



Builders' Association of India

(All India Association of Engineering Construction Contractors and Builders)

G-1/G-20, 7th Floor, Commerce Centre, J. Dadajee Road, Tardeo, Mumbai 400034

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🐦 @BAINational

📺 Builders Association of India

www.baionline.in

Ref.: 961/M/2022-23 dated 3rd March, 2023

Shri Kanwalpreet Ji
Director (PPD)
Ministry of Finance,
Department of Expenditure,
Procurement Policy Department,
264-C, North Block,
New Delhi – 110001

Respected Sir,

Sub: 'Vivad se Vishwas II' (Contractual Disputes).

Builders' Association of India (BAI) is an apex all India body of Engineering Construction Contractors and Real Estate Companies founded in 1941, with more than 20,000 business entities as members through its 200 plus Centres (Branches) throughout the country. Regional Associations Affiliated to BAI form indirect membership of more than 1,00,000. The fundamental aim of the Association is to bring about all round improvements in the construction sector, while striving towards resolution of operational as well as policy level problems faced by the construction industry. This involves making efforts to obtain from policy makers and authorities the level of attention that the construction industry deserves in view of its tremendous contribution and importance to the economy.

Draft Scheme for settlement of pending disputes related to government contracts. Under the '**Vivad se Vishwas II**' (contractual disputes) is attached herewith for your kind perusal.

We also appreciate, if you kindly grant us an opportunity to meet you on any date and time at your office to explain more on the above matter.

Thanking you,

Yours faithfully,

Niimesh Paatel

NIIMESH PAATEL

President

Builders' Association of India

Encl. As above

Delhi Office : D1/203, Aashirwad Complex, Green Park Main, New Delhi - 110 016 ☎ : (011) 26568763 / 9555448763 • Email : baidelhi16@gmail.com

BAI Centres at :

Adilabad, Agra, Agra Cantt., Ahmedabad, Ahmednagar, Aligarh, Allahabad, Alleppy, Aluva, Amravati, Amaravathi, Andaman & Nicobar, Angamali, Aurangabad, Avadi, Baghpat, Bangalore, Baramati, Bareilly, Baroda, Bharuch, Bhopal, Bhubaneswar, Bilaspur, Butibori, Calicut, Chandigarh, Changanacherry, Chengai, Chennai, Chettinadu, Chikmagalur, Chitradurga, Coimbatore, Delhi, Delhi East Shahadra, Delhi North, Delhi South, Delhi West, Dhanbad, Dharapuram, Dhule, Dehradun, Dindigul, Durgapur, Durg-Bhillai, Erode, Ettumanoor, Faridabad, Gautam Buddha Nagar, Gandhinagar, Ghaziabad, Goa, Greater Hyderabad, Greater Jaipur, Greater Noida, Guntur, Gurgaon, Guwahati, Haldia, Hapur, Hasan, Hyderabad, Ichalkaranji, Idukki, Indore, Jabalpur, Jagdalpur, Jaipur, Jalgaon, Jaisalmer, Jamshedpur, Jodhpur, Kalpakkam, Kallakurichi, Kamareddy, Kanchipuram, Kaner, Kannur, Kanpur, Kanpur-South, Kanyakumari, Karaikal, Karimnagar, Karnai, Karnavati, Khammam, Kochi, Kodaikanal, Kodungallur, Kolhapur, Kolkata, Kollam, Kottayam, Kumbakonam, Kundli, Latur, Loni, Lucknow, Madhuranthakam, Madurai, Mahaboobnagar, Malegaon, Mangalore, Mandya, Mayiladuthurai, Medachal, Medak, Meerut, Meerut Cantt., Modinagar, Moradabad, Moradabad Nor. Rly., Mumbai, Muvattupuzha, Muzaffarnagar, Mysore, Nagapattinam, Nagpur, Nalgonda, Namakkal, Nanded, Nandurbar, Nasik, Nellore, Neyveli, Nilgiri, Nizamabad, Ongole, Palani, Panipat, Parbhani, Patna, Perambalur, Phaltan, Pink City Jaipur, Pondicherry, Ponneri, Poonamallee, Por-Ramangamdi, Pudukkottai, Pune, Raichur, Raigad, Raipur, Rajahmundry, Rajkot, Ramanathapuram, Ranchi, Ranga Reddy, Ravulapalem, Salem, Sangamner, Sangli, Satara, Shahda, Shimoga, Silchar, Sitapur, Solapur, Surat, Tambaram, Tanuku, Tenkasi, Tezpur, Thanjavur, Theni, Thiruporur, Thiruthurai, Thiruvalla, Thiruvannamalai, Thiruvannur, Thripunithura, Thrissur, Tiruchirappalli, Tirunelveli, Tirupur, Tiruvallur, Thiruvananthapuram, Tuticorin, Udumalpet, Uthasnagar, Vellore, Vijayawada, Vikarabad, Villupuram, Visakhapatnam, Vizag Steel City, Wai, Warangal, Western U.P. Electrical, Yadadri.



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959/J/2023-24 dated 3rd March, 2023

To,

Smt. Nirmala Sitharaman Ji
Hon'ble Finance Minister of India
Room No. 134, North Block,
New Delhi-110 001

Respected Madam,

Subject : BAI's Suggestions on VIVAD SE VISHWAS II'

Ref.: Notification No. F.1/7/2022-PPD dated 8th February, 2023,
issued by the Ministry of Finance.

Builders Association of India (BAI) is the apex All-India body of engineering construction contractors and real estate companies founded in the year 1941 with more than 20,000 business entities as its members through nearly 200 chapters across the country. The association is a registered body established with the objective of encouraging trade, industry and profession of construction works and all other ancillary and allied trades and industries amongst others.

We hereby congratulate your good office for circulating a draft scheme for settlement of pending disputes related to government contracts. Under the '**Vivad se Vishwas II'** (contractual disputes) scheme, wherein contractors will be offered settlement amounts depending on the status of a dispute.

In this regard, we wish to respond and request the Government to consider the following points:-

1. This scheme covers Central Government and CPSE's. Majority of Contractor work for various State Governments and heir PSU's and Authorities. As Hon'ble Prime Ministersays "One Country and One law", we seek implementation of this scheme as "One Country and One Scheme", **we seek implementation of this scheme as "One Country and One Scheme" which should cover all such works where Public Money is involved including Public limited companies. As now Govt. is going more and more for privatization for Public works.**

2. Secondly, it is noticed the Government may opt out of this scheme if claims and counter claims exceed Rs. 500 cores. Thus even in the scheme the Government is being kept in higher pedestal. We seek equality and fairness for contractors too so as to maintainsanctity of Scheme. All should be included as this amount to pressurize weaker player and allow big corporates to take advantage.

3. Once an agreement is reached under the scheme, the amount should be paid within 30 days from the date of settlement falling which interest stipulated in the award shall apply or at least 12% compounded interest.

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4. Once this scheme is adopted by the contractor and amount and interest is settled, the Departments are given clear and strict guidelines to make payment. **Must provide budget provision for the same else non availability of fund will again a cause of disputes.**
5. Provide ongoing settlement forum during the execution of work which should be binding on both the parties till completion of work with a right to reserve their disagreement for referring to arbitration at the end of contract within a period of 15 days failing which it should be considered as Accord and satisfaction. This scheme should be under “DART” i.e Dispute Avoidance and Resolution Mechanism.”
6. No Arbitration or litigation till completion of contract or till termination and or foreclosure of contract. Clause in contract must be modified accordingly. This will eliminate multiple arbitration from same contract.
7. After the Award is declared without any reservation, should first go to settlement committee. During settlement by and large negotiations should be done on interest components and claims part should be pursued with the contractor but should not be with any preconditions.
8. Most important for the point 5 as stated above, should be implemented with all sincerity. As seen many contracts have such provision though not properly drafted, department and contractor both are ignoring this provision. In arbitration department takes advantage of taking technical objection stating that the contract provisions have not been followed.
9. Contract should have in built provision of resolving all issues. Though FIDIC has such provisions same are modified to suit Govt. by introducing COPA.
10. We need standard Contract documents based on Indian legal system as many provisions of FIDIC not in tune with Indian Laws. Moreover, by introduction of COPA huge ambiguity is created which is cause of disputes.
11. Arbitration in construction contract should be made compulsory before going to court. In many contracts, the Arbitration clause is deleted. In such scenario **what Vivad to Vishwas will do?**
12. Why not to generate scenario of **“NO VIVAD ONLY VISHWAS”?**
13. Our organization can provide experts inputs for redrafting of the scheme.
14. Construction Industry is a unique one and hence one need to implement the scheme based on the Trade Practices. Contract during the execution is undergoing so many changes which are required to be take care:-

Sl. No.	Status of dispute	Settlement Amount	Comments & Suggestions
(a)	Court Order passed. Award with net amount payable to the contractor.	90% of the net "Amount awarded by the court".	Award reaches its finality once Commercial Court rejects application u/s 34 of Arbitrations & Conciliation Act, 1996. Just to reach conciliation mode, reduction of 10% is adequate, only on compensation components and not on work done claims which should be paid 100% with Future 12% Interest after 30 days of arriving settlement.

	<p>Note:</p> <p>i. Case may or may not be under further appeal.</p> <p>ii. Court order will include the cases where the parties have approached the courts directly or approached the court subsequent to arbitral award.</p>	<p>Note:</p> <p>1. In case, court has directed 'X' to be paid to contractor and 'Y' to be paid to procuring entity by the contractor, then the amount payable in such will be 80% of (X-Y)</p> <p>2. In case court upheld the Arbitral Award, fully or partially, as the case may be, interest as stipulated in the Arbitral award will also be included till the date of the court order in "Amount awarded by court."</p> <p>3. In case no payment is made or only partial payment is made within 30 days of the date of award by the court, additional simple interest at the rate of 6% per annum will be payable for time period beyond such 30 days till date of acceptance of claim under the scheme by the procuring entity. It is further clarified that such 6% interest will be paid only on 80% of the net amount awarded by the court minus payments already made</p>	<p>1. It appears that Ministry is availing 20% for extending this facility and in order to reach an amicable solution, it is requested that 90% of awarded amount may be granted only on compensation components and not on work done claims which should be paid 100% with Future 12% Interest after 30 days of arriving settlement.</p> <p>2. Seems to be alright</p> <p>3. An interest as 6% is too low to cover losses incurred by the contractor due to withholding of awarded amount. Least the Government can do it is to offer bank lending interest rate, which is almost 12% as of now. As most of the time, claims are arising out of work done under COS claims for which contractor has already spent the money in executing the work.</p>
(b)	Arbitral Award passed. Award with net amount payable to the contractor.	60% of the amount awarded by the Arbitral Tribunal. The award amount shall include any interest awarded by the tribunal till the date of award.	From Award 100% should be paid on work done claim Award & 75% on compensation component with Future Interest of 12%.
	Note: Case may or may not be under appeal before a Court.	Note: However, in case there is delay in payment of the award amount, interest will be payable at simple interest of 6% per annum for the award amount not paid.	An interest as 6% is too low to cover losses incurred due to withholding of awarded amount. Least the Government can do it is to offer bank lending interest rate, which is almost 12% as of now. As most of the time, claims are arising out of work done under COS claims for which contractor has already spent the money in executing the work.

(c)	<p>On-going litigation (Either in Court where no arbitration was done; OR before Arbitral Tribunal OR ongoing conciliation including dispute resolution board (DRB) etc.)</p> <p>Note: (i) Disputes arising out of contracts in which physical activity has been stopped (i.e. either 100% physical progress against the same contract is anticipated) shall only be eligible for settlement. (ii) Terminated contracts will also be eligible. (iii) The decision of the procuring entity shall be final in this regard.</p>	<p>30% of the net claim amount (i.e. claims by the contractors minus counter - claim by the procuring entity) excluding interest of either of the party.</p>	<p>This is not a justified proposal. Why counter claims can be adjusted 100% without any justification. Work done and COS must be paid 100% and compensation component can be negotiated as Government Department is raising Counter Claims to run away from responsibility even though it is Government fault. Hence, proposed to have ongoing Dispute Resolution Mechanism.</p> <p>(iii). BAI proposes consensus between the contractor and the department so as to reach finality. Needs amendment. Unilateral Decision Authority is not acceptable. To generate "VISHWAS" it should be a joint decision.</p>
(d)	<p>On-going litigation (Either in Court where no arbitration was done; OR before Arbitral Tribunal OR ongoing conciliation)</p> <p>Note: Disputes arising out of contracts in which physical activity is ongoing.</p>	<p>20% of the net claim amount (i.e. claims by the contractors minus counter - claim by the procuring entity) excluding interest of either of the party.</p>	<p>The proposal is unfair and should adopt Dispute Avoidance and Resolution Technique "DART" and clause to that effect must be included in the contract.</p>

(e)	Disputes submitted on or before 30.09.2022 will be considered. But counter claims submitted upto 31.12.2022 by the procurement entity shall be considered	Disputes submitted on or before 30.09.2022 will be considered. But counter claims submitted up to 31.10.2022 by the procurement entity shall be considered	This is not acceptable as Government proposing to adjust 100% Counter Claim. It is likely to be unfair practice by Department to raise Counter Claims more than claims. So not to pay anything. Here also "DART" should be implemented. Without proper justification, ad hoc settlement of claims and counter claims is not just and proper.
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We wish to add that as Scheme talks about Vishwas, we humbly seek Vishwas from the side of the Government so as to make this scheme a success.

We also earnestly request you to kindly grant us an audience on any date and place convenient to you to apprise more about the matter by Construction Industry Experts from our Association.

Thanking you,

Yours faithfully,

Niimesh Paatel

NIIMESH PAATEL
President
Builders' Association of India