

Office Memorandum

Subject: Vivad se Vishwas II (Contractual Disputes).

The undersigned is directed to refer to Rule 227A of the General Financial Rules (GFRs), 2017 and Department of Expenditure's (DoE's) "General Instructions on Procurement and Project Management" containing instructions to deal with dispute cases. Para 16.4 of the "General Instructions" 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. Following excerpt from the final report is highlighted:

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.

3. It is understood, however, that more efforts are required to clear the backlog of old litigation cases. Such cases are holding back fresh investment, reducing the ease of doing business with the Government, tying up scarce working capital and indirectly reducing competition for newly floated tenders. In this context, after due study of the experience in past cases, Government has decided to implement a one time settlement scheme called "**Vivad se Vishwas II (Contractual Disputes)**" to effectively settle pending disputes.

Applicability:

4. The scheme will apply to contractual disputes where one of the parties is either the Government of India and/ 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 without legislature and all agencies/ undertakings thereof; and
- e) to all organisations, like Metro Rail Corporations, where Government of India has shareholding of 50%; however, these organisations can opt out of the scheme at their discretion, with approval of the Board of Directors.

The above mentioned organisations shall hereinafter be referred to as “procuring entities.” The other party in dispute with the procuring entity shall be referred to as contractor(s) hereinafter.

5. Disputes where the award by court/ Arbitral Tribunal (AT) is only for monetary value will be eligible for settlement under this scheme. In case the award stipulates specific performance of contract (either fully or partially); such awards will not be eligible for settlement through this scheme.

6. Cases shall satisfy following criteria to be eligible for settlement under this scheme:

Status of dispute	The award shall have been issued upto the following date
Arbitral Award passed	31.01.2023.
Court Award passed	30.04.2023.

7. The scheme will be applicable only to those contractors who wish to participate in the scheme. Central Public Sector Enterprises (CPSEs) etc., who are contractors to the procuring entities as listed above, are also eligible to submit their claims under this scheme.

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

9. The scheme shall be applicable to all kinds of procurement including procurement of goods, services and works. The scheme is also applicable to all “earning contracts” (i.e. contracts where government receives money in exchange for goods, services, rights, etc.) as well as contracts under Public Private Partnership (PPP) arrangements.

Amount payable under the scheme

10. 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 Award passed on or before 30.04.2023. Notes:	85% of the net amount

	<p>i. Case may or may not be under further appeal.</p> <p>ii. Court award will include the cases where the parties have approached the courts directly or approached the court subsequent to arbitral award (under any provision of the Indian Arbitration and Conciliation Act, 1996). However, Interim Orders under Section 9 of the Indian Arbitration and Conciliation Act, 1996, shall not be considered as an award eligible for settlement under this scheme.</p>	<p>awarded/ upheld by the court or 85% of the claim amount lodged by the contractor under this scheme, whichever is lower.</p>
(b)	<p>Arbitral Award passed on or before 31.01.2023.</p> <p>Notes:</p> <p>i. Case may or may not be under challenge/ appeal before a Court.</p> <p>ii. Arbitral Award passed by the Micro and Small Enterprises Facilitation Council (MSEFC) or Arbitral Tribunal appointed on reference by MSEFC under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006, shall also be included under this scheme.</p> <p>iii. However, Interim Orders of the Arbitral Tribunal under any provision of the Indian Arbitration and Conciliation Act, 1996, shall not be considered as an award eligible for settlement under this scheme.</p>	<p>65% of the net amount awarded/ upheld by the court or 65% of the claim amount lodged by the contractor under this scheme, whichever is lower.</p>
Notes for both (a) and (b) as above	<p>1. In case, the award directs 'X' to be paid to contractor and 'Y' to be paid to procuring entity by the contractor, then the net amount awarded shall be (X-Y) and the amount payable under this scheme will be 85% or 65%, as the case may be, of (X-Y).</p> <p>2. In case no payment or only partial payment has been made as per the award within the stipulated time given in the award itself (time should be taken as 30 days in case there is no time stipulated in the award for making payments), simple interest at the rate of 9% per annum will be payable on 85%/ 65% of the net amount awarded, as the case may be, minus the amount already paid, if any, for time period beyond such stipulated period till date of acknowledgement email, as specified in Step 3 of para 14, by the procuring entity.</p> <p>3. It is further clarified that such 9% interest will be paid only on the net amount payable under this scheme after deducting the payments already made.</p> <p>4. Even if award mentions any rate of interest (may be</p>	

below or above 9%) for payments made after the stipulated period for making such payments, still interest payable under this scheme shall only be 9% simple interest per annum.

Illustration 1:

<i>Award</i>	<i>Rs. 1,00,000/- in favour of contractor plus interest as indicated below.</i>
<i>Interest</i>	<p><i>Payable as per award:</i></p> <ul style="list-style-type: none"> <i>i. 10% till date of award, from a date mentioned in the award.</i> <i>ii. Payment to be made within 60 days of the award (stipulated period = 60 days from the date of award).</i> <i>iii. 12% for the period for which payment is delayed beyond the stipulated period.</i> <p><i>Payments including modalities under this scheme will be as under:</i></p> <ul style="list-style-type: none"> <i>i. 10% till date of award, from a date mentioned in the award. (i.e. till the date of award calculation of amount payable, including interest, shall be as per the award).</i> <i>ii. No interest is to be paid for the period stipulated for making payments in the award (60 days in the current case).</i> <i>iii. 9% for the period beyond 60 days in case of delayed payments on 85% of court award i.e. Rs. 85,000/-.</i>

11. In case the award directs payment of amount to the procuring entity, such awards shall also be eligible to be considered under the scheme, if opted by contractor. To clarify, in such cases, the contractor in order to bring finality to the case, may voluntarily offer to close the dispute on same terms and conditions as laid down in this scheme by paying the amount to the procuring entity, 85% or 65%, of the net award amount, as due under para 10(a) or 10(b) above and notes there-under, whichever may be applicable in the case.

12. Wherever the procuring entity has deposited some amount with a court before filing an appeal/ challenge, the interest payable on the amount due, as per para 10(a) or 10(b), shall be on the amount, payable under this scheme, without any reduction for the amount deposited with the court.

It shall be the obligation of the procuring entity to take prompt action to ensure release of such deposited amount at the earliest after the settlement under the scheme is accepted.

13. As per Rule 227A of the General Financial Rules (GFRs), 2017, and earlier guidelines, in case the procuring entities challenge an arbitral award, 75% of the award amount has to be paid to the contractor, against a Bank guarantee (BG) of equivalent amount, before filing of the challenge in the court. Such amounts paid to the contractor shall be adjusted with the amounts due under the present scheme. However, no reimbursement of BG charges will be made to the contractor.

Illustration 2:

Assuming Rs. 10,000 is to be paid to the contractor by the procuring entity as per para 10(a) or 10(b) above, as the case may be.

The BG available with the procuring entity under Rule 227A (equivalent to the value already paid by the procuring entity to the contractor) could be of a value either more or less than Rs. 10,000.

Such cases will be dealt as below:

(a) In case BG available is less than Rs. 10,000/- (say Rs. 6,000/-). In such a case, procuring entity will pay Rs. 10,000 – Rs. 6,000 = Rs. 4,000 to the contractor and BG will be returned to the contractor. It may be noted that 9% interest, as per para 10, will be paid only on Rs. 4,000/-. No reimbursement of BG charges will be paid to the contractor.

(b) In case BG available is more than Rs. 10,000/- (say Rs. 15,000/-). In such a case, contractor will be required to deposit Rs. 15,000 – Rs. 10,000 = Rs. 5,000 with the procuring entity. It may be noted that 9% interest will be paid on Rs. 5,000/- by the contractor. Only thereafter BG will be returned to the contractor. No reimbursement of BG charges will be paid to the contractor.

Submission of claims and Time periods

14. Contractors should submit their claims through Government e-Marketplace (GeM), for which GeM will provide a dedicated link on their portal for implementation of this scheme. The link/ portal will provide functionality to contractors to register their claims through their authorized personnel. For non- GeM contracts of Ministry of Railways, contractors should register their claims on IREPS (www.ireps.gov.in). The information regarding contracts for which claim is to be lodged on IREPS will be provided on GeM as well as IREPS. The broad features of these portals are as under:

Step 1: The registered contractor shall list out the eligible disputes which it is willing to settle under this scheme, on the portal. The list of the procuring entities will be available through drop down menu on the portal. The details of the dispute should contain atleast the following: contract number, procuring entity/ contracting authority, paying authority, net award amount (as detailed in para 10(a) and 10(b)), claim amount with details thereof and the status of the dispute.

Step 2: GeM shall intimate (through dashboard) such details to the procuring entities to verify the dispute under this scheme. The procuring entity shall verify the claim details and update the same, if any. Each entry on the portal shall be dispute specific. There can be more than one dispute under same contract, which shall be claimed, under this scheme, separately.

Step 3: The procuring entities shall evaluate the settlement amount due, as per this scheme and offer it to contractor for acceptance normally within two weeks of receipt of claims on the portal. The contractor will be required to accept the offer within the prescribed time period. If the contractor accepts the offer Step 4 shall follow else Step 5 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. However, the procuring entity shall have the authority to amend/ withdraw the offer, under this scheme, at any time before the acceptance by the contractor.

Immediately on acceptance of the settlement offer under the scheme, an acknowledgement through email, of the parties reaching such settlement, shall be automatically generated and sent to both the parties by the portal.

Step 4: The contractor will be given 45 days (or longer period if permitted by the procuring entity), from the date of the acknowledgement email as indicated in Step 3 above, to file application for withdrawal of the case before the court. However, only after the contractor uploads the document indicating that court has permitted to withdraw the case, if applicable, should the settlement agreement under this scheme be executed and the payments made by the procuring entities.

In case the procuring entity has to withdraw the case from court, the procuring entity shall also file an application for such withdrawal within 45 days. The settlement agreement shall be executed within 30 days of submission of application of withdrawal of case from the court in such cases, without waiting for formal permission of the court regarding withdrawal of the case.

If the contractor agrees to the settlement under this scheme, 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.) may be digitally signed, preferably in pdf format, by both the parties. 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. Stamp duty for the settlement agreement, in all cases under this scheme, shall be paid by the contractor.

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 pending related to this dispute, 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 settlement agreement, (iii) is signing on the settlement agreement out of complete free will and consent, without any pressure, undue influence, and (iv) the settlement agreement shall be final and binding on and enforceable against the Party and the persons claiming under/ through him.

The procuring entity or the contractor, as the case may be, shall make payments within 30 days of the execution of the settlement agreement.

Step 5: If the contractor does not accept the offer: the ongoing litigation process may continue.

Other Provisions:

15. The status of dispute shall not change, in case appropriate court passes an award on the dispute after 30.04.2023 and before settlement under this scheme. The only exception to this provision will be the cases discussed in para 16 as below.

Illustration 3:

An arbitral award has been passed in a dispute on 15.02.2022 (a date prior to 31.01.2023). Further, the said award, as on 31.01.2023, is under consideration of the appropriate court, through an appeal or challenge. The court has given/ upheld the same award on 03.05.2023 (a date after 30.04.2023). Even in such cases, only 65% of the award as per Para 10(b) will be payable under the scheme.

16. Procuring entities should continue to closely monitor any court awards, in all cases where claim, under this scheme, has been already lodged by the contractor, even subsequent to 31.01.2023 till the date of issue of acknowledgement email, as specified in Step 3 of para 14, above. Some court awards could be passed between 31.01.2023 and 30.04.2023, in which case status of the case will be as per the court award only.

However, there could be some cases where court awards may be in favour of the procuring entity i.e. net payable amount to the contractor, under this scheme, may decrease, if the court award published after 30.04.2023 is taken into consideration. In all such cases procuring entities should immediately send revised offers to the contractor, as per the same procedure specified in Step 3 of para 14, above. The contractor shall be given 30 days to consider the revised offer (from the date of revised offer) made by the procuring entity. However, in no case, revised offer is to be sent by the procuring entity after issue of the acknowledgement email. In case acknowledgement email has been issued, settlement agreement shall only be in terms of the offer of the procuring entity

already accepted by the contractor and any court order issued subsequent to the date of acknowledgement email shall be ignored.

Illustration 4: (Only for the purpose of principal amount payable under this scheme. The calculation for interest shall apply separately.)

Case A
<i>Net amount payable to contractor under this scheme based on status of case as on relevant cut-off date mentioned in para 6 is Rs. 1 cr. and procuring entity has not yet issued any offer to the contractor.</i>
<i>Amount payable as per the scheme on the basis of court award published on 30.05.2023 is Rs. 50 lakh</i>
<i>In such a case, procuring entity will make an offer of only Rs. 50 lakh to contractor.</i>
Case B
<i>Net amount payable to contractor under this scheme based on status of case as on relevant cut-off date mentioned in para 6 is Rs. 1 cr. and procuring entity has issued an offer to contractor of Rs. 1 cr. However, the contractor has not yet accepted the offer.</i>
<i>Amount payable as per the scheme on the basis of court award published on 30.05.2023 is Rs. 50 lakh</i>
<i>In such a case, procuring entity will modify the offer to Rs. 50 lakh to contractor.</i>
Case C
<i>Net amount payable to contractor under this scheme based on status of case as on relevant cut-off date mentioned in para 6 is Rs. 1 cr. and procuring entity has issued an offer to contractor of Rs. 1 cr. The contractor has accepted the offer resulting in automatic issue of the acknowledgement email by the portal.</i>
<i>Amount payable as per the scheme on the basis of court award published on 30.05.2023 is Rs. 50 lakh</i>
<i>In such a case, procuring entity will not make any changes in the settlement amount of Rs. 1 cr., which has been already agreed by the procuring entity as well as the contractor.</i>

17. The date of commencement of the scheme shall be 15.07.2023 and claims can be submitted by 31.10.2023.

18. In all cases where the claim amount is Rs. 500 crore or less, procuring entities will have to accept the claim, if the claim is in compliance with these guidelines.

19. Only in case the claim amount, by the contractor, under this scheme exceeds Rs 500 crore, the procuring entities will have an option not to accept the settlement request of the contractor. Wherever, it is decided by the procuring entities not to accept the claim of contractors, the same should normally be communicated to the contractor within 60 days of receipt of claim on portal (unlike two weeks for evaluation of the settlement amount under Step 3 of para 14 above).

Note: The contractor may, if he so desires, reduce the amount claimed, under this scheme, from the award amount while submitting his dispute for settlement on the portal under this scheme.

Illustration 5:

Net award amount payable to the contractor = Rs. 510 cr.

Claim amount lodged by the contractor under this scheme = Rs. 490 cr.


In such cases procuring entities will have to accept the same, as the claim amount is less than Rs. 500 cr., if the claim is otherwise in compliance with these guidelines and para 19 will not be applicable in such case.

20. However, wherever under paragraph 19, in respect of claims exceeding Rs. 500 crore, 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.

21. In case settlement could not be achieved for any reason under this scheme, any offer, including reduction of claim amount, by any of the parties during the settlement process under this scheme, shall not be quoted in any further litigation.

22. It may be possible that a Public Authority may have used a procuring entity to make procurement on their behalf. For example, a University (public authority in this case) gets a project executed through Central Public Works Department (procuring entity in this case). In such a case:

- i. The procuring entity shall be the competent authority to accept the settlement under the scheme including the cases where the award amount is more than Rs. 500 cr (refer paras 18 to 20 above)
 - ii. Budget for meeting the settlement agreement shall be provided by the public authority which got the project executed through procuring entity.
 - iii. The public authority and the procuring entity may also be the same in some cases.
23. It is clarified that the scheme does not apply to cases where parties, including the procuring entities, have already reached a settlement through conciliation agreement. However, in case conciliation process is underway even after such award, eligible for settlement under this scheme, either by the Arbitral Tribunal or the court, then such conciliation process should be kept in abeyance and the process provided in this scheme can be followed. In case no settlement is reached under this scheme, the conciliation, as prior to the scheme, can continue.
24. 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.


29/05/2023
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Director(PPD)

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To

1. Secretaries of all Ministries/ Departments of Government of India for information and necessary action. They are also requested to inform these provisions to all procuring entities under their administrative control.
2. Secretary, Department of Public Enterprises with a request to reiterate these orders in respect to public enterprises.
3. Secretary, Department of Financial Services with a request to reiterate these orders in respect to public sector financial institutions.
4. Chief Secretaries/ Administrators of Union Territories without legislature.
5. CEO/ GeM.

Copy to: Chief Secretaries of all State Governments and Union Territories (UTs) with legislature with a request to consider adoption of this scheme in their States/ UTs for which GeM will make necessary arrangements, if requested.

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 above mentioned contract. The dispute has been considered by _____ Court/ Arbitral Tribunal and the award was issued vide _____ dated _____.Theaward directs as follows:

- A. Amounts due from PROCURING ENTITY to CONTRACTOR
 - i. (amount), (interest rate), (date of interest)
 - ii.
- B. Amounts due from CONTRACTOR to PROCURING ENTITY
 - 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 mentioned hereinabove 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 the claims and disputes set out hereinabove in reference to the said contract.

2. That both parties hereby agree that all differences arisen out of the said dispute mentioned hereinabove 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. 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.
9. 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.
10. 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: