

No. 15-18/1/2020-HYDEL-II(MoP)

Government of India

Ministry of Power

Shram Shakti Bhawan, Rafi Marg,
New Delhi, dated the 27th September, 2021

OFFICE MEMORANDUM

Subject: Model Contract Provision for "Dispute Avoidance Mechanism" through 'Independent Engineer' (IE) in the Construction Contracts of CPSEs executing Hydro Power Projects

1. Hydro CPSEs have been raising concerns that the present mechanism of dispute resolution in Hydro Power sector does not provide adequate framework to address the conflicts between the Employer i.e CPSE and the Contractor at their inception stage but only addresses it after the disputes have arisen and notified between the Parties. A Committee of Board level Officers was constituted to study the field level issues and the difficulties in arriving at the resolution of these issues. The Committee submitted its report which was deliberated in the Ministry during which CEA and Board level officers of Hydro CPSEs too participated.
2. Following points emerged after the deliberations:
 - i. Delays in addressing disagreements or claims related to execution of Contracts actually results in significant financial and economic losses besides time and project cost over runs. Further, dispute resolution is a long-drawn process leading to unjustified and inflated claims with adverse impacts on timely completion of projects involving termination of contracts and/or leading to arbitration.
 - ii. Fair and just resolution of disagreements related to Contracts at inception stage, is key to successful performance of the contract as per scheduled timelines leading to both effective utilization of budget and prevention of time and cost over runs.
 - iii. An optimal way of addressing the aforementioned issues is to have a mechanism of an independent, third party widely used in major infra projects, nationally as well as internationally, in the form of engaging Independent Engineer for the specific project who are "Experts" having domain knowledge of the subject as well as commercial and legal principles and who can have regular oversight over the project with open communication with all the key stakeholders that can play an effective role in the avoidance of disputes.
 - iv. Efficient access to a fair and transparent mechanism for timely resolution of conflicts at the inception stage itself plays a key role in expeditious development of infrastructure projects. Formulation of a robust 'Dispute Avoidance Mechanism' through appointment of an independent expert in the form of 'Independent Engineer', will be an effective initiative to prevent time and cost overruns in Hydro projects.

3. The main objectives of appointing 'Independent Engineer' are as follows :

- i. To reduce the conversion of initial disagreements over issues into full-fledged disputes.
- ii. For expeditious elimination of disagreements in a just and fair manner.
- iii. To avoid time and cost overruns so as to ensure timely completion of the Projects.

Accordingly, based on the detailed deliberations on the subject matter, a model contract provision for "Dispute Avoidance Mechanism" through 'Independent Engineer' (IE); selection criteria for IE; Standard Operating Procedures (SOPs) for dispute resolution through the IE have been finalized in consultation with CEA and all CPSEs executing Power Projects . Salient features of the same are as under :

4. Appointment, Selection and Removal of IEs/Experts :-

- i. Ministry of Power shall prepare a panel of domain specific Experts with high level of integrity and proven track record by adopting a transparent and objective selection process as per the selection criteria mentioned at Annexure-1 and the panel so prepared shall be published by the Ministry on its website. Further, any changes in the panel shall only be made by the Ministry and the Ministry shall also keep updating the panel at regular intervals.
- ii. The CPSE & Contractor shall jointly select only one Member from the above panel of Experts for each package of works. The Expert would be designated as 'Independent Engineer' (IE) for each contract.
- iii. The initial term of appointment of IE would be for a period of five (5) years or contract period whichever is lesser and may be further renewed on a year-on-year basis as may be mutually agreed between the CPSE and the Contractor subject to the consent of IE and final approval by the Ministry.
- iv. It will be mandatory for the IE to visit the site once in every two months to be constantly aware of the ongoing project activities and to have a fair idea of any situation that may lead to disagreement between the parties. Further, additional visits may also be undertaken as and when called upon to address issues of disagreements.
- v. CPSE or Contractor will not be able to change the IE in any case. In case of adverse finding about IE such as not performing duties or complaints of integrity, that Expert would be dropped by the Ministry from the panel itself and a new Expert would be selected by the CPSE and Contractor jointly from the panel for performing the duties of IE.

5. Standard Operating Procedure(SOPs) for Independent Engineer (IE):-

- i. IE shall act as per the Standard Operating Procedures (SOPs) attached at Annexure-2.

ii. Resolution by IE shall commence when the claimant Party submits detailed information as per Standard Format for Disagreement Case filing attached as Annexure-3 to IE for intervention along with the necessary documentary evidences. Demand for IE intervention will not be admissible without initial documentary evidence.

iii. Necessary information sought by IE during the course of investigation shall be provided in a time bound manner by both the Parties and non-compliance of the same shall lead to imposition of penalties, elaboration of which shall be made by the CPSEs in their respective contracts depending upon the criticality of the contract.

iv. IE will examine the issue(s) raised by the Parties concerned as mentioned at point number (ii) above by conducting inspections involving field measurements as may be required to further investigate and to also conduct hearing/mediation with both the parties.

v. Based on the preliminary hearing of the parties, IE shall prescribe resolution timeline depending upon the number and nature of disagreements subject to a maximum duration of thirty (30) days or within extended timeline under extraordinary circumstances and for reasons to be recorded in writing .

vi. There shall not be any conflict of interest and it shall be ensured that IE should not have been engaged for providing any other services to any of the parties i.e. either Owner or Contractor in the last three years.

vii. In the event of non-performance of obligations/services by the IEs at any time during the duration of its contract, the Employer and the Contractor, on mutually agreed basis, shall have the right and discretion to terminate IEs contract by giving a termination notice of thirty (30) days to IEs.

6. Terms and Conditions for Payments to 'Independent Engineer' -

(a) Retainership Fee : A retainer fee of Rs.100,000 per month fixed for FY 2021-22 for 'Independent Engineer' for a specific project shall be considered as payment in full for :

- i. being available on a notice of 2 weeks for all site visits and hearings;
- ii. becoming and remaining conversant with all the project developments and maintaining relevant files;
- iii. compensating all office and overhead expenses including secretarial services, photocopying and office supplies incurred in connection with his duties; and

The retainer fee of Experts, shall be increased annually by 10%. Further, an Expert, shall not be in the retainerhip of more than two Hydro power contracts concurrently in the same CPSE. In case of two contracts, expert shall draw retainerhip fee limited to one contract only i.e. Rs.100,000 referred to for FY 21-22. The duration of retainerhip shall be for such duration as may be mutually decided by the Owner and Contractor but shall not, in any case, extend beyond 3 months after the completion of works as per the contract. The retainerhip fee shall be shared by the CPSE and the Contractor equally but shall initially be paid to the IE by the concerned CPSE.

(b) Site Visit Fee : A daily visiting fee of Rs 20,000/- to either project site or project office, anywhere in India, limited to a maximum of 10 days in a month for Expert, shall be paid for hearing, preparing reports etc initially by the Client fixed for FY 21-22. The daily visiting fee of Expert, as mentioned above, shall be increased on yearly basis @10%.

(c) Reimbursement of travel, boarding/lodging expenses incurred by 'Independent Engineer' : The travel, boarding/lodging expenses of the 'Independent Engineer', as per entitlement of Executive Director of CPSE, would be made initially by the Client i.e. Owner or Contractor. If any expert of 'Independent Engineer' does not receive payment of the amount due within 30 days after submitting claim, the expert shall be free to suspend his/her services without notice until the payment is received.

(d) Meeting Expenses : All the payments for holding the meeting would be initially borne by the Client i.e. Owner or Contractor, as the case may be, and shall be shared equally by the Owner and Contractor.

(e) Sharing of Expenses on Independent Engineer : All the payments for holding the meeting, site visits, reimbursement of travel, boarding/lodging expenses and monthly compensation of 'Independent Engineer' shall be shared equally by both the parties i.e. Owner and Contractor.

(f) Audit : The Concerned Hydro CPSE shall maintain an account of all the expenses incurred by it on 'Independent Engineer' and such account shall be subject to Audit.

7. Dispute Avoidance Mechanism through IE as above shall be adopted by all the Hydro CPSEs executing Power Projects. IE shall be implemented in all cases irrespective of the fact that the contractor is a CPSE or a private party. Dispute resolution mechanism through DRB or DAB in existing contracts may be subsumed by the aforementioned Dispute Avoidance Mechanism through IE with mutual consent. For future contracts, Dispute Avoidance Mechanism through IE shall only be provisioned in place of Dispute Resolution Board or Dispute Adjudication Board.

8. CPSEs are directed to take all necessary actions for incorporating the aforesaid provisions in all their future contracts and to also amend the provisions in existing contracts with mutual consent of both the parties.

This issues with the approval of the Hon'ble Minister of Power, New and Renewable Energy.


27.09.2021
(S.B. Saini)

Under Secretary to the Govt. of India
Telefax: 23705841

To,

1. The Chairperson, Central Electricity Authority, New Delhi.
2. Member (Hydro), Central Electricity Authority, New Delhi
3. CMDs - NHPC Ltd, SJVN Ltd, THDC (I) Ltd, NEEPCO Ltd and NTPC Ltd.
4. Chairman, BBMB.

Copy to:

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3. Sr. PPS to Secretary (Power) / Sr. PPS to AS(SKG) / Sr. PPS to AS&FA / Sr. PPS to AS(VKD)/PPS to JS(Hydro)
4. All Joint Secretaries / equivalent level Officers of Ministry of Power
5. All Directors / Deputy Secretaries of Ministry of Power

Annexure 1

Eligibility and Qualification Criteria for Appointment of IE (*Indicative - Appropriate formats may be prescribed in the bid document*)

ELIGIBILITY CRITERIA FOR APPOINTMENT OF EXPERT OF INDEPENDENT ENGINEER IN HYDRO POWER CONTRACTS

1. A retired person with the following qualifications and experience shall be eligible to be nominated as an 'Independent Engineer' for Hydro Power Sector:

i. Has held the post of Chairman and Managing Director/Managing Director, Chief Executive Officer, Functional Director of the Board, Executive Director (E-9) or above of any CPSE of Govt. of India engaged in development / implementation , operation and maintenance of projects in Hydro Sector including Hydro Power plants / Pumped Storage Plants / Multipurpose Power projects.

Or

ii. Has held the post of Chief Engineer in Central Electricity Authority / Central Water Commission or equivalent in any other body of Govt. of India / State Govt. engaged in planning /designing/ development of projects in Hydro Sector including Hydro Power plants / Pumped Storage Plants / Multipurpose Power projects.

Annexure 2**Standard Operating Procedures (SOPs) for IE**

Investigations by Independent Engineer for any contentious issue / disagreement shall be as per pre-defined Standard Operating Procedure (SOP). IE shall strictly follow the SOPs and will also document and maintain all the records. Following is a representation of the SOPs for IE for processing key tasks, roles and responsibilities and commensurate timelines.

Based on the preliminary hearing of the Parties, IE shall prescribe resolution timeline depending upon the number and nature of disagreements subject to a maximum duration of thirty (30) days.

Key Task	Stakeholder involvement	Activity Description	Proposed Timeline
1 Disagreement Filing	Contractor Client	Case Filing – A disagreement case begins when claimant party submits a demand for intervention by IE in the prescribed format along with documentary evidence. Demand without initial documentary evidence will not be admissible for IE intervention.	Day 0
2 Preliminary Hearing & Scheduling	Independent Engineer Contractor Client	Preliminary hearing and scheduling process - IE to organize a preliminary hearing with the parties and prescribe suitable timeline for resolution or settlement.	Day 1 to Day 6
3 Finalisation of Issues	Independent Engineer	Finalisation of Issues – After due examination and diligence to finalise the issues requiring resolution.	Day 3 to 9
4 Hearing/ Mediation	Independent Engineer Contractor Client	Hearing / Mediation –The parties and IE meet in person to conduct the Hearings.	Day 4 to 12
5 Inspection	Independent Engineer	Inspection - IE conducts the inspections involving field measurements, if any, to further investigate evidence conferred to the IE by both parties during the hearing.	Day 5 to 17
6 Post Inspection Briefs	Independent Engineer Contractor Client	Post-Inspection Briefs - After the inspection takes place; both the parties may come up with additional testimony, as permitted by the IE.	Day 10 to 30
7 Closure	Independent Engineer	Closure - IE closes the report on the case and issues a decision, along with any claim settlement, if applicable.	Day 10 to 30

Annexure 3**Standard Format for Disagreement Case Filing (Indicative)**

In line with the SOPs, an IE expert should follow a standard format provided below for disagreement case filing and further investigations.

Disagreement Documentation Report (to be filled by Independent Engineer)

1. Name of Party	2. Disagreement Reporting Date	3. Has the documentary Evidence been Submitted
		☐ Yes
4. Contract Reference number	5. Party Representative Name Reporting Disagreement	☐ No
	Name: _____ Contact: _____ Details: _____	☐ Not Applicable
6. Name of Independent Engineer(IE)	7. IE Contact details	8. Disagreement Reference Number Allocated by IE
9. Supplementary Note Recording the Disagreement		
[Text]		
<i>Documentary Evidences to be Annexed</i>		
10. Critical Engineering Expertise Relevant to investigate the Disagreement (Check All Required)		
☐ Engineering Design ☐ Geology ☐ Civil Works ☐ Hydro Mechanical ☐ Electro Mechanical ☐ Electrical Switchgear ☐ Quality Assurance & Inspection		
11. Record Notes of Preliminary hearing Organized by IE with the parties		
[Text]		
<i>Documentary Evidences by Parties along with MoM to be Annexed</i>		
12. Brief Narration on discovery process - after Preliminary hearing & listing of next step to examine the issues and procedural difficulties relating to the case		
[Text]		
<i>Documentary Evidences to be Annexed</i>		
13. Record notes of Hearing/Mediation between the parties and IE		
[Text]		
<i>Documentary Evidences with Video Records to be Annexed</i>		
14. Inspection Records with Field Measurements Conducted by IE		
[Text]		
<i>Documentary Evidences to be Annexed</i>		
15. Record notes of Inspection Briefs by IE along with additional testimony by the Parties if any		
[Text]		
<i>Documentary Evidences & Inspection Reports to be Annexed</i>		
16. Closure Report by IE with Decision & Claim settlement if applicable		
[Text]		
<i>Documentary Evidences to be Annexed</i>		
Final Acceptance by All the Parties		