till the date of award.</p> <p>Note: However, in case there is delay in payment of the award amount, interest will be payable at simple interest of 6% per annum for the award amount not paid.</p>
(c)	<p>On-going litigation (Either in Court where no arbitration was done; OR before Arbitral Tribunal OR ongoing conciliation including dispute resolution board (DRB) etc.)</p> <p>Note:</p>	<p>30% of the net claim amount (i.e. claims by the contractors minus counter-claim by the procuring entity) excluding interest of either of the party.</p>

	<ul style="list-style-type: none"> (i) Disputes arising out of contracts in which physical activity has been stopped (i.e. either 100% physical progress achieved or no further physical progress against the same contract is anticipated) shall only be eligible for settlement. (ii) Terminated contracts will also be eligible. (iii) The decision of the procuring entity shall be final in this regard. 	
(d)	<p>On-going litigation (Either in Court where no arbitration was done; OR before Arbitral Tribunal OR ongoing conciliation)</p> <p>Note: Disputes arising out of contracts in which physical activity is ongoing.</p>	20% of the net claim amount (i.e. claims by the contractors minus counter-claim by the procuring entity) excluding interest of either of the party.

Submission of claims and Time periods

9. Government e-Marketplace (GeM) shall provide an online portal for the purpose of settlement through this scheme. The broad functionality of the portal shall be as follows:

Step 1: GeM shall enable the contractor (through its authorized personnel) to register on the portal.

Step 2: The registered contractor shall list out the eligible disputes under this scheme on the portal. The list of the procuring entities shall be available only through a drop down menu, which should be changed only with the approval of DoE. The details of the dispute should contain atleast the following details: contract number, contracting authority, paying authority, claim amount, counter claim amount and the status of the dispute.

Note: The contractor may, if he so desires, reduce the claim amount, while submitting his dispute for settlement on the portal, from what was submitted earlier, i.e. before a court or Arbitral Tribunal or for conciliation.

Step 3: GeM portal shall intimate (through email) the nodal officers of each procuring entity to verify/ settle the dispute under this scheme. The nodal officer should also be able to see the details of such requests for settlement on his dashboard designed specifically for this scheme by GeM.

Step 4: The nodal officer of the procuring entity shall, verify the dispute as per system prescribed by its organisation (including claim/ counter-claim amount and will make necessary corrections, if any). Each entry shall be dispute specific i.e. there can be more than one claim or counter claim against a dispute. However, there can be more than one dispute under same contract, which shall be entered separately.

Notes:

(a) *Net claim amount will be calculated by considering all claims/ disputes in the particular contract.*

(b) In case of ongoing contracts under para 8(c) and 8(d) all disputes in a particular contract where contractor has submitted claims upto 30.09.2022 are to be considered together.

(c) Each contract will be dealt separately for the purpose of this scheme.

Step 5: System shall evaluate the settlement amount due, as per the above formula and offer it to contractor for acceptance. The contractor will be required to accept the offer within the prescribed time period. If the contractor accepts the offer Step 6 shall follow else Step 7 shall follow. Time available for contractor to respond to the offer shall be 30 (thirty) calendar days only (Calendar day ending at midnight). There shall be no option for any relaxation, including claims of GeM portal not working on last day, etc.

Step 6: If contractor agrees, a settlement agreement (a model agreement is at Annexure I which the procuring entities are free to appropriately modify, without changing core terms, based on their past experience, local needs etc.) shall be digitally signed by both the parties (nodal officer of the procuring entity and authorised personnel of the contractor) through the GeM portal. The settlement agreement shall have the same meaning and consequence as the settlement agreement consequent to successful conciliation as per The Arbitration and Conciliation Act, 1996. The settlement agreement shall be signed only by the parties without any need for attestation of any conciliator. Other than digital agreement, agreements on stamp paper can also be uploaded.

The settlement agreement shall clearly state that even though the dispute is finally settled, the settlement does not decide on any issue, either of law or of fact, under dispute. Further, it should be clearly stated and implied from the settlement agreement that as a process of settlement the parties shall withdraw all litigation/ arbitral proceeding/ conciliation proceeding pending on this dispute(s), willingly, without duress and after fully understanding the consequences.

The Settlement Agreement shall contain a statement to the effect that each of the persons signing thereto (i) is fully authorized by the respective Party he/ she represents, (ii) has fully understood the contents of the same, (iii) is signing on the same out of complete free will and consent, without any pressure, undue influence, and (iv) the same shall be final and binding on and enforceable against the Party and the persons claiming under/ through him.

The contractor will be given 30 days to file application for withdrawal of the case before the court/ Arbitral Tribunal etc. as the case may be. However, only after contractor uploads the supporting document that court/ Arbitral Tribunal has permitted to withdraw the case, the payments will be made by the procuring entities.

Step 7: If the contractor does not accept the offer: the ongoing litigation/ conciliation process may continue.

Miscellaneous conditions:

10. The last date for the contractor to upload the dispute for settlement on GeM shall be XX.XX.XXXX (three months from the date of notification of the scheme).

11. In case where the total claim amount (claim and counter-claim amount added together) exceeds Rs 500 crore, the procuring entities will have an option not to accept the settlement request of the contractor. However, wherever it is decided not to accept the request for settlement from the contractor, the reasons for the same shall be recorded on file by the procuring entities and approval of the Secretary concerned in case of Ministries/ Departments or Chief Executive Officer in case of CPSEs etc shall be obtained. The decision not to accept the request for settlement should not be taken in a routine manner but only when the case genuinely merits going for the appeal and there are high chances of winning in the court/ higher court. The decision should be based on success rate of appealing against court/ arbitration awards in the past. A special committee may be set up to review the case, before it is decided not to accept the request for settlement. The committee or other authority deciding on the matter shall clarify that it has considered both legal merits and the practical chances of success and after considering the cost of, and arising through, litigation/ appeal/ further litigation as the case may be, it is satisfied that such litigation/ appeal/ further litigation cost is likely to be financially beneficial compared to accepting the settlement. In this regard para 16 of the General Instructions on Procurement and Project Management, issued by DoE vide OM No. F.1/1/2021-PPD dated 29.10.2021 may be specifically referred.

12. The scheme shall apply only for cases involving domestic arbitration and cases under international arbitration are not eligible to be settled under this scheme.

13. DoE may, from time to time, issue such directions or orders under the scheme, as it may deem fit, which may include giving clarifications or further directions/ instructions for implementation of the scheme and to remove difficulties arising in giving effect to the provisions of this scheme.

Annexure

Settlement Agreement between (procuring entity) and Contractor under section 73(2) of the Arbitration and Conciliation Act, 1996.

This agreement is entered into this (date) day of (year) ("Settlement Agreement") between (procuring entity) (hereinafter referred to as "procuring entity" which expression shall, unless, repugnant to the context or meaning thereof, include its legal successor, executors, permitted assignees) of the one part and

M/s.....having its registered office at.....hereinafter referred to as the "CONTRACTOR" which expression shall unless repugnant to the context or meaning thereof, include its legal successor, executors, permitted assignees) of the other part.

WHEREAS:

PROCURING ENTITY awarded a contract for.....(hereinafter referred as "Contract").

Dispute arose between PROCURING ENTITY and the CONTRACTOR in the contract The claims of the contractor are as follows:

- i. (amount), (interest rate), (date of interest)
- ii.

Counter claims are as follows

- i. (amount), (interest rate), (date of interest)
- ii.

NOW THIS SETTLEMENT AGREEMENT WITNESSETH AS BELOW :

1. It is agreed between the parties to this Settlement Agreement that PROCURING ENTITY shall pay Rs...../- (Rupees in words.....) inclusive of taxes , if any to the CONTRACTOR as per full and final settlement of all the disputes pertaining to the above mentioned contract.

Thus total amount of Rs...../- will be payable by PROCURING ENTITY to the CONTRACTOR within one month from the date of execution of this Settlement Agreement by the Parties towards full and final settlement of all its claim and disputes whatsoever in reference to the said Contract.

2. That both parties hereby agree that all differences arisen out of the said dispute now stand resolved and fully settled on payment of the sum stipulated in para no. 1 above, and no dispute of any nature whatsoever shall survive. Accordingly, subject to aforesaid both PROCURING ENTITY and CONTRACTOR agree that they shall neither raise any dispute nor they shall initiate any proceedings, legal or otherwise against each other with reference to the aforesaid dispute.
3. That this Settlement Agreement shall continue perpetually and shall be binding upon the parties, their successors and assignees.
4. The Settlement Agreement constitutes the entire agreement and supersedes all prior understandings and writings between PROCURING ENTITY and CONTRACTOR hereto concerning the disputes and/or subject matter of this Settlement Agreement.

5. PROCURING ENTITY and CONTRACTOR hereby agree that this Settlement Agreement shall have same status and effect as that of an Arbitral Award on agreed terms upon the substance of the dispute in accordance with Section 74 of the Arbitration and Conciliation Act, 1996 and shall be capable of execution as such.
6. PROCURING ENTITY and CONTRACTOR hereby agree and undertake that in terms of Section 75 of the Arbitration and Conciliation Act, 1996; they shall keep confidential all matters relating to the conciliation proceedings. They also agree that the confidentiality shall extend also to the Settlement Agreement, except where its disclosure is necessary for purposes of implementation and enforcement.
7. The two identical counterparts of the Settlement Agreement are hereby executed by and between PROCURING ENTITY and CONTRACTOR through their authorised signatories and with understanding that each shall be deemed original for all purposes.
8. In view of the aforesaid , all the obligations between the parties stand discharged fully to the satisfaction of both .
9. The parties agree and understand that even though the dispute is finally settled the settlement agreement does not decide on any issue, either of law or of fact, under dispute. This is a settlement agreement under the one time dispute settlement scheme of the Government of India, without consideration of the factual or legal issues at stake.
10. The parties agree and understand that as a process of settlement the parties shall withdraw all litigations/ arbitral proceedings/ conciliation proceedings pending on the matters, willingly, without duress and after fully understanding the consequences.
11. Each of the persons signing this settlement agreement is fully authorized to do so, has fully understood the contents of the same and is signing on the same out of complete free will and consent, without any pressure and undue influence.

IN WITNESS WHEREOF, the parties here to have hereunto set their respective hands the day and year first above written.

(Signed for and behalf of PROCURING ENTITY)

Name :

Designation :

(Signed for and on behalf of.....)

Name :

Designation :

Annexure-II

Draft Scheme for Vivad se Vishwas II (Contractual Disputes).

Name of Organisation/ Person:		Ref No and Date	
Name and Designation of contact person:		Phone/ Email:	