

Instructions regarding Disputes Resolution and Arbitration Cases in PWD (B&R).

1. General :

Dispute arises when a party to a Contract Agreement asserts its right or claim and the other party denies or repudiates the same whether in writing or by its conduct.

Every officer of Public Works Department shall make efforts to avoid disputes with Contractual agencies and engage his energies towards successful and timely completion of the works. The Engineer-in-Charge and other senior officers shall make every effort to ensure that all genuine issues and claims of contractors are resolved in time.

The departmental officers handling the contracts shall thoroughly understand the various clauses of the contract agreement, their implications, rights and obligations of the parties, and administer the contract with due diligence & in a reasonable and business like manner. All correspondence with the contractor should be handled very carefully.

The arbitration cases shall be given due importance and dealt with on priority basis at all stages till these are finally disposed of.

2. Arising of disputes and their avoidance :

The disputes or differences of any kind what-so-ever may arise between the Government, its authorized representative and the contractor at any stage i.e. before the commencement of work, during the progress of work, or after completion/termination of work. At every stage, the concerned officers/officials shall consciously avoid actions/situations likely to result in disputes, but without showing laxity in effectuating the provisions of the contract or neglect of their duties.

(1) Avoidance of disputes arising before commencement of work :

- i) To avoid disputes at a later stage, the bidding document which is the most important document at tendering stage shall be prepared very carefully. The senior officer or officers competent to accept tenders must give reasonable time for preparation of bidding document and their checking. So far as possible Standard Bidding Document (SBD) issued by the State Government or the concerned ministry of the Government of India as the case may be, shall be used. The terms & conditions should be clear, unequivocal &

complete and consistent with one another. Technical Specifications which may have more than one interpretation or the materials which are not easily available should be avoided. Conflict between actual physical conditions at site and those promised or implied shall be obviated with due diligence. The time period for completion of work shall be commensurate with the nature of work and its complexity. The questions raised during the Pre-Bid meetings shall be answered very carefully by responsible & competent officers and the proceedings of Pre-Bid meeting shall be duly recorded and issued.

- ii) To avoid disputes at pre-construction stage, the Executive Engineer shall take timely and effective steps to discharge the obligations cast on the employer such as availability of hindrance free site, cutting of trees, shifting of utilities, removal of encroachments, availability of designs and drawings etc. The forest and environmental clearances if required shall be obtained well in time preferably before award of work. The process for land acquisition if required shall also be started well in advance.

(2) Disputes arising during progress of work :

- i) To avoid disputes during progress of work, the Engineer-in-Charge i.e. Executive Engineer, SDE & A.E./J.E shall carefully understand their obligations and duties as provided in the Contract Agreement.
- ii) The Executive Engineer shall maintain a separate file for the disputes that crop up during the progress of the work. Photocopies of all important letters in respect of issues raised, notices received/issued and instructions or replies given etc. shall be put in this file and duly indexed.
- iii) In case of his transfer or relinquishing charge due to any reason, he shall leave a self-contained note on the file at the time of his handing over charge, giving full background of all the disputes that have cropped up during the time of his incumbency, various

developments thereon and the orders passed with due reference to the connected files.

- iv) Suitable method and procedure shall be devised in the Divisional Office by which such files are carefully preserved and become available at a later stage to the Executive Engineer who is required to defend the case.
- v) All important documents such as drawings issued with bid document & those subsequently followed for execution of work shall be properly preserved and kept along with contract documents & other documents such as measurement books, site order book, bank guarantees, progress reports (showing resources employed by the contractor, his handicaps and reasons thereon). A list of all such records should be prepared and kept handy so that correct position of each case may be known to the Executive Engineer who is required to conduct the case, to enable him to do so on proper lines.
- vi) The Superintending Engineer shall hold regular meetings regarding status of works, hindrances and efforts for removal of hindrances etc. The proceedings of the meetings shall be recorded and action taken report shall be reviewed in subsequent meetings till compliance.

(3) Disputes in case of Centrally Sponsored Projects or Externally Aided Projects :

- i) In case of Centrally Sponsored Projects or Externally Aided Projects, the dispute redressal system may be in accordance with the Standard/Model Bidding Document of the funding agency.
- ii) In case the funding agency does not insist on their own dispute redressal system, the dispute resolution system of the department shall be adopted.

3. Procedure when a Dispute Arises :

In case the disputes are not resolved amicably and one of the parties of the Contract Agreement wants to invoke Arbitration clause, the following procedure

shall be adopted :

(1) Procedure when Govt. wants to invoke Arbitration Clause :

When the Engineer-in-charge i.e. Executive Engineer wants to invoke arbitration clause, he should with promptitude refer the matter to Superintending Engineer incharge enclosing with reference the following information :

- i) An attested copy of relevant arbitration clause;
- ii) a copy of the contract clause which Government alleges the opposite party has breached or failed to fulfil or on which the dispute has more particularly arisen;
- iii) statement of facts and dates arranged chronologically on the strength of which Government alleges breach of non-fulfilment;
- iv) copy of any clause of contract, or an indication of the law or legal principle under which Government may have exercised, or may claim any, specific remedy;
- v) copy of relevant arbitration clause of the contract agreement between the parties for referring disputes to the Arbitrator/Arbitral Tribunal; and above all
- vi) a statement of the points or issues to be decided by the arbitrator.

The Superintending Engineer shall send his report to the Chief Engineer within 15 days for his orders.

(2) Procedure when Contractor invokes Arbitration Clause :

In case the contractor invokes the Arbitration Clause as per Contract Agreement, the following steps shall be taken by the Executive Engineer with a view to properly defend the Arbitration Case :

- i) As soon as a contractor applies for arbitration, the Executive Engineer shall prepare a detailed history sheet containing the details regarding estimates, designs/drawings, NIT, contract agreement, extra and substituted items, reduction statements, extension of time/notices issued etc., and send a copy to the Superintending Engineer.

- ii) List out important letters in respect of the issues that are raised by the contractor, or the important notices by the contractor, or the important notices issued to the contractor, and place true copies of these documents in a separate file.
- iii) Original agreements, plans, designs including the calculations for these if available, details of measurements and analysis of rates attached to the technically sanctioned estimates, all the Measurement Books connected with the work, Cash Book, Site Order Book, Cement Register shall be kept in safe custody.
- iv) The Measurement Books shall be closed.
- v) All the files connected with the work shall be properly page-numbered, stitched and sealed, and kept by the Executive Engineer along with the above records.
- vi) If there are important situations or circumstances which are not available on the file, but are only known to the Executive Staff, their signed statements regarding the factual information should be obtained and kept on record, as after a lapse of time they may not be available for personal discussions, or they may be unable to recall past events.
- vii) The Executive Engineer may call the Executive Engineer in-charge of the work or other officials from their new stations for any information that he may need to collect by personal discussions.
- viii) If the work has been completed, the final bill shall be prepared as early as possible, and in any case before the disputes are referred to arbitration.
- ix) The Executive Engineer shall inform the authority with whom Extra/Substituted/Deviations/NS items are pending about the arbitration case with a request to approve the items immediately. The concerned authority shall ensure that all such pending items are finalized before defence reply is submitted.
- x) A detailed note on the facts of the case dealing with each and every item of the claims and/or counter claims shall be prepared by the Executive Engineer, along with reference to various relevant

documents supporting the Government case or negotiating the contractor's claim(s).

- xi) In case of transfer when the Executive Engineers hand over charge of the Division, or transfer arbitration cases/works, they should, unless all the facts and arguments are already explained in the written counter statement of facts, prepare and place on record a self-contained note giving all the facts of the case and detailed comments on the claims.
- xii) In case of works where a Supervision Consultant has been appointed, a provision shall be made in the Contract of Supervision Consultant making it the responsibility of Supervision Consultant to assist the employer in the matters of all disputes/differences which may arise up to the defect liability period, and thereafter to give complete handing over notes to the Executive Engineer. The Consultant shall, if required also appear as witness and also render any additional service on mutually agreed terms.

4. Processing of contractor's application

- (1) The Executive Engineer shall send one copy of the application of contractor direct to the Chief Engineer with the under-noted information within 15 days from the date of receipt of the contractor's application in his office, with a copy to Superintending Engineer. The Superintending Engineer shall send his report to Chief Engineer immediately.
 - i) An attested copy of relevant arbitration clause.
 - ii) A note regarding verification of the factual data furnished by the contractor in the application form.
 - iii) Brief comments on each claim of the contractor. While giving such comments, the admissibility of the claims in the light of arbitration clause and Limitation law, should be kept in view and commented upon.
 - iv) Statement of counter claims of the Department, if any. However, if counter claims are not readily enlisted or available, such position

shall be clearly stated but comments on contractor's claims should not be delayed.

5. Appointment of Arbitrator

- (1) The Arbitrator or the Arbitral Tribunal shall be appointed as per terms & conditions of the Contract Agreement.
- (2) In cases where no agreement exists, or where no clause exists in an agreement for referring the matter of dispute to the arbitrator, the disputes should not be referred to arbitration by mutual consent and no agreement should be drawn up for this purpose.
- (3) The authority of an appointed Arbitrator does not become revocable except with the order of the Court. It shall not be revocable by the death of any party or parties to the contract.

6. Action subsequent to appointment of Arbitrator

- (1) When the Arbitrator enters into reference and writes to the parties to the contract to file the statement of facts and counter statement of facts before him, the Executive Engineer should take prompt action to prepare the defence statement, duly supported by adequate documentary evidence and witnesses, and arrange for its submission and approval from competent authority and send to the Arbitrator by the date and within the time specified by him.
- (2) The Executive Engineer shall deal with submission of counter statement with utmost urgency and priority. The Executive Engineer shall submit the counter statement of facts normally within two (2) months, and in exceptional cases within three (3) months from the date of receipt of the statement of the facts.
- (3) The Executive Engineers shall invariably follow the above time limit. However, in cases where they foresee some unavoidable delay in adhering to the time limit, they should explain the position to the Arbitrator/AT under intimation to the other party and obtain extension of time before the expiry of the stipulated date.

- (4) The Executive Engineer shall himself attend all the hearings before Arbitrator/Arbitral Tribunal. However, if it is not possible for Executive Engineer to attend a hearing due to some other important official engagement, he may depute the SDE incharge of the work after obtaining permission for Superintending Engineer.

7. Availing Services of Legal/Techno-Legal Expert :

- (1) In Arbitration cases where claims are of technical nature, and amount of claims is not very high, the Executive Engineer may himself defend the case. However, if the amount of claim is very high and legal issues are involved, services of the legal counsels or Techno-legal experts, if considered necessary may be availed with the prior approval of the Chief Engineer.
- (2) Where the fees are in excess of the approved rates of charges laid down by the government, prior approval of the Government should be obtained.
- (3) The adjournment of an Arbitration case should not ordinarily be sought due to non availability of lawyer. In such circumstances, the Executive Engineer may make his submissions on the claims involving technical and physical points. For submissions on legal issues, the Arbitrator may be requested that submissions on legal points by the Government Counsel are necessary and to adjourn the case to a future date.
- (4) In case where the claims are of very high amount say above Rs. 10.00 Crore, particularly when intricate legal issues are involved or where the contractor has engaged Senior Lawyer or law firms, the department may also engage with prior approval of the Govt., a Senior Lawyer who have sufficient experience in dealing with Arbitration cases.
- (5) Even if a legal counsel/Techno-legal expert or a Senior lawyer has been engaged to defend the case, the attendance of Executive Engineer in all the hearings shall be mandatory.

8. Production of official documents before the Arbitrator/Arbitral Tribunal :

- (1) In the course of arbitration proceedings, the Arbitrator/Arbitral Tribunal may either themselves or at the instance of the opposite party, require

production of official records, e.g. files, correspondence, registers or the other documents which are supposed to have a bearing upon the case. While the Arbitrator may require production before them of any document relevant to the case, it must be borne in mind that in terms of Sections 123, 124 of the Indian Evidence Act, the Government is permitted to claim privilege for not producing documents, the disclosure of which may be considered detrimental to public interest. Such privilege may invariably be claimed in respect of all "unpublished records" of the Government i.e. documents which have not come to the knowledge of the other party. For this purpose "Notes Portion" of a file and all communications and letters other than those emanating from or sent to the party (original or copies) should be treated as "Unpublished" records of the Govt. in respect of which privilege, as aforesaid, can be claimed. This will be done by producing before the Arbitrator a declaration, signed by Chief Engineer as Head of the Department, stating that documents referred in the declaration contain unpublished official information relating to the affairs of the State, and that privilege in respect of the same is being claimed as their disclosure would be detrimental to the public interest.

- (2) A departmental officer may appear as a witness if summoned by the Arbitrator at the request of a contractor also. He is expected to give true and correct facts of the case. Deterrent action should be taken against the officials concerned, if they are found responsible for giving wrong evidence or concealing materials facts in an arbitration case.
- (3) Wherever required and found necessary, records of Chief Engineer (Quality Control) for defective work, reports of the Vigilance Department may be consulted and their assistance availed of.

9. Default of a party :

- (1) As per Arbitration and Conciliation (Amendment) Act, 2015, unless otherwise agreed by the parties, where, without showing sufficient cause :
 - i) the claimant fails to communicate his statement of facts in accordance with the time determined by the Arbitrator without

- showing sufficient cause, the Arbitrator shall terminate the proceedings.
- ii) the respondent fails to communicate his counter statement of facts within the time determined by the Arbitrator, the Arbitrator shall continue the proceedings without treating the failure in itself as an admission of allegations by the claimant and shall have the discretion to treat the right of the respondent to file such statement of defence as having been forfeited.
 - iii) a party fails to appear at hearing or fails to produce documentary evidence, the Arbitrator may continue the proceedings and make the award on the evidence before him.
- (2) In view of para (1) above, the Executive Engineer shall ensure that the statement of claim is submitted within the period of time agreed upon by the parties or determined by the Arbitral Tribunal.

10. Period of Limitation

- (1) It is a term of the contract in the relevant arbitration clause that if the contractor does not make any demand for arbitration in respect of any claim (s) in writing within 60 days of receiving of decision from the Executive Engineer, the said decision shall be final and binding upon the contractor and will not be a subject matter of arbitration at all.
- (2) In spite of the above specific provision in the arbitration clause, the Chief Engineer should not withhold appointment of Arbitrator on the ground that the request was received after the expiry of the specified period mentioned in the relevant arbitration clause of the agreement, but should appoint the Arbitrator clarifying in the letter of appointment of the Arbitrator that the reference is without prejudice to the defence that may be raised by the Government regarding the tenability of the claim on all necessary and available grounds including those of limitation, and the parties to the agreement will be free to raise the question of limitation before the Arbitrator.
- (3) While examining the request for arbitration from a contractor or any claim in a litigation case, the Executive Engineer should examine whether the

claim of the contractor is time barred, in accordance with the provisions of the Limitation Act, 1908 or 1963 as the case may be. This point should be taken into consideration in preparing the defence.

- (4) The question as to whether any dispute has become time barred will itself be a dispute which can only be settled by arbitration. The stage of reference is not concerned with the question whether the claim of the party to the arbitration agreement is barred by the Law of Limitation and that question falls within the province of the Arbitrator to whom the dispute is referred. The reference of the disputes, even though seemingly time barred, would therefore be made to the Arbitrator. The parties would be free to agitate the question of time bar before the Arbitrator, who would no doubt consider this point and give his award. However, it can be clarified in the letter of appointment of the Arbitrator that the reference is without prejudice to the defence that may be raised by the Government regarding the tenability of the claim on all necessary and available grounds including those in limitation.

11. Settlement during Arbitration Proceedings :

As per Section 30 of the Arbitration and Conciliation Act, 1996, the Arbitral Tribunal, with the agreement of the parties, may at any time during the Arbitration proceedings use mediation, conciliation or any other procedure to encourage settlement. If the parties reach a settlement, Arbitral Tribunal will terminate the arbitration proceedings, and if requested by the parties and not objected to by the tribunal, record the settlement in the form of an arbitral award on agreed terms.

12. Publishing/Making of Award :

- (1) Whenever an award is made by an Arbitrator appointed otherwise than through a Court, and if under the award some money is payable to the Government by the contractor, the Executive Engineer should first supply to the Arbitrator stamped paper of appropriate value as may be asked for by the Arbitrator according to amount of the award as per the rules of the State where the award is likely to be made by the Arbitrator, and request

the Arbitrator to write the award on the stamped paper (non-judicial) so supplied to him.

- (2) It is open to objection in a Court of law to write the award on ordinary paper and afterwards rewrite it on the stamped paper. The award should, therefore, always be obtained on stamped paper. It is for the Arbitrator to say as to which party should supply the stamped paper in such cases.
- (3) As per Section 31 (3) of the Arbitration and Conciliation Act, 1996, the Arbitral Award shall state the reasons upon which it is based, unless :
 - a) the parties have agreed that no reasons are to be given, or
 - b) the award is an arbitral award on agreed terms under Section 30.

13. Correction & Interpretation of Award and Additional Award :

Section 33 (1) of the Arbitration and Conciliation Act, 1996, provides that within 30 days from receipt of arbitral award, unless another period of time has been agreed by the parties :

- a) a party, with notice to the other party, may request the arbitral tribunal to correct any computation errors, any clerical or typographical errors or any other errors of a similar nature occurring in the award;
- b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

The Arbitral Tribunal shall make the correction or give the interpretation within 30 days from the receipt of request and the interpretation shall form the part of the arbitral award. The Arbitral Tribunal may also correct any error on its own initiative within 30 days from the date of arbitral award.

Further Section 33 (4) of the Arbitration and Conciliation Act, 1996, also provides that unless otherwise agreed by the parties, a party with notice to the other party, may request, within thirty days from the receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to claims presented in the arbitral proceedings but omitted from the arbitral award. The Arbitral Tribunal shall make additional award within 60 days from the receipt of such request.

The Arbitral Tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation or make an additional arbitral award.

14. Procedure after Publishing/Making of Award :

- (1) After the award is published, it should be examined if it is acceptable to the Government. Once the competent authority decides to accept the award, immediate action should be initiated to make the payment to the contractor at the earliest to avoid accrual of interest.
- (2) Immediately on decision to accept the award by the competent authority, a communication should be issued to the contractor intimating the fact of such acceptance, and offer payment in terms of the award if the contractor communicates acceptance of the award within the specified time. Payment so made would bar the contractor from suing again in respect of the same dispute.
- (3) An Arbitration award shall not be discharged by the death of any party thereto either as respect to the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

15. Acceptance/Challenge of award

- (1) No authority lower than the Chief Engineer shall have power to accept an arbitral award. Power to accept the award shall be as per delegation by the Government.
- (2) When, in the opinion of Chief Engineer, the award is just and reasonable and there are no grounds to challenge, the case need not be referred to the Legal Remembrance for their advice. However, if considered necessary, Chief Engineer may refer the matter to Legal Remembrance before accepting/recommending for acceptance of the award.
Where, in the opinion of Chief Engineer, there are good grounds available to challenge the award (whole or part of the award), Legal Remembrance should be consulted by the competent authority before taking a decision.
- (3) If it is decided by the competent authority to accept the award or the challenge before the courts ultimately fails, payment may be authorised by the Chief Engineer if funds are available, otherwise assurance on single file should be obtained from the Government for provision of funds. It shall be

desirable to pay the award as soon as possible to avoid the incidence of interest liability.

(4) The question of challenging the arbitral award in a Court of law shall be considered very carefully. Under section 34 of Arbitration and Conciliation Act, 1996 further amended vide Arbitration & Conciliation (Amendment) Act, 2015, there are very few grounds available to challenge the arbitral award and the same are as follows :

- (a) The party making the application furnishes proof that :
 - (i) a party was under some incapacity, or
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force, or
 - (iii) the party making the application was not given proper notice of the appointment of an Arbitrator or of the arbitral proceedings or was otherwise unable to present his case, or
 - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of submission to arbitration, or it contains decision on matters beyond the scope of submissions to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not submitted, only the part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside, or
 - (v) the composition of the arbitral tribunal or arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or failing such agreement, was not in accordance with this Part, or
- (b) the Court finds that :
 - (i) the subject matter of the dispute is not capable of settlement by the arbitrator under the law for the time being in force, or
 - (ii) the arbitral award is in conflict with the public policy of India.

“Explanation 1.- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if, -

- i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- ii) it is in contravention with the fundamental policy of India law; or
- iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2. – For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of India law shall not entail a review on the merits of the disputes.”;

- (5) As per provisions contained in Section 34 (3) of Arbitration Act 1996 an application for challenging the award may not be made after 3 months have elapsed from the date of receipt of award or, if a request had been made under Section 33, from the date on which such request had been disposed of by the Arbitrator. Provided that if the Court is satisfied that the Applicant was prevented by sufficient cause from making application within the said period of 3 months, it may entertain the application within a period of 30 days, but not thereafter. In view of this specific provision of Section 34 (3) of the Arbitration Act, the following Time Schedule will be strictly followed:
- i) Executive Engineer shall prepare a summary of award showing all claims, amount claimed & awarded against each claim and submit the case to Superintending Engineer within 30 days from the date of receipt of award or from the date of disposal of application filed u/s 33 of Arbitration Act.
 - ii) Superintending Engineer shall further submit the case to Chief Engineer within 10 days. The Superintending Engineer shall offer his specific comments about acceptance or challenging award against each claim.
 - iii) Chief Engineer will take decision about accepting or challenging the award within 30 days after receipt of case from Superintending Engineer.

Assuming that it takes about a month in the CE’s office to take decision, even then the Executive Engineer will have at least 15 days to prepare

grounds and file application in the competent court, if the decision is to challenge the award.

- (6) The reasons for an award going against the department shall be examined, initially by the Superintending Engineer and then by the Chief Engineer. Responsibility for any lapse should be fixed, and if any system weakness is discovered, measures should be taken to plug it for the future.

16. Award amount not to be deposited in Court :

Liability to pay further interest does not cease even if award amount is deposited in court. Therefore, in case of challenge to the award, the award amount should not be deposited in the court unless otherwise directed by the court.

17. Enforcement of Arbitral Award :

Arbitration and Conciliation (Amendment) Act, 2015, as per Section 36, provides as under :

36. (1) Where the time for making an application to set aside the arbitral award under section 34 has expired, then, subject to the provisions of sub-section (2), such award shall be enforced in accordance with the provisions of the Code of Civil Procedure, 1908, in the same manner as if it were a decree of the court.
- (2) Where an application to set aside the arbitral award has been filed in the Court under Section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provision of sub-section (3), on a separate application made for that purpose.
- (3) Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the Court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing :
Provided that the Court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908.

18. Action to be taken when the award is challenged in Court :

- (i) The Executive Engineer shall be primarily responsible for handling and defending the case in the Court. He shall keep close liaison with the counsel, brief him properly, keep track of the case, and ensure that at no time case goes by default. Legal advice should be taken to avoid/reduce the incidence of interest in case the challenge fails.
- (ii) The Superintending Engineer shall also keep a constant watch over the progress of the case and see that the case, at every stage is processed properly.
- (iii) If it is considered necessary to obtain advice of higher authorities at any stage, the Superintending Engineer shall refer the matter immediately to the Chief Engineer concerned for advice either personal or in writing, according to the needs of the occasion.

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