

National Highways Authority of India

Plot No. G 5 & 6, Sector 10, Dwarka, New Delhi - 110075

NHAI/ Policy Guidelines/ Conciliation & Settlement of Contractual Disputes/ 2017

No. 2.1.22 / 2017 Dated, the 2nd June, 2017

Subject: Establishment of a Conciliation & Settlement Mechanism for Contractual Disputes under the contract agreements with the Contractors/ Concessionaires/ Consultants in NHAI - Panel of Independent Experts and Constitution of Conciliation Committees - regarding.

1. Objective:

The NHAI has been entering into various contract agreements with the Contractors/ Concessionaires/ Consultants for implementing the Highway projects in various modes [Item Rate, BOT(Toll), BOT(Annuity), Hybrid-Annuity, EPC, OMT, etc]. Several disputes have been arising under these contract agreements. Presently, there are 144 references before the Courts on contractual disputes/ claims involving a total claim amount of nearly Rs. 5,700 Crore. Further, 132 references have been made to various Arbitral Tribunals entailing a total claim amount of Rs. 38,000 Crore. Thus the problem of pending disputes and claims has assumed serious proportions. The associated legal costs and diversion of manpower of both parties are enormous. The early resolution/ settlement of claims, preferably through an out-of-court settlement process, is in the interest of all the stakeholders.

2. Background:

2.1 An alternate dispute resolution mechanism was established in the NHAI vide office order dated 03.12.2012 of the Contract Management Cell (CMC), with the approval of NHAI Board in its meeting held on 09.11.2012, for one-time settlement of pending claims in the item rate contracts. Further, as approved by the NHAI Board in its meeting held on 05.04.2016, the settlement mechanism was extended to other forms of contracts [BOT(Toll)/ BOT(Annuity)/ OMT/ Hybrid-Annuity/ O&M/ Toll, etc.] as well. This mechanism involves three steps: viz. (i) initial negotiations by a 3-CGM Committee, (ii) recommendations of the Independent Settlement Advisory Committee (ISAC), and (iii) approval of the Executive Committee (EC)/ Board of NHAI.

2.2 As decided by the Board of NHAI in its meeting held on 16.02.2015, the Executive Committee (EC) was authorised to decide cases involving settlement up to Rs.

50.00 Crore per contract. It was also decided vide Policy Circular dated 27.11.2015 (Admn/Fin-164/2015) that the cases which could not be finalized after initial negotiations by the 3-CGM Committee would also be referred to ISAC for their review based on a discussion paper prepared by the 3-CGM Committee. So far, claims for a total amount of Rs. 18,743 Crore in 111 number of contract packages have been settled for Rs.1,713 Crore through this mechanism.

- 2.3 There is also a provision in the BOT/ EPC/ OMT Projects to refer a dispute to the Chairman of NHAI and the Chairman of Board of Directors of the Concessionaire for amicable settlement. Further, based on a decision of the Executive Committee, a CGM-level committee consisting of concerned CGM(T), one CGM(T) nominated by the Member concerned and CGM(F)/ GM(F) nominated by Member (Finance) was constituted vide Office Order dated 15.01.2013 of the Contract Management Cell (CMC) to examine such cases. This Committee, after weighing all pros and cons, was required to give detailed reasoning for settling the dispute through conciliation or adopt the course of arbitration. The recommendations of this Committee for conciliation of disputes have to be placed before the Executive Committee through concerned Member for a decision.
- 2.4 The Cabinet Committee on Economic Affairs (CCEA) took certain decisions in its meeting held on 31.08.2016 for revival of the construction sector. These decisions were communicated by the NITI Aayog vide its two OMs No. 14070/14/2016-PPPAU dated 5th September 2016. One of these OMs titled "*Initiatives on the measures for revival of the Construction Sector - Reg.*" (copy enclosed at Annexure-2) required all the concerned Departments/ Ministries/ PSUs to expeditiously examine the initiatives contained therein and take action for their implementation. The initiatives, inter alia, include establishing a system of conciliation of disputes for amicable settlement through appointment of Conciliation Committees comprising of independent experts in order to ensure speedy disposal of pending or new cases. Recourse to such conciliation is open before, during or after the arbitration proceedings. A provision to this effect would also need to be made in the Contract Agreements in future as a mechanism for resolution of disputes.

3. The Standing Operating Procedure (SoP)

In view of the aforesaid, the procedure for conciliation/ amicable settlement of disputes is revised as under with the approval of Board of NHAI in its meeting held on 19.05.2017 in order to ensure speedy disposal of pending or new cases of

disputes in all forms of contracts [Item Rate, DBFOT (Toll/Annuity/Hybrid Annuity), EPC, OMT, O&M, Toll, Consultancy Contract etc]. The revised procedure given hereunder will supersede all the previous procedures/ circulars on the subject.

- 3.1 On receipt of a reference from the Contractor (reference to Contractor made herein includes Concessionaire/ Consultant) as per provision in the agreement for conciliation of disputes through a meeting at the level of the Chairman, NHAI and the Chairman of Board of Directors of the Concessionaire, the concerned Technical Division shall send a response **within 7 working days** thereby inviting the Concessionaire/ Contractor/ Consultant to depute a team of their representatives to interact with the Contract Management Division (**CMD**) of NHAI. The template response is attached herewith as **Annexure-3**.
- 3.2 The Contract Management Division will obtain and examine the correspondence/ documents of either parties relating to the disputes, preferably **within 30 days**, hold discussions with the team of the Concessionaire/ Contractor/ Consultant and the Technical Division to crystallise the issues; prepare the agenda containing the gist on each dispute; fix up a meeting of both the Chairmen and circulate the meeting notice and the agenda.
- 3.3 Thereafter, both the Chairmen may meet on the date fixed, discuss the agenda and explore the possibilities of conciliation/settlement. The conciliation may be successful or partially successful or may fail. Whatever be the outcome, the CMD will issue the minutes with the approval of Chairman NHAI after the meeting, clearly indicating the outcome/ conclusions along with the reasons on each dispute/ claim.
- 3.4 In the event of the conciliation between the parties at the level of the Chairman, NHAI and the Chairman of the Concessionaire/ Construction Agency being successful, the Contract Management Division shall prepare the agenda for the Executive Committee/ Board of NHAI as per the internal delegations of the NHAI.
- 3.5 In cases, where the conciliation is partially successful or failed, the NHAI shall offer the other party to refer the matter to the Conciliation Committee of Independent Experts as the conciliation is intended to be one consolidated package of settlement. Subject to consent of the other party, the matter would be referred to a Conciliation & Settlement Committee established under these guidelines.

4. **Panel of Members for Constitution of the Conciliation Committee of Independent Experts:**

4.1 Following the decisions of the Cabinet Committee on Economic Affairs (CCEA) and the provisions contained in the Arbitration & Conciliation Act 1996, it has been decided to constitute a panel of Independent Experts comprising of the following:

Sr. No.	Names of Experts	Brief particulars of the Expert
(i)	Sh. Pradeep Kumar, IAS (Rtd.)	Former Chief Vigilance Commissioner (CVC), ex-Secretary to Government of India and ex-Chairman, NHAI;
(ii)	Justice (Rtd.) Sh. I.P. Vasishth	Retired as a Judge of the Allahabad High Court and former Lokayukta, Haryana – as Legal Expert
(iii)	Sh. Vivek Mehrotra, IAS (Rtd.)	Served as Secretary to Government of India and is an Expert in Public Finance.
(iv)	Sh. Jagdish Khattar,	Formerly MD, Maruti Suzuki India, and Industry representative
(v)	Sh. V. V. Ranganathan	Formerly, a Senior Partner with one of the big four accounting firms, as Industry representative.
(vi)	Sh. A.V. Sinha, Rtd. DG, MoRTH	Technical/ Engineering Expert

4.2 Depending upon the response to this mechanism, the work load and requirements for speedy settlement of disputes, the panel may be expanded further with the approval of the competent authority.

4.3 Constitution of Conciliation and Settlement Committees:- Following two Committees are constituted for the purpose:

Conciliation & Settlement Committee -1		Conciliation & Settlement Committee-2	
Sr. No.	Names of the Members	Sr. No.	Names of Members
1.	Sh. Pradeep Kumar	1.	Justice I.P. Vasishtha (Rtd.)
2.	Sh. Jagdish Khattar	2.	Sh. Vivek Mehrotra
3.	Sh. A.V. Sinha	3.	Sh. V. V. Ranganathan

4.4 Upon receipt of consent of the Concessionaire/ Contractor/ Consulting Agency for reference to the Conciliation and Settlement Committee of Independent Experts constituted herein, the Chairman NHAI shall refer the matter to either of the Committees depending on the work-load already available to the Committee.

The consent of the Concessionaire/ Contractor/ Consulting Agency for conciliation shall also be deemed to be their consent to the Committee of Conciliators in terms of Section 63 and 64 of the Arbitration and Conciliation Act.

- 4.5 The broad Terms and Conditions and the Terms of Reference of the Conciliation Committees are enclosed as **Annexure-1**. The Conciliation Panel shall meet in the first instance and evolve its own procedures and methodologies for undertaking the functions by the Committees following such Standard Operating Procedure (SoP). The Contract Management Division will arrange for the required infrastructure, secretarial assistance and logistic support to the Conciliation Committee.
- 4.6 The possibility of non-availability of any one of the members of a Committee in any proceedings cannot be ruled out. As such, the Committee comprising of the other two members shall be competent to proceed in the matter and the proceedings of the Committee shall not be vitiated if one of the three members is not present in the deliberations of the Committee. The recommendations/ decision of the two-member Conciliation Committee in such a case shall be valid and binding on the parties.
5. The Conciliation process shall be conducted under Part III of the Arbitration and Conciliation (Amendment) Act, 2015. The Conciliation & Settlement Committee would either be able to resolve and settle the dispute(s) between the parties, or the process may fail. In case of failure of the conciliation process at the level of the Conciliation Committee, the parties may withdraw from conciliation process and take recourse to the laid down legal process of arbitration/ Courts. In the event of the conciliation proceedings being successful, the parties to the dispute would append their signatures to the settlement concluded by the Committee.
6. **Follow-up action by NHAI on the recommendations of the Conciliation Committee:**

The NHAI would honour and implement the recommendations/ decisions of the Conciliation Committee of Independent Experts.
7. Once the recommendations/ decision of the Conciliation & Settlement Committee are received, the Contract Management Division of NHAI shall inform the concerned Technical Division accordingly within 7 working days. The concerned CGM/ GM (Technical) shall take prompt action for signing of the

settlement agreements, making payments to the Concessionaires (if any) and withdrawal of the cases pending before the Arbitration Tribunals/ Courts, preferably within a period of 30 days.

8. The Contract Management Division shall place a Standing Item for the Board of NHAI containing information about the Settlements reached under para 3 or at the level of the Conciliation Committee for the information of the Board in every meeting of the NHAI Board in the following format:

Sr. No.	Brief of the Dispute by the Party	Claim Amount	Settlement Amount	Level of Settlement (Chairman/ EC/ Conciliation Committee)

9. **Procedure in cases already pending before the Arbitral Tribunals/ Courts:**

- 9.1 In cases of disputes pending before the Arbitration Tribunals or the Courts, the Contract Management Division shall make an offer to the Concessionaire/ Contractor/ Consultant to come forward and explore the possibilities of conciliation through the Conciliation Committee of Independent Experts as per template communication enclosed as **Annexure-4**. Wherever the parties to the dispute(s) agree to invoke the good offices of the Conciliation Committee, the Contract Management Division shall make an appropriate reference to the Conciliation Committee, upon which the Committee shall proceed to examine such reference(s). However, wherever the parties agree to reach out to the Conciliation Committee, they shall be required to keep the proceedings pending before the Arbitral Tribunals/ Courts in abeyance.

- 9.2 It may be noted that this is an alternate dispute resolution mechanism being put in place by the NHAI and if the Concessionaire/ Contractor/ Consultant is not willing to take recourse to this process or has any reluctance, whatsoever, in this behalf, there is no compulsion and they are free to follow the provisions as per the law.

0-0-0-0-0

**Conciliation & Settlement Committees of Independent Experts
Broad Terms and Conditions and Terms of Reference**

1. The Panel of Independent Experts approved under these guidelines shall remain valid for a period of three years from the date of issue of these guidelines. Depending on the response from the contesting parties and the work-load, the panel may be suitably expanded from time to time with the approval of the competent authority.
2. The Conciliation process will be conducted under Part III of the Arbitration and Conciliation (Amendment) Act, 2015.
3. A member of the CCIE shall be paid a sitting fee of Rs. 50,000/- + Rs. 5000/- for Local Transport charges for each day of proceedings. An out-station member shall be reimbursed the air-fare in addition. Applicable taxes, if any, shall also be reimbursed as per actuals.
4. The Conciliation Panel shall meet in the first instance and evolve its own procedures and methodologies for undertaking the functions by the Conciliation and Settlement Committee(s). Depending upon the work-load, the Chairman NHAI may assign the reference to any one of the Conciliation Committees.
5. The CCIE shall hold its day-to-day sittings at a suitable place at New Delhi/ Dwarka and may hold as many sittings every month as it deems appropriate keeping in view the volume of work at its disposal. It is expected that the conciliation–cum-settlement proceedings shall be completed in each case through 5 sittings in a period of no more than six months from the day the reference is made to the CCIE. In case any particular dispute requires more than 5 sittings, the same may be held at the discretion of the Committee with a cap on payment of fee for 5 sittings.
6. The CCIE may give its recommendations on amicable settlement separately for each contract.
7. The CCIE shall develop its own procedures/ processes for dealing with matters referred to it. However, for the understanding of the parties, it may be noted that the procedure of CCIE may not be treated as alternate arbitration proceedings, where both parties come with Statement of Claims/ Defence, arguments/ counter arguments, rejoinders, written submissions, etc., aided by their respective lawyers. The forum of CCIE is a settlement forum, where mutual give and take constitutes the essence, rather than strict legal positions of the parties. Hence, the parties are expected to be brief and to the point before the Committee with regard to their respective stands and view the exercise in the spirit of conciliation/ settlement.
8. Based on the experience gained in the course of Conciliation Proceedings, the Conciliation Committee may suggest/ recommend advisories to the NHAI from time to time for improvement in its Contract Management Systems.

0-0-0-0-0

**No. N-14070/14/2016-PPPAU
Government of India
National Institution for Transforming India (NITI Aayog)**

NITI Bhawan, New Delhi
September 05, 2016

Office Memorandum

Subject: Initiatives on the measures for revival of the Construction Sector - regarding.

The construction sector has been facing a number of problems, mainly arising from the liquidity constraints caused on account of their payments not being released by the Government Departments/ Public Sector Undertakings (PSUs) pursuant to the arbitral awards. To discuss the problems of the construction sector, detailed deliberations/ consultations were held with the representatives of the construction industry, banks, major government PSUs and concerned Ministries/ Departments. Based on the above deliberations/ consultations, the NITI Aayog placed a proposal before the Cabinet Committee on Economic Affairs (CCEA) for its consideration suggesting various immediate and long-term measures required for addressing the issues ailing the construction sector. The CCEA, chaired by the Hon'ble Prime Minister, has considered the proposals of NITI Aayog in its meeting held on 31 August 2016 and approved the same for the revival of construction sector.

2. The NITI Aayog has separately issued instructions on the subject with regard to the immediate measures to be taken by all concerned. In addition to the said instructions, the CCEA has also directed that the following measures may be expeditiously examined by all the concerned Departments/ Ministries /PSUs:
 - 2.1 Item-rate contracts, may be substituted by EPC (turnkey) contracts, wherever appropriate. Such contracts have been in vogue for over two decades in the developed world and Fédération Internationale Des Ingénieurs-Conseils (FIDIC – an International Federation of Consulting Engineers, known by its French acronym) has also published such contractual frameworks;
 - 2.2 Model bidding documents and Model EPC contracts, suitably revisited or modified wherever required to suit the requirements of particular sectors, may be adopted by PSUs/ Government Departments for construction works;
 - 2.3 Ministry of Finance has issued model bidding documents for RFQ, RFP etc. which may be adopted (with appropriate changes wherever required) in all sectors. Model EPC contracts have been developed for Highways and Railways and published by the erstwhile Planning Commission also. NHAI has already adopted this document and all construction contracts are currently being structured on this model. NITI Aayog shall assist the concerned departments, wherever required, in this regard.

- 2.4 The method of conciliation has proved more effective in settling disputes as per experience of some of the PSUs. All PSUs/ Departments issuing public contracts may consider setting up Conciliation Committees/ Councils comprising of independent subject experts in order to ensure speedy disposal of pending or new cases. Recourse to such conciliation may be open before, during or after the Arbitration proceedings. A provision to this effect would also need to be made in the Contract Agreements in future as a mechanism for resolution of disputes.
3. All the concerned Ministries/ Departments shall also communicate the above to their respective PSUs for taking necessary action on the aforesaid measures.

(A. Muthuvezhappan)
Director (PPPAU)

To

1. Secretaries of all the Ministries/Departments of Government of India.
2. Chairpersons/ CMDs/ MDs of all the Central Government PSUs.
3. Chairpersons/ CMDs/MDs/CEOs of all the Scheduled Commercial Banks.
4. Chief Executive, Indian Banks Association, Mumbai.
5. Shri Alok Tandon, Additional Secretary, Cabinet Secretariat, Rashtrapati Bhavan, New Delhi – 110001.
6. Dr. T. V. Somanathan, Joint Secretary, PMO, South Block, New Delhi – 110001.

Copy for information to:

1. PS to Vice Chairman/ PS to MoS/ PS to all Members
2. Sr. PPS to CEO/ PPS to Special Secretary

Template Letter to be sent to the Concessionaire/ Contractor/ Consulting party

From:

_____,
Plot No. G 5 & 6, Sector 10,
Dwarka, New Delhi

To

No. _____ Date: _____

Subject: Your reference dated _____ regarding the Dispute in the project _____ for a meeting at the level of Chairman NHAI and your Company Chairman for settlement.

Sir,

Kindly refer to your above cited reference on the subject cited above. It is agreed to refer the matter for consideration of the two Chairmen for settlement of the dispute. However, in order for the two Chairmen to arrive at any proposed conciliation, it would be useful if the team from the NHAI and your Company/ firm discuss and crystallise the issues in advance of the proposed meeting.

2. You are, therefore, requested to discuss the issues/ disputes with the NHAI team led by the Contract Management Division of the NHAI on a date mutually convenient.

Yours Sincerely,

(_____)
General Manager, (T)
NHAI

Copy to:

1. CGM(CMD), NHAI, HQ.
2. RO, _____
3. PD, _____. It is requested that all correspondence/ documents relating to the subject along with index may please be furnished to the Contract Management Division within 7 days of this letter.
4. Independent/ Authority Engineer, _____

Letter to be sent to all the Concessionaires/ Contractors/ Consultants of NHAI

No. _____
Date: _____

Subject: Establishment of Conciliation Committees of Independent Experts in terms of the provisions contained in Part-III of the Arbitration & Conciliation(Amendment) Act, 2015 in NHAI pursuant to the decisions of the CCEA.

Dear Sirs,

I have been directed to inform you that the NHAI has established two Conciliation Committees of Independent Experts for conciliation/ settlement of any contractual disputes between the NHAI on the one hand and the Concessionaires/ Contractors/ Consultants working for the NHAI on the other.

2. The Standard Operating Procedures (SoP) for conciliation and settlement of disputes through the conciliatory process and the constitution of the Conciliation Committee of Independent Experts (CCIE) is contained in the Policy Guidelines issued by the NHAI on the subject and placed on the website of the NHAI. It may be noted that the scope of the CCIE pervades across disputes before, during or after the Arbitral process.

3. Presently, as on 25.05.2017, there are 144 references before the Courts on contractual disputes/ claims and 132 references have been made to various Arbitral Tribunals. The NHAI would be agreeable to refer all the cases filed by it before the Hon'ble Courts challenging the Arbitral Awards with appropriate request to the Hon'ble Courts for holding the proceedings in these matters in abeyance for such time as may be taken by the Conciliation Committee of Independent Experts for settlement of the related disputes in case you are agreeable to the same.

4. Further, in case you are agreeable to refer the disputes presently under Arbitral proceedings to the said Committee(s), you may also take recourse to this conciliatory and settlement route with appropriate request to the Arbitral Tribunals to hold the proceedings in abeyance till such time the said dispute(s) is/ are considered by the Conciliation Committee.

5. Please take note that by giving your consent/ willingness to refer the dispute(s) to the Conciliation Committee, you are also confirming your acceptance of the conciliation process as contained in the Policy Guidelines of NHAI dated 02.06.2017, more specifically to the provisions contained in Sections 63 and 64 of the Arbitration and Conciliation(Amendment) Act, 2015, and that it meets the requirements on "conciliation" under the Act *ibid*.

6. Accordingly, you are requested to indicate your consent/ willingness in this behalf at the following address:

*The Chief General Manager
Contract Management Division, NHAI
Plot No G - 5&6, Sector 10,
Dwarka, New Delhi.
Email: _____
Contact No. _____*

Yours Sincerely,

(_____)
Chief General Manager, (CMD)

Copy to:

1. All Technical Divisions, NHAI, HQ.
2. All ROs
3. All PDs