

Ministry of Defence  
D (Vigilance)  
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Subject: Guidelines of the Ministry of Defence for Penalties in Business Dealings with Entities.

In continuation of this Division's ID Note of even number dated 21.11.2016 forwarding therewith Guidelines of Ministry of Defence for penalties in business dealings with entities for compliance, the procedure for Penal Action under the said guidelines duly approved by Hon'ble RM is forwarded herewith for information and necessary compliance.

2. The FAQs on the said guidelines are also enclosed for information and guidance.

Encl.: As above.

*20/12/2016*  
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Director (Vigilance)  
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SA to RM	Secretary (DP)	Secretary (Defence Finance)		
VCOAS	VCNS	VCAS	DG (Coast Guard)	CISC
DG (Acquisition)	AS (R)	AS (J)	JS &AM (LS)	JS&AM (MS)
JS&AM (Air)	JS (Army)	JS (Air/BR)	JS (Works)&CVO	

MoD ID No.31013/1/2016-D (Vig) Vol.II dated 30.12.2016

Copy to:

PS to RM

PS to RRM

SO to Defence Secretary

*O/c*

*Issue of order  
encd. in  
2-1-17*

**PROCEDURE FOR PENAL ACTION UNDER THE GUIDELINES OF THE MINISTRY OF DEFENCE FOR PENALTIES IN BUSINESS DEALINGS WITH ENTITIES**

1. Proceedings for levy of financial penalties and/ or suspension/ banning of business dealings with entities are in the nature of summary administrative decisions, aimed at protecting Government interest.
2. Accordingly, issuance of an order of suspension/ banning or any other penal action shall be based on the Competent Authority being satisfied that such action is appropriate and necessary in order to protect the Government interests considering the facts and circumstances of the case.
3. The proceedings under the Guidelines for Levy of Financial Penalties and / or Suspension / Banning of Business Dealings will be applicable in respect of entities seeking to enter into contract with / having entered into a contract for the procurement of goods and services related to defence equipment within the ambit of Defence Procurement Manual (DPM) and Defence Procurement Procedure (DPP).
4. The following procedure may be followed for taking penal action under the Guidelines of the Ministry of Defence for Penalties in Business Dealings with Entities issued on 21<sup>st</sup> November 2016 and as amended from time to time(hereinafter referred to as 'the Guidelines').The procedure shall be read in conjunction with the Guidelines.

**Procedure for Initiating Penal Action**

5. The Service Headquarters/ HQ IDS/ attached/ subordinate Offices of Ministry of Defence, on noticing or receiving information regarding allegations or facts related to any of the grounds enumerated in the Guidelines, shall refer the matter to the concerned Wing of Ministry of Defence with relevant details and recommendation for action under the Guidelines.
6. On receipt of such recommendation regarding allegations or facts related to any of the grounds enumerated in the Guidelines or taking suo motu cognizance of such information available to it, the concerned Wing of Ministry of Defence shall examine and submit the proposal for action under paras C, D, F of the Guidelines, to the Competent Authority for consideration and appropriate decision.

7. For the purpose of the examination, the concerned Wing of Ministry of Defence shall, if required, call for all related files and documents from concerned SHQs/ Organizations / Offices.

**Suspension of Business Dealings**

8. Business dealings with an entity may be suspended under the circumstances listed at Para D.1 and D.2 of the Guidelines. The Competent Authority for suspension of business dealings with entities under the Guidelines shall be the Raksha Mantri.

9. It is not necessary to give any show-cause notice to the entity before issuing the order of suspension of business dealings with an entity.

10. On receipt of information regarding allegations or facts on the basis of which it is proposed to suspend business dealings with an entity, the Competent Authority may constitute a Committee to further examine the facts and make recommendation for suspension or otherwise.

11. The order of suspension of business dealings with an entity shall be issued for such period as the Competent Authority may deem fit. The total period of suspension of business dealings with an entity shall not exceed the maximum period of business dealings with an entity for the same cause of action.

12. The concerned Wing of Ministry of Defence may get the draft order of suspension of business dealings vetted by LA (Defence).

13. The order of suspension of business dealings with an entity shall be issued by the concerned Wing of the Ministry of Defence and such order shall be communicated through D(Vigilance) to all Wings in the Ministry of Defence(including DDP and DRDO)/ Service Headquarters/ HQ IDS/ Attached and Sub-ordinate Offices of Ministry of Defence.

14. Simultaneously, D(Vigilance) shall also update the list of entities with which business dealings have been suspended, on the website of the Ministry of Defence.

15. The entity with which the business dealings have been suspended shall be dealt with as provided under Para (E) of the Guidelines.

16. A review of order of suspension shall be undertaken before expiry of the period specified therein or within six months of the issue of such order, whichever is earlier.

The concerned Wing of Ministry of Defence shall examine the case for review and submit the proposal for extension or revocation of suspension order or otherwise to the Competent Authority for consideration and appropriate decision.

17. The Competent Authority may constitute a Committee to further examine and make recommendation for extension or revocation of suspension or otherwise. Such Committee shall be headed by a two-star or equivalent rank officer.

18. Similar procedure as mentioned in Para 16 above shall be followed for subsequent reviews on six monthly basis and the order of revocation or further extension of the order of suspension shall be issued before the expiry of the order of suspension in vogue, with the approval of the Competent Authority.

### **Banning of Business Dealings**

19. Business dealings with an entity may be banned under the circumstances listed at Para F.1 and F.2 of the Guidelines. The Competent Authority for banning of business dealings with entities under the Guidelines shall be the Raksha Mantri.

20. It is not necessary to first suspend the business dealings with an entity before initiating the proceedings for banning of business dealings with an entity.

21. No order of banning of business dealings with an entity shall be made without issuing a show-cause notice explaining the grounds for the proposed action and providing an opportunity to the entity to explain its case. However, such notice shall not be required in cases where an entity has already accepted the misconduct related to any of the grounds enumerated in Para C.1 (a) to (f) of the Guidelines.

22. The concerned Wing of Ministry of Defence shall examine and submit the proposal for issuance of show cause notice for banning of business dealings with the entity or otherwise to the Competent Authority for consideration.

23. The concerned Wing of Ministry of Defence may get the draft show-cause notice vetted by LA (Defence).

24. The show-cause notice shall contain the following:

- (a) The reason for the proposed action and the grounds relied upon.
- (b) That, the entity should submit its response in writing within 30 days after the receipt of the Notice.

(c) That penalty of banning of business dealings with the entity is being contemplated including or excluding its allied firms.

25. Record of delivery of show-cause notice to the entity shall be maintained by the concerned Wing of the Ministry of Defence.

26. In case no reply to show cause notice is received from the agency within stipulated time, action against the concerned entity shall be initiated by the concerned Wing ex-parte.

27. The written response of the entity shall be examined by the concerned Wing of the Ministry of Defence. For the purpose of the examination, the concerned Wing of Ministry of Defence shall call for all related files and documents from concerned SHQs/ Organizations / Offices. The concerned Wing of the Ministry of Defence may also seek the advice or comments of MoD (Finance) and/ or Ministry of Law & Justice.

28. After examination of the written response, the concerned Wing of Ministry of Defence shall submit the proposal for banning of business dealings with the entity or otherwise to the Competent Authority for consideration and appropriate decision.

29. The Competent Authority may at any time in the process, constitute a Committee to make recommendation for banning of business dealings with the entity or otherwise.

30. The order of banning of business dealings with an entity shall be issued for such specified period as the Competent Authority may deem fit.

31. For the grounds listed in paragraph C.1 (a) to (d) of the Guidelines, the period of banning of business dealings with an entity shall not be less than five years and not more than ten years.

32. For the grounds listed in paragraph C.1 (e) and (f) of the Guidelines, banning of business dealings may be resorted to if, in the view of the Competent Authority, the grounds for action are such that continuation of business dealings with the entity would be detrimental to public interest. In such cases, the period of banning of business dealings with an entity shall not ordinarily exceed three years.

33. The period of Banning of business dealings with an entity in both the categories will be inclusive of period of suspension of business dealings with an entity, if any, for the same cause of action.

34. In exceptional cases and those involving national security considerations the competent authority may order a longer period of banning of business dealings with an Entity, as deemed appropriate.

35. A speaking order for banning the business dealings with the entity shall be issued by the concerned Wing of Ministry of Defence with the approval of Competent Authority. The speaking order shall contain the facts that the decision has been taken after the issuance of show cause notice and consideration of representation of entity, if any, in reply thereto.

36. The concerned Wing of Ministry of Defence may get the draft order of banning of business dealings with an entity, vetted by LA (Defence).

37. The order of banning of business dealings with an entity shall be communicated through D(Vigilance) to all Wings in the Ministry of Defence(including DDP and DRDO) / Service Headquarters/ HQ IDS/ Attached and Sub-ordinate Offices of Ministry of Defence.

38. Simultaneously, D (Vigilance) shall also update the list of entities with which business dealings have been banned, on the website of the Ministry of Defence.

39. The entity with which the business dealings have been banned shall be dealt with as provided under Para (G) of the Guidelines of Ministry of Defence for Penalties in Business Dealings with Entities.

#### **Levy of Financial Penalty**

40. Financial penalties may be levied as provided for in the Pre-Contract Integrity Pact and / or the Contract which may be governed under the extant provisions of the DPM and DPP.

a) In cases involving non-performance or under performance of contract, the Performance-cum-Warranty Bond and / or Advance Bank Guarantee shall be invoked as per specific provisions of the Contract apart from other actions including cancellation of the contract.

b) In cases involving violation of Pre-Contract Integrity Pact under the Defence Procurement Procedure, apart from other actions including cancellation / rescinding of

concerned or all Contracts; any one or all of the following actions can be taken towards levying financial penalty:

- i) Forfeiture of the IPBG / Performance-cum-Warranty Bond either fully or partially.
- ii) Recovery of all sums already paid by the Buyer, in case of an Indian Bidder with interest thereon at 2% higher than the prevailing Base Rate of SBI and in case of a Bidder from a country other than India with interest thereon at 2% higher than the LIBOR. If any outstanding payment is due to the Bidder from the Buyer in connection with any other contract for any other defence stores, such outstanding payment could also be utilised to recover the aforesaid sum and interest.
- iii) Encashment of the advance bank guarantee and Performance-cum-Warranty Bond if furnished by the Bidder, in order to recover the payments, already made by the Buyer, along with interest.
- iv) Recovery of all sums paid in violation of this Pact by Bidder(s) to any Agent or broker with a view to securing the contract.

c) In cases involving violation of Standard Clause in the Contract relating to Agents / Agency Commission under the Defence Procurement Procedure, apart from other actions including putting on hold or cancellation of the contract either wholly or in part, any one or all of the following actions can be taken towards levying financial penalty:

- i) To pay to the Buyer any such amount paid as gift, reward, fees, commission or consideration along with interest at the rate of 2% per annum above LIBOR rate.
- ii) Refund of all payments made by the Buyer in terms of the Contract along with interest at the rate of 2% per annum above LIBOR rate.
- iii) Recovery of any such amount referred in (i) and (ii) above from other contracts of the Seller with the Government of India.

41. The proceedings for levy of financial penalty shall be under the specific clauses of the PCIP and / or Contract and show-cause notice (if required) / orders letters for invoking Bank Guarantees etc. may be vetted by LA (Defence).

42. The proceedings for levy of financial penalty shall be initiated by the concerned Contract Management Authorities. No order of levying a financial penalty shall be made without issuing the show cause notice explaining the grounds for the proposed action and providing an opportunity to the entity to explain its case.

43. The show-cause notice shall contain the following:

- (a) The reason for the proposed action and the grounds relied upon.
- (b) That, the entity should submit its response in writing within 30 days after the receipt of the Notice.

44. The orders for imposing financial penalty shall be issued with the approval of Competent Authority on file.

45. The Competent Authority for imposition of financial penalties in cases covered under Para 40 (a) above, shall be the Vice Chief of the Services / CISC in respect of delegated powers and the Raksha Mantri for other cases. For imposition of financial penalties in cases covered under Paras 40 (b) and (c) above, the Competent Authority shall be the Raksha Mantri.

(Note: The above examples are based on provisions of the DPP 2016. For cases being dealt with under the DPM, the relevant clauses shall apply.)

46. The Guidelines and above Procedure may be suitably adopted by concerned Departments / Attached / Subordinate Offices under MoD in respect of entities with which business dealings are being / have been undertaken other than under DPM and DPP.

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**FREQUENTLY ASKED QUESTIONS(FAQ) ON THE  
GUIDELINES OF THE MINISTRY OF DEFENCE FOR  
PENALTIES IN BUSINESS DEALINGS WITH ENTITIES**

Q1. What constitutes the Ministry of Defence?

Ans: Ministry of Defence includes Department of Defence, Department of Defence Production, Department of Defence Research & Development, Headquarters Integrated Defence Staff, Armed Forces Headquarters and their attached/subordinate offices.

Q2. What all comprises 'Entities'?

Ans: "Entities" includes companies, trusts, societies, as well as individual and their associations with whom the Ministry of Defence has entered into, or intends to enter into, or could enter into contracts or agreements for the procurement of goods and services under the DPP and DPM.

Q3. How are allied firms of an entity determined?

Ans: All firms/companies which come within the sphere of effective influence of the entities shall be treated as its allied firms. In determining this, the following factors may be taken into consideration: -

(i) Whether the management is common or the majority interests in the management is held by the partners or directors of the entities.

(ii) Majority shares are owned by the entity, their directors/shareholders and by virtue of this it has a controlling voice.

Q4. Who is the competent authority for such penal levies and/or suspension/ban?

Ans: The competent authority for suspension/ban on business dealings with entities is the Raksha Mantri. With regard to financial penalties as provided for in Contracts, the competent authority in respect of contracts concluded within the delegated powers of Services, it shall be the VCOAS/VCNS/CISC/DCAS/DG,ICG. For the rest, it shall be Raksha Mantri. This is based on provisions of the DPP 2016. For cases being dealt with under the DPM, the relevant clauses shall apply.

Q5. Is the competent authority the sole authority or does he/she have an advisory council/body?

Ans: The Competent Authority may constitute Committees as necessary, to examine and make recommendations on any matter provided for under these guidelines.

Q6. What are grounds for penal levies and/or suspension/banning of Business Dealings with an Entity?

Ans: The grounds for levy of financial penalties and/or suspension/banning of business dealings with an Entity are as follows: -

- (a) Violation of Pre-Contract Integrity Pact (PCIP) (where such PCIPs are entered into between the Ministry of Defence and entity).
- (b) Resort to corrupt practices, unfair means and illegal activities during any stage of bid/contract to secure a contract, even in cases where PCIP is not mandated.
- (c) Violation of Standard Clause in the contract of agents/agency commissions.
- (d) If national security considerations so warrant.
- (e) Non-performance or under performance under the terms and conditions of contract(s) or agreements(s) not covered in grounds listed in (a) to (c) above in accordance with provisions in contract or agreement.
- (f) Any other ground for which the competent authority may determine that suspension or banning of business dealings with an entity shall be in the public interest.

Q7. What would constitute non-performance or under-performance?

Ans: Under-performance and non-performance is determined in accordance with the terms and conditions of the procurement contract or agreement.

Q8. How would under-performance be qualified?

Ans: Under performance would be qualified through the recorded/documented serviceability and/or performance, vis-a-vis the vendor's assured performance criteria. (Downtime / failure rate etc.)

Q9. What would be the status of running contract in case of suspension?

Ans: Any contract(s) related to the procurement process(es), in connection with which business dealings with an entity are suspended, will be held in abeyance. However, other contracts involving such entity shall continue unless a decision to the contrary is taken by the competent authority, on a case by case basis.

Q10. How many times can suspension be extended?

Ans: An order of suspension of business dealing with an entity will be issued for such period as the competent authority may deem fit. The period of suspension shall not ordinarily exceed one year and in any case shall not be more than ten years. A review of the Order of suspension of business dealings with an entity shall be undertaken within six months of the issue of such an Order and before expiry of the period specified therein. The suspension of an entity may be extended beyond the period of one year, on the order of the Competent Authority for subsequent periods of six months each.

Q11.a) Will the suspension period get counted in the final order of debarment?  
b) What happens if the period of debarment decided by the competent authority is less than the cumulative period served in suspension?

Ans: The total period of suspension of business dealings with an entity shall not exceed the maximum period of banning of business dealings with an entity for the same cause of action.

Q12. What is the composition of committee?

Ans: Committee would comprise any or all of the experts in the fields of acquisition, defence and law, etc. as decided by the Competent Authority.

Q13. What are the effects of Banning of Business Dealings with an Entity/ Debarment of an Entity?

Ans: An order of banning of business dealings with an entity shall result in immediate ineligibility of the entity, from participating in future bids for a specified period with effect from the date of such order. No RFP will be issued to such an entity.

Q14. What are the effects of Banning of Business Dealings with an Entity on cases at different stages of procurement?

Ans: The effect on case at different stages of procurement is as follows:

(a) **L1 not determined;** Case will be progressed after excluding the bid involving entity with which the business dealings are banned. In case there are only two bidders, one being the entity with which business dealings are banner, the procurement will be progressed as per extant provisions of DPP after excluding such an entity.

- (b) **L1 determined:** Any on-going procurement process where the lowest bidder involves an entity with which the business dealings are banned, will be terminated and fresh procurement process, if required, may be initiated.

Q15. Does the order of banning of business dealings with an entity affect its allied firms?

Ans: Orders of banning of business dealings with an entity may be extended to its allied firms by specific order of the Competent Authority.

Q16. What are the effects of Suspension or Banning of Business Dealings with an Entity on its Employees / Agents?

Ans: Any employee or agent of an entity with which business dealings are suspended or banned and who is involved in a case of alleged impropriety for which investigation or judicial proceedings is in progress, will not be allowed to engage in any bid process in any capacity with the Ministry of Defence even after the expiry of the period of suspension / banning of business dealing with the entity.

Q17. Is it permissible to deal with the suspended or banned firms under any circumstances?

Ans: If it becomes necessary on grounds of national security and operational preparedness / export obligations, to deal with an entity with which business dealings have been suspended or banned, in a procurement process and which is the only source that can supply/manufacture an equipment/weapon systems, the Competent Authority will be approached for approval of issuance of RFP or conclusion of contract with such an entity.

Q18. Can a suspended or banned business entity be permitted to transact contracts or agreements under a different name / division?

Ans: The entity with which business dealings have been suspended or banned will not be permitted to transact contracts or agreements under a different name or division either through a transfer of assets of such an entity to another legal entity or otherwise.

Q19. Where can one find the list of entities with business dealings have been suspended or banned?

Ans: An updated list of entities with which business dealings have been suspended or banned by the competent authority and/or against which financial penalties have been imposed shall be maintained on the official website of the Ministry of Defence.