

DEFENCE PROCUREMENT MANUAL

2009

(REVENUE PROCUREMENT)

Presentation by

Dr. Anjula Naib

SCOPE OF PRESENTATION

- CHAPTER 7: IMPORTANT CONDITIONS OF CONTRACT
- CHAPTER 15 : DESIGN, DEVELOPMENT AND FABRICATION CONTRACTS

Important Conditions of Contract

CATEGORISATION OF CLAUSES

Safeguard Provisions



Advances, Performance, Warranty, Guarantee, Product support, Option, PDI/JRI, Packing,

Deterrent Provisions



L/D, Termination, Risk Purchase

Transparency clauses



Agents, Undue Influence, Access to Books of Accounts, Integrity Pact

Enforceability clauses



App law, Arbitration, Force Majeure, Patent & IPR, Contract Effective Date, Amendment,

Payment issues



Terms, Taxes & Duties, Claims

Contract Effective Date

- Normally date of signing of contract
- Where specially agreed otherwise by Parties, any or last of the following –
 - Date of issue of End user Certificate By Buyer
 - Furnishing of Performance Bond from Seller
 - Advance Bank Guarantee
 - Export Authorization & confirmation to buyer

Apportionment of Qty

- If Pre decided due to apprehension about lack of capacity -disclose apportionment bet vendors in RFP.
- If at CNC stage find L1 does not have capacity as per RFP qty.
 - Go to L2, L3.....at same rate as L1.
 - On the basis of their avg actual delivery/capacity
- Where decided in advance to have more than one source (due to vital or critical nature of item) ratio of splitting to be shown in RFP.

ADVANCE PAYMENT

- Ordinarily no advance to be offered in RFP.
- Where decided to allow, state upfront in RFP.
- May become nec in following cases :
 - Firms holding maint/service contract
 - Against Fabrication/Turn-key Contracts
 - Not exceed 15% of contract value or amt payable for 6 months for maint contracts
 - Beyond above ceiling, approval of SDF & Def Secy reqd

Option Clause

- Not to be included as a matter of routine. Include if work is indeterminable.
- Exercised during original period of contract & upto 50% of original ordered qty.
- During extended DP ltd to 50% of bal qty after DP.
- May be exercised more than once.
- No downward trend in prices
- PAC/OEM - Exercise option. Cautious use in multi vendor sit.

Repeat Order

- Not to be included as a matter of routine.
- Include if work is indeterminable.
- Within 6 mths of date of supply against 1st order.
and upto 50% of original ordered qty
- Requires approval of CFA having powers for
Original qty + 50% qty.
- May be used along with option clause provided
total addl qty ordered does not exceed 50% of
Original Order qty
- Cautious use in multi vendor sit.

Performance Bank Guarantee

- 10% of value of Contract \leq 30 days of Signing of Contract
- Valid 30 days / 90 days from signing of Acceptance Certificate After JR
- Bond from First class bank of International Repute
- Confirmation by SBI, Syndicate, Canara Bank / cost of confirmation by Buyer.
- Confirmation Cost of LC by Seller.

Liquidated Damages

Law allows recovery of such pre-estimated loss provided clause is included.

- Delay Actual / Demonstrable Loss/Firm fully responsible Full LD
- Firm resp only for part of delay for pd of & rest beyond his control resp Full LD firm's
- Delay due to Force Majeure Waive
- Actual loss can't be certified/ no inconvenience caused Waive
 - 0-5 % per wk subject to max of 10 % of value of delayed stores
 - Loss not reqd to be proven.

PRICE VARIATION CLAUSE

- Nec in long term contracts more than 18 mths duration
- Base level for PV to be specified
- Illustrative formula in Part IV of Appx 'C'
- Specify cut of dates for material & labour
- PV ceiling to be given (either % pa or overall or both) with provision for passing benefit of any redn in price to buyer
- Minimum % of escalation fixed beyond which PV payable

PRICE VARIATION CLAUSE

- In case of advance/stage payment- no PV on value price after payment date.
- For delivery accepted beyond due date - subject to LD to be levied on price as varied by PV.
- No PV allowed beyond orig delivery date if default due to supplier but permissible if due to Force Majeure/Govt default.
- Imported stores or locally manf items- the % and element of duties/taxes incl in price be specified.
- Mode of Calculation and supporting docus reqd.

EXCHANGE RATE VARIATION

- Only given to Def PSUs
 - If delivery exceeds 1 yr
 - Contract has import content
- If DP is refixed/extended - ERV not admissible for supplier's default.
- Base Exchange Rate be specified in contract.
- Variation on base date upto mid pt of manf unless specified otherwise.
- Other conditions prevail as in PV.

PERFORMANCE SECURITY DEPOSIT

- Furnished as PBG
- Preferably 10% of contract value
- Valid for 60 days beyond dt of completion of contractual obligations
- Delayed contract – Get BG revalidated
- Returnable on completion of obligations
- Format given (in Form DPM-15)

RISK & EXPENSE PURCHASE

[Optional Clause]

- Undertaken if supplier fails to honour the contracted obligations within given period & where extension of DP is not approved.
- Purchaser must be satisfied that supplier has failed to deliver & been given adequate/proper notice to discharge obligations.
- Supplier liable to pay the addl amt spent, if any, in procuring goods/services through a fresh contract.
- Method of recovering amt to be considered while invoking clause for Risk Purchase. Standard format given in DPM-2009 [Part IV-Appx 'C']

Note: Clause rarely invoked in case of import contracts or where item is of proprietary nature & remote possibility of an alternative source. Performance clause can be invoked to cover such default.

FALL CLAUSE

- Invoked if price charged for stores sup under contract exceeds the lowest price at which contractor sells identical stores to any other Org/Deptt of Central Govt/State Govt/Undertaking during currency of RC.
- If contractor reduces the sale price, sells, or offers to sell the said store at a lower price, he must notify such reduction & the price payable under the contract shall stand correspondingly reduced.
- Must be incl in contracts with firms whose RC with DGS&D, etc. has expired and renewal not taken place.
- If contractor found to sell at lower rate, then the lower rates shall be applicable in instant contract if fall clause is included.

BUY BACK OFFER

- Included when existing old item is to be replaced with new item.
- Depends on the value and condition of the old item to be traded, time & mode of handing over and details given in RFP.
- Provn made to enable purchaser to trade or not to trade the old items while purchasing new ones.
- The value of the buy-back offer is to be reduced from the offered price for the new item.

ARBITRATION CLAUSE

- Disputes not resolved through mutual discussions to be referred for arbitration
- Panel of Arbitrators prepared by MoD/CFA
- Approach Def Sec/CFA to appoint arbitrator
- Min of Law may be approached, if reqd.
- SHQs may appoint arbitrator within their delegated fin powers
- Court of Law may be approached in certain cases
- Forms given in DPM Forms for indigenous contracts, foreign contracts and PSUs

Arbitration – CPSUs/DPSUs

- Any dispute or difference relating to the interpretation and application of provisions of the contract
 - shall be referred by either party to the Permanent Arbitration Machinery set up in the Department of Public Enterprises and
 - if the Dept of Public Enterprises fails to settle the dispute, it will be referred to the Cabinet Secretariat for consideration by a Committee comprising Cab Secy, Secy Dept of Ind Devp, Secy Legal Affairs, Finance Secy, Secy of Dept concerned.

No legal recourse prior to Committee's clearance

ARBITRATION FOREIGN CONTRACTS

- Disputes not resolved through mutual discussions to referred to Arbitration Tribunal comprising 3 members.
- one arbitrator each to be nominated by the SELLER and the BUYER.
- third arbitrator, who shall not be a citizen or domicile of the country of either of the parties or any other country unacceptable to either party within (90) days.
- failing which 3rd arbitrator nominated under the provisions of UNCITRAL by the International Chamber of Commerce, Paris at the request of either party.

ARBITRATION FOREIGN CONTRACTS

- Arbitration proceedings to be conducted in India under Indian Arbitration and Conciliation Act, 1996 and award of Arbitration Tribunal shall be enforceable in Indian Courts or as mutually agreed.
- Decision of the majority of arbitrators shall be final and binding .
- Provisions for appointment of Arbitrator by the International Chamber of Commerce, Paris only be invoked in cases of International Commercial Arbitration.
- UNCITRAL provisions only apply in foreign arbitration.

FORCE MAJEURE

[Optional Clause]

- Wherever nec, to be included in RFP/Contract substituting earlier provision that Force Majeure be included when insisted upon by the supplier.
- Neither party bears responsibility for non-performance of obligations, if it results from such Force Majeure circumstances as flood, Fire, earthquake and other acts of God as well as War, military ops, blockade, actions of State auth or any other circumstances beyond control of parties.
- Force Majeure conditions to be notified in writing to the other party at the beginning and cessation of above conditions [not later than 10 days].
- Conditions certified by Chamber of Commerce or other competent auth of respective Country/State as proof of commencement & cessation of conditions.

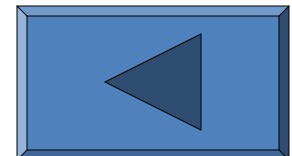
FORCE MAJEURE

[Optional Clause]

- Time for performance of obligations gets extended for corresponding period.
- If conditions last for more than 6 mths, either party can terminate contract, totally or partially, with a prior written notice of 30 days to terminate it without any liability, other than reimbursement provided in the contract for goods recd.
- Format for Clause given in DPM-2009.

Performance Bank Guarantee (Foreign Contracts)

- 10% of value of Contract \leq 30 days of Signing of Contract
- Valid 30 days / 90 days from signing of Acceptance Certificate After JR
- Bond from First class bank of International Repute
- Confirmation by SBI, BOI, BOB, Canara Bank / cost of confirmation by Buyer.
- Confirmation Cost of LC by Seller.



LACK OF COMPETITION

- Exists in following situations-
 - ✓ Number of offers : **Less than 2**
 - ✓ Ring prices quoted by all tenderers
 - ✓ Product of same manufacturer offered by all tenderers
 - ✓ Store is chronically in short supply where acceptable offers never exceeds 2

LAST PURCHASE PRICE

Issues to be considered :

- LPP more than 3 yrs vintage not taken as real scale but as input for assessing
- LPP should pertain to last successfully executed order of similar size and scope
- Basket price and bulk discount offered need to be taken into a/c while using LPP as a scale
- PV Clause and final cost bid in r/o of last purchase be considered
- Items supplied against LPP being of current production or ex-stock seen

CHAPTER 15

Design, Development and Fabrication Contracts

Chapter 15

Design, Development and Fabrication Contracts

- Indigenisation activity transferred from DGQA/DGAQA to the Services in 2006.
- New Chapter added in DPM 2009 Covering Procedures for concluding contracts for design, indigenous development, indigenization and fabrication of stores, equipment and spares.
- Based on extant Govt letters/Standing Orders on Devp Contracts issued by MoD in r/o DRDO and by MoD/ DDP&S, extant rules of MoF contained in GFRs / other letters.
- The relevant CVC guidelines too have been incorporated

Chapter 15

Design, Development and Fabrication Contracts

AUTHORITIES

- Decision for indigenisation / Indigenous development / fabrication of items to be taken by-
 - Indigenisation Agency nominated by the Service HQrs in respective Service.
 - Nominated Workshops, Tech Centres, Depots.
 - Agencies tasked for handling research, development and fabrication work
 - Technical Dtes of Indigenisation/Technical Committees set up for the purpose.

Chapter 15

Design, Development and Fabrication Contracts

Issues Covered

- Criteria for selecting items for indigenisation.
- Dispensations allowed to firms undertaking Design & Devp contracts.
- Conditions for placing Design & Development Contracts.
- Terms of Payment- Advances and Milestone Payments.
- Post Contract Mgmt
- Declaration of Item as Free flow (ready for bulk prodn)

Chapter 15:

Design, Development and Fabrication Contracts

Selection of Items

- When OEM is closing / has closed prodn & spares not available ex-import for eqpt having adequate residual life and popln.
- Items for which TOT has been taken.
- Low tech items for which the sample is available and it is economic to develop.
- Fast moving spares for which reqmt is recurring.

Chapter 15:
Design, Development and Fabrication Contracts
Selection of Items

- Goods whose import price is exorbitant.
- Items short-listed from MRLS/import list depending on criticality, technological processes and consumption rate.
- If firm offers to develop an item on 'No Cost : No Commitment' basis.
- For any other strategic reason.

Chapter 15

Design, Development and Fabrication Contracts

Special Provisions

- Wide exploration of sources in public/pvt sector and tech competence to be criteria for consideration.
- Generally with 2 or more contractors in parallel.
- Ratio of splitting of order in cases of parallel devp incl criteria thereof must be pre-disclosed in the RFP.
- In case of meager reqmt & complex tech, single expert source may be considered.
- During development stage, 20 % of the total order qty (indent) to be earmarked for development.

Chapter 15: Design, Development and Fabrication Contracts

Special Provisions

- Pre-bid Conference for turnkey projects & devp orders for sophisticated & complex eqpt.
- Advance payment where necessary upto 15 % and stage payments linked to actual work performed as per cognizable milestones.
- Firm capable of taking on bulk production later.
- Specifications/designs/drawings issued to the contractors or prepared by them for the contract should be taken over as these belong to the Govt.

Chapter 15:

Design, Development and Fabrication Contracts

STEPS IN PROCESSING

- Identification/Selection of stores/items for indigenous development.
- Generation of the Paper Particulars / drawings.
- Identification of vendors/firms.
- Framing and Issue of RFP.
- Technical evaluation of bids and holding of CNC/PNC.
- Conclusion of Contract/ Supply Order.
- Post Contract Management.

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Chapter 15: Design, Development and Fabrication Contracts

Key Issues

Indent for Indigenous Development Contracts

- 20 % of the annual requirement projected in the provision review can be diverted towards indigenous source development.
- This qty remains deficient for service indentors.
- Since devp gen takes 2-3 years, not desirable to keep critical reqmts deficient for field army for long.
- Accordingly following is provided-

“During the developmental stage, 20% of the total order quantity may be earmarked for development. This would, however, not be considered as a case of dual procurement.”

Chapter 15: Design, Development and Fabrication Contracts

Placement of Contracts on two Devp Agencies.

- Para 9.3 (c) provides that generally development/indigenization contracts are to be concluded with 2 or more contractors in parallel.
- The Services, particularly the Navy, felt strongly that it is was not feasible to develop two sources of supply in the following circumstances –
 - **When the qty required is meagre and requirement for the item is far spaced eg anchors**
 - **(b) When complex technology is involved, requiring huge investment in setting up of infrastructure.**
- Provision made to approach single source in above cases

Chapter 15: Design, Development and Fabrication Contracts

Key Issues

Declaration of a source as developed.

The MoD/DDP&S guidelines provide that

- 1990/97- An item is considered developmental until at least two sources supply the store successfully against two successive purchase orders each.
- In 1999 in order to accelerate the pace of indigenization to modification allowed that “an item be declared as free flow if the second source is not developed within 5yrs from the date of completion of first supply order. However, there could be exceptions with full justification.”
- Both provisions incorporated in DPM with a further modification of the 1990/97 orders that “two sources supply the store successfully against one purchase order each.”

Chapter 15: Design, Development and Fabrication Contracts

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