



FAQ ON PROCUREMENT OF GOODS

**VIGILANCE ORGANISATION
SOUTHERN RAILWAY**



Frequently

Asked

Questions

On Procurement of Goods

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Disclaimer

The contents of this handbook should not be construed as legal advice; they are meant merely to serve as guidelines. The topics covered in this handbook should not be considered as exhaustive, nor should they be cited as authority in any official reference or produced in a court of law. Any reference, whenever necessary, should always be made to the original statute provisions, Railway Board Circulars etc., which are cited in this handbook.

While every care has been taken to ensure that the contents of this handbook are accurate and up to date till October 2023, readers are advised to check the precise current provisions of law and other applicable instructions from the original sources. In case of any conflict between the provisions stipulated in this handbook and in the original source such as SOP or Railway Board Circulars or the prevailing laws, the provisions contained in the extant law and the original instructions shall prevail.

Introduction

Even though there is no exclusive law governing public procurement as on date, the goods procurement system in Indian Railways is bound to follow several framework laws (apart from the Constitutional Provisions) such as the Indian Contract Act, 1872, Arbitration and Conciliation Act, 1996, IT Act, 2000, Competition Act, 2002, MSMED Act, 2006 etc., and also the provisions of GFR, 2017, Manual for Procurement for Goods (Updated June 2022), Stores Code, IRS conditions of contract (Updated September 2022), Several circulars of Railway Board, SOP and local Policy Circulars.

This handbook is intended to serve as a guide to the officers and officials who deal with the procurement of goods in Indian Railways. An attempt is made in this handbook to answer the commonly and frequently arising questions while handling tender cases, during contract management etc., This handbook is to be

considered as a starter. Readers are requested to go through the references cited in this handbook in its entirety to get complete knowledge of public procurement.

Indian Contract Act,1872

- 1. A tender case was re-tendered owing to higher rates not being reasonable. However, rates received in re-tender are still higher than that of the previous tender. If the validity of the eligible offer in the previous tender has not expired, can such offer be considered?**

Answer:

Such decisions are normally taken because of the following reasons:

- Rate of the eligible offer in the previous tender is less than that received in the re-tender.
- To avoid finalization of tender at higher rates and
- In the interest of Railways

As stipulated in the Indian Contract Act, 1872, the offer comes to an end- where the offeree rejects the offer. In other words, once the offeree rejects the

offer, such offer cannot be revived by subsequently attempting to accept it. Such rejection of offer can be express or implied.

By re-tendering the case, the offer received against such tender was rejected. Therefore, validity of such rejected offer has no significance thereafter and hence subsequent acceptance of such rejected offer on account of rates received being higher in the re-tender is not appropriate.

To sum up, offer received in the previous tender cannot be considered and accepted after the case was re-tendered.

2. Tender was floated with Delivery Period (DP) as 2 months. L1 vendor has offered to supply the item in 8 months. The offer of the vendor is otherwise technically suitable and its rate is also reasonable. Can the PO be released on L1 vendor with DP as per the tender requirements?

Answer:

If the tender was floated with Time Preference Clause in it, then the offer of L1 vendor in this case can be passed over on the grounds that the DP in the offer is not as per the tender requirements.

If the tender was not floated with Time Preference Clause in it, L1 vendor can be requested to supply the item as per tender requirements. If the vendor is not in a position to accept it, then the contract has to be concluded on the vendor as per its offer. In other words, DP in the subject contract would be 8 months- as per the offer of the vendor.

As per the provisions of the Indian Contract Act, acceptance must be absolute, unqualified and shall be in accordance with the exact terms of the offer. Otherwise, such acceptance is not considered as valid and the resulting contract is nothing but a “counter-offer” extended to the vendor- which can be accepted or rejected by it.

In case the contract was concluded in this case on L1 vendor with DP as 2 months and the vendor reject such contract because of the DP, then the DP of the contract has to be amended in line with the offer of the vendor or the contract has to be cancelled without financial repercussion.

3. **PO was released on a dealer for supply of an item with Model "X" manufactured by an OEM. Before expiry of DP, OEM has given a letter stating that the model stipulated in the contract is no longer manufactured by it. The dealer is also not having any stock of the same and could not acquire the item from other dealers. Can the contract be cancelled with levy of GD/ forfeiture of SD?**

Answer:

When the contract was concluded in this case, Model "X" was being manufactured by the OEM- which made the dealer to quote for the same in the tender under valid authorisation of the OEM. However, the OEM has stopped manufacturing the item before expiry of DP, which had resulted in the inability of the dealer to supply the item as per the contract. It is also clear that the item was not available in the market. Thus, the element of "impossibility of performance" is established in this case.

As per the provisions of the Indian Contract Act, such contract is a “Void contract”. (A contract to do an act- which becomes impossible after the contract is made- becomes void, when the act becomes impossible). Therefore, under such circumstances, the contract has to be cancelled without Financial Repercussions.

To sum up, the contract in this case has to be cancelled without levy of GD/ forfeiture of SD.

4. Why to release LOA (Letter of Acceptance) prior to the release of PO? Why not release the PO directly without releasing LOA?

Answer:

As per the provisions of the Indian Contract Act, an offer could be revoked anytime by the offeror- before the communication of the acceptance of his offer by the offeree. Therefore, if the acceptance of the offer by Railways was not communicated to the bidder, the bidder can withdraw his/her offer anytime. LOA is the tool through which the acceptance of the offer by Railways is communicated to the successful bidder.

Apart from the above, bidders' offers would be valid only upto a certain period of time within which the contract shall be concluded, failing which the offers would lapse- unless its validity has been further extended by the bidder.

There may be occasions where the draft PO is under vetting of Accounts and such draft PO is kept pending for want of funds. Because of such a delay in the release of PO, it is possible that the validity of the offer could lapse or that the successful bidder could even decide to withdraw his/her offer.

Under such circumstances, if the LOA was not released, there is no other option but to either re-tender the case or to seek extension of validity of offer from the bidder. To avoid such situations, release of LOA as soon as the tender is accepted is essential.

To sum up, the release of LOA before releasing the PO is a good and essential practice- as mandated by the Indian Contract Act.

- 5. PO released with DP by the end of February.**
- Owing to consignee's remarks that the item is urgently required, DP of the contract was unilaterally advanced by Railways to December (i.e., DP advanced by two months). The Contractor contested the above modification of DP and supplied the item only by the end of January. Can the DP be extended upto the date of supply with levy of LD?**

Answer:

A contract is a legally enforceable agreement that is entered into by two or more parties containing terms that have been mutually discussed and agreed to. Therefore, any amendments to the contract must be agreed to by all the parties and hence any unilateral amendment to the contract (without the assent of the other party(ies)) is not enforceable.

In this case, the unilateral advancement of DP by Railways to December is not enforceable. The same was contested by the contractor also. Therefore, LD is also not leviable- since the item was supplied by the end of January- which was within the actual contract period (February end).

- 6. PO released with DP by the end of February. Owing to the lack of availability of funds, DP of the contract was unilaterally postponed by Railways to the end of April (i.e., DP postponed by two months). The Contractor contested the above modification of DP and requested to cancel the PO. Can the PO be cancelled with GD?**

Answer:

A contract is a legally enforceable agreement that is entered into by two or more parties containing terms that have been mutually discussed and agreed to. Therefore, any amendments to the contract must be agreed to by all the parties and hence any unilateral amendment to the contract (without the assent of the other party(ies)) is not enforceable.

In this case, the unilateral postponement of DP by Railways to April is not enforceable. The same was contested by the contractor. Therefore, GD is also not leviable, if the PO is to be cancelled.

7. A tender was floated in which the validity period of offers was requested for 60 days. The validity of the offer of L1 vendor (which was technically suitable and its rate was also reasonable) was only for 30 days. Can the bidder quote such lesser validity period when it was explicitly stated in the tender that the offer validity shall be for 60 days?

Answer:

It is not mandatory on the part of the bidders that the validity period of their offers should match with that of the tender requirements. Also as stipulated in the Indian Contract Act, 1872, the offer could be revoked anytime by the offeror, before the acceptance of his/her offer was communicated to him/her.

To sum up, the bidder can quote his/her offer with validity period lesser than that specified in the tender.

8. A Tender was finalised after expiry of offer validity period and thereafter LOA (Letter of Acceptance) were issued to two eligible vendors, requesting each to remit SD. While one of the vendors rejected the LOA stating that the tender was finalised beyond the offer validity period, the other vendor remitted SD. Can the PO be released on the second vendor, even though the LOA for the second vendor was also issued after expiry of offer validity?

Answer:

As stipulated in the Indian Contract Act, 1872, the offer gets lapsed automatically- if the communication of acceptance was not made to the offeror within the offer validity period- unless the offer validity was extended further by the offeror. In this case, the tender was finalised after expiry of offer validity and hence the LOA was rightfully rejected by the first vendor. In other words, the first vendor neither extended the offer validity nor

remitted the SD as stipulated in LOA. Therefore, PO cannot be released on the first vendor.

However, the second vendor did not explicitly extend the offer validity but remitted the SD as stipulated in LOA. Such action tantamount to “acceptance by conduct” as stipulated in the Indian Contract Act, 1872 i.e., as per the conduct of remitting the SD, the second vendor had accepted the LOA. Therefore, PO can be released on the second vendor- even though offer validity was not explicitly extended by it.

GST

- 9. Offer received with Nil GST. However, the offer is technically suitable and its rate is also reasonable. Can the offer be accepted?**

Answer:

Following steps shall be followed in the same order of precedence:

- Check whether GST is leviable for the item (for which the tender was floated). Diesel, for example, is not subjected to levy of GST. In such a case, the offer for such item will obviously cannot contain GST element in it and therefore the offer can be accepted.
- If GST is leviable for the tendered item but still the offer was without GST, the bidder shall be requested to furnish its GSTIN, which shall thereafter be checked in the official website of GSTN to ascertain the status of the bidder. If the status of the bidding entity is shown as "Composition" (instead of "Regular"), then the

bidder cannot collect GST and hence the bidder had rightly quoted without GST in its offer. In such a case, the offer can be accepted and, in the PO, a remark is to be made, duly indicating the GSTIN of the contractor stating that the contractor is registered under "Composition Scheme" and hence GST is "Nil" in the contract.

- If the status of the bidding entity is shown as "Regular" and still the bidder has not quoted GST, then it is not appropriate and hence such offer is not to be considered.
- If the bidder has not furnished its GSTIN and has also not quoted GST in its offer, it is possible that the bidder is not registered with GSTIN and thus is not having GSTIN. (Without having GSTIN, a person cannot collect GST and because of this reason, the bidder could not have quoted GST in its offer). In such a scenario, the offer can be considered and contract can be concluded with the bidder-

provided the GST must be borne by the contractor. To this effect, it is to be remarked in the PO that the Bill Paying Officer shall deduct the applicable GST from the bills of the contractor and thereafter remit the amount to Tax Authorities under Reverse Charge Mechanism (RCM).

10. PO was released on a vendor with HSN Code: "XXXX" as per its offer. After release of PO, vendor has requested to amend the HSN Code to "YYYY" which is with higher GST rate than that of HSN Code "XXXX". In order to ensure that the all-in-cost remains the same (and hence no further expenditure to be incurred by Railways in the contract), vendor is ready to reduce its basic rate commensurate with the increase in GST rate, as a result of amending the HSN Code to "YYYY" as per its request. Can the request be considered?

Answer:

As per the extant tender conditions of Railways, vendor shall quote the HSN and GST as felt by appropriate by it at the time of bidding and the same shall be considered as final by Railways, which shall thereafter be incorporated in the contract. Therefore, any request of the vendor for

amendment of HSN code/GST rate at a later date after conclusion of contract shall not be accepted.

Even though there is no loss to Railways on account of issuing such amendment regarding HSN code (since the vendor had agreed to reduce its basic rate commensurate with the increase in GST), the possibility of vitiation of tender on account of issuing such amendment cannot be overruled. In other words, if the HSN code/GST rate was to be amended, it could be possible that the vendor might not have been the lowest eligible vendor in the first place in the tender- had the vendor quoted such higher GST rate in the subject tender itself.

To sum up, such request of the vendor shall not be accepted- even though there is no loss to Railways.

Note:

Availability of SVC in the contract has no connection with the above process of change in

HSN code. SVC would come into play, only if there is increase in GST rate during the course of contract under the same HSN code. Since the request of the vendor in this case was to amend the HSN code itself, SVC has no role to play in this case.

11. Tender floated and the offer received were, both, without SVC. Hence, PO was also released without SVC. Meanwhile, GST rates were increased. Now the contractor is asking amendment to: (1) incorporate SVC in the PO and (2) thereafter to increase the GST rates in the PO. Can these requests be considered?

Answer:

As stipulated in the “Manual for Procurement of Goods” (Updated June 2022) issued by Ministry of Finance, the Procuring Entity is not liable for any claim from the supplier on account of fresh imposition and/or increase (including statutory increase) in excise duty, custom duty, sales tax, and so on, on raw materials and/or components used directly in the manufacture of the contracted goods taking place during the pendency of the contract, unless such liability is specifically agreed to in terms of the contract.

In other words, if the contract was without SVC in it (since the offer was without SVC), then the later request of the contractor to incorporate SVC and thereafter to increase the GST rates cannot be accepted.

It is a good practice to adopt SVC in the tender- since the increase in taxes, if any, during the course of execution of the contract, is a statutory levy and the contractor has no role in it.

12. In tenders pertaining to procurement of goods, which GST-ITC flag shall be chosen at the time of placing indent?

Answer:

Railway Board vide letter no: 2016/AC-II/01/06/CRIS dated 22nd February 2023 has instructed that appropriate GST ITC flags are to be mandatorily captured at the stage of demand generation by indentors based on end use of the item. Accordingly, five ITC flags viz., T1, T2, T3, T4 and C2 with their respective descriptions were tabulated in the aforesaid circular.

As per the following notifications of the Department of Revenue under Ministry of Finance, no ITC of input goods shall be utilized by Zonal Railways in paying CGST, SGST, IGST or UTGST on the supply of its output service. It implies that the ITC of input services shall be utilized by Zonal Railways in paying CGST, SGST, IGST or UTGST on the supply of its output service:

- Notification No. 11/2017- Central Tax (Rate) dated 28th June 2017
- Notification No. 8/2017- Integrated Tax (Rate) dated 28th June 2017

Notwithstanding the above, Railway Board vide its GST circular no: 21/2018 (RBA No: 68/2018) dated 25th June 2018 has stipulated that ITC is available for GST paid relating to procurement of services only. The same was reiterated by Railway Board in its GST circular no: 28/2019 (RBA No: 98/2019) dated 6th November 2019 and also in its GST circular no: 10/2020 (RBA No: 18/2020) dated 19th February 2020. Thus, it is clear that the Zonal Railways cannot avail/utilize the ITC of input goods in paying CGST, SGST, IGST or UTGST on the supply of its output service.

To sum up, the indentors of Zonal Railways shall select “T3” (No ITC i.e., Input Goods- ITC of which is blocked or restricted”) in “GST-ITC flag” while preparing the indents for procurement of goods.

MSE

13.If the tender qty. is 1 no., MSE policy is still applicable in such tender? How the qty. distribution will be done in such case among the non-MSE and MSE vendors?

Answer:

It is a case of indivisible tender qty. Therefore, in such cases, if L1 vendor is a non-MSE unit and L2 vendor is a MSE unit within the range of (L1+15%), then the offer of L2 can be considered for 100% of tender qty., subject to matching the L1 prices - if the offer of the vendor is technically suitable.

Similarly, regarding PPP-MII in this case, if the L1 vendor is a Class-II Local Supplier and L2 vendor is a Class-I Local Supplier within the range of (L1+20%), then the offer of L2 can be considered for 100% of tender qty., subject to matching the L1 prices- if the offer of the vendor is technically suitable. (Assuming that there is no restriction in

the tender in procuring the item from Class-II Local Suppliers).

14.Preference to MSE units is “upto 25%” or “minimum 25%”?

Answer:

As per the revised FAQs in respect of Public Procurement Policy for MSE order, 2012 (circulated by Railway Board vide letter no: 2022/RS(G)/363/1 dated 21st September 2022), MSE units shall be allowed to supply upto 25% of total tender value. However, at the Ministry Level, it is mandatory to procure at least 25% of the annual procurement from MSEs.

To sum up, the MSE units shall be given preference in the individual tenders “upto 25%”, whereas the overall target at the Ministry level is “minimum 25%”.

15.Can SD be waived for a bidder, on the grounds that it is an MSE unit?

Answer:

In terms of Railway Board letter no: 2004/RS(G)/779/11/Pt. dated 23rd December 2019, EMD is exempted for MSE units. However, there is no exemption granted to MSE units from payment of SD.

To sum up, SD cannot be waived for a bidder on the grounds that it is an MSE unit.

PPP-MII

16. Offer received in a tender from the PAC holder is with 0% local content. Since the item must be procured from such PAC holder only, can the offer be accepted? Is there any exemption available for PAC items in PPP-MII (Make in India Policy)?

Answer:

As per the extant provisions of PPP-MII, bidders quoting local content less than 20% are termed as “Non-Local Suppliers” and such non-local suppliers are not eligible to bid in cases other than global tenders. Therefore, in the case of tenders other than global tender, offers of “Non-Local Suppliers” cannot be accepted- even if such offer is from PAC holder. Thus, the only solution available in such case is to float Global tender.

However, as laid down by Ministry of Finance in its OM No: F.No.12/17/2019-PPD dated 15.05.2020, no Global Tender Enquiry (GTE) shall be issued

without the approval of competent authority as designated by Ministry of Finance in its OM- in cases where the estimate value is upto Rs.200 crores.

In its OM No: F.12/17/2019-PPD dated 29.10.2020 (communicated by Railway Board vide its circular no: 2020/RS(L)/779/1 dated 24.11.2020), Ministry of Finance has clarified that the aforementioned OM will not apply to the procurement of spare parts of the equipment/Plant & Machinery etc., on “nomination basis” from OEM/OES or OPM- as no competitive tenders are invited in such cases. (As specified in paragraph 4.1 of Chapter-4 of the Manual for Procurement of Goods, 2017 issued by the Ministry of Finance- “nomination basis tenders” include tenders floated for PAC items)

Therefore, in the case of PAC items that could not be procured owing to the constraints outlined in PPP-MII, GTE can be solicited regardless of the tender value, as per the aforesaid circular. This

does not negate the applicability of PPP-MII to PAC items. Only the restriction regarding floating global tenders will not apply to PAC items, as specified in the circular.

To sum up, in case the PAC holder being a “Non-Local Supplier”, the only option available is to float global tender (irrespective of the estimated value) and to finalise it thereafter. There is no specific exemption stipulated in PPP-MII for PAC items.

17.L1 offer in a tender is with 0% local content.

However, user department has certified the offer as technically suitable. Can the PO be released on L1 firm based on the technical suitability?

Answer:

By certifying the offer as “Technically Suitable”, the user department has only meant that the offer was in compliance with the technical requirements enshrined in the specification/ drawing indicated in the tender. However, the aspect of compliance with the provisions of PPP-MII (Make in India Policy) must be investigated by the Stores Department only. To put it another way, the Stores Department is solely responsible for ensuring that the offer complies with the requirements of PPP-MII and the same does not fall under the purview of the user department.

Therefore, even if the offer was certified as “technically suitable” by the user department, the

Stores Department shall pass over the offer of L1 in the subject case- since the offer is not in compliance with PPP-MII.

18.Item made in foreign country. Local content quoted by the dealer is 100%. Can the offer of the dealer be accepted?

Answer:

From the authorised dealership certificate issued by the OEM in favour of the dealer, it would have been clear that the item was not manufactured in India. However, the dealer has quoted the local content in its offer as 100%.

As per Railway Board circular no: 2020/RS(G)/779/2-Part-1 dated 17th May 2021, the bidders offering imported products will fall under the category of “non-local suppliers” and such bidders cannot claim themselves as Class-I suppliers/Class-II suppliers.

In this case, even though the item is imported, the dealer has claimed itself as Class-I supplier, by quoting local content as 100%. Hence, the offer of the dealer in this case cannot be accepted.

19. A tender was floated with estimated value of Rs. 4.95 lakhs. L1 offer was for Rs. 5.05 lakhs. Even though the offer was otherwise suitable, its local content was 0%. Applying the principles of PPP-MII, can this offer be passed over?

Answer:

As per the extant provisions of PPP-MII (Make in India Policy) Order, the policy is applicable in cases where the “estimated value” of the tender is equal to or more than Rs. 5 lakhs. In other words, procurements where the estimated value is less than Rs. 5 lakhs are exempted from this order.

In this case, the estimated value of the tender was less than Rs. 5 lakhs. Therefore, the provisions of PPP-MII order will not be applicable in this case. Thus, the offer of L1 vendor (which was otherwise suitable) can be considered for acceptance- even though its offer value has exceeded Rs. 5 lakhs.

However, it shall be ensured that the procurement is not split for the purpose of avoiding the provisions of PPP-MII order and that the estimated value of the tender was arrived at as per the latest BQ rates or as per latest LPR (last purchase rate).

Railway Board Circulars

20. Can the offer of L2 vendor be accepted, if the L1 vendor withdraws its offer after opening of tender?

Answer:

As stipulated in the Indian Contract Act, 1872, the offer could be revoked anytime by the offeror before the communication of the acceptance of his/her offer was received by him/her. Therefore, it is quite possible that L1 vendor could withdraw its offer after opening of the tender, before the acceptance of its offer was communicated.

As per the guidelines of CVC in its letter no: 98/ORD/1 dated 24th August 2000, if L1 vendor backs out, the case shall invariably be re-tendered. However, citing the provisions stipulated in the then Manual for Procurement of Goods (2017 version) issued by Ministry of Finance, Railway Board vide letter no: 2017/Trans/01/Policy dated 17th November 2017 has stipulated that in case the L1

vendor backs out after opening of the tender, the L2 vendor be provided with an opportunity to match the price of L1 vendor and if the same was accepted, award the contract to L2 vendor- if the procuring authority was satisfied that it is not a case of cartelization and that the integrity of the procurement process has been maintained.

However, in its subsequent letter no: I(X)II/2017/PW/3/Pt. dated 06th January 2020, Railway Board has reiterated that the provisions of CVC guidelines in its aforesaid letter no: 98/ORD/1 dated 24th August 2000 will hold good till any further clarification/instruction is received from CVC.

To sum up, in case L1 vendor withdraws its offer after opening of the tender and before the acceptance of its offer was communicated, the case shall invariably be re-tendered.

21.Can the offer of a developmental vendor be considered for bulk order?

Answer:

In terms of Railway Board letter no: 2001/RS(G)/779/7 Pt 2 (1) dated 06th November 2018, the developmental vendors can be considered for placement of bulk order without any quantity restrictions- where there are not more than three Indian Suppliers categorized as Approved vendor for a particular item by RDSO. It was also stipulated in the aforesaid circular that while considering such developmental vendors for bulk orders, factors such as past performance, capacity, delivery requirements, quantity under procurement, nature of item, outstanding order load etc., shall be considered, subject to rates being reasonable. The aforesaid circular was applicable only for RDSO directory items and where there are not more than three “Indian” approved vendors for the item.

The scope of the above instruction was widened by Railway Board in its letter no: 2021/RS(G)/779/7

dated 18th January 2022. In terms of the above circular, the instructions contained in the earlier letter dated 06th November 2018 shall also apply for all items approved by all vendor approving agencies. In other words, the provisions of the letter dated 06th November 2018 is now applicable for all directory items. In addition to the above, the term “Indian” has been dropped in the letter dated 18th January 2022.

Therefore to sum up, the developmental vendors can be considered for bulk order for any directory item for which there are not more than three “approved vendors” (and not “Indian Approved Vendors”) – subject to the conditions stipulated in the letter dated 06th November 2018.

22. There are three vendor approving agencies for an item viz., ICF, RCF and MCF. One of the vendor is categorised as an “Approved Vendor” by ICF for that item, while the same vendor is not figuring in the RCF and MCF directories for the same item. Offer of this vendor is ranked as L1 in the tender. Can the offer be passed over?

Answer:

As per the terms of Railway Board letter no: 2001/RS(G)/779/7 dated 07th November 2019, all vendors appearing in the approved vendor list of multiple vendor approving agencies for same item shall be considered as approved source for all the Railways and PUs. The same was further reiterated by Railway Board in its letter no: 2021/RS(G)/779/7 dated 18th January 2022 by stipulating that a vendor, approved by one agency for an item, shall be deemed as approved vendor for that item for procurement by entire Indian Railways.

To sum up, the offer of the vendor in this case cannot be passed over and can be considered for bulk order- since the vendor is categorised as “Approved vendor” by ICF.

23. A tender with estimated value of Rs. 10.15 crores (Reverse Auction) was floated and opened. The first round of TC (i.e., evaluation of technical bids, being an RA case) was prepared by SAG level officers (since the estimated value exceeded Rs. 10 crores) and the TC recommendations were accepted by PCMM (i.e., the TAA). After opening the financial bids, it was observed that the offers of L1 to L3 (all of which were eligible for bulk orders) were less than Rs. 10 crores. Can the second round of TC be prepared by JAG level officers and accepted by an SAG level officer- since the rates of these offers were less than Rs. 10 crores- thus falling within the purview of JAG level TC?

Answer:

In terms of Railway Board letter no: 2019/RS(G)/779/2 dated 08th August 2019, Reverse Auction shall be the preferred method for

procurement in tenders valued more than Rs.5 crores.

As stipulated in Railway Board letter no: 2017/Trans/01/Policy/Pt-S dated 28th March 2018, the level of TC to consider the Final Price Offers shall be determined on the basis of lowest Initial Price Offer of the bidder qualified for Bulk Order. Thus, it would seem that JAG level Officers should prepare second round of TC in this case- since the lowest offer eligible for bulk order was less than Rs.10 crores.

However, it was stipulated in the aforesaid letter that in case the TC which evaluated technical bids was higher than the level of TC competent to consider lowest Initial Price Offer of bid qualified for bulk order, the higher level of TC shall continue to finalize such tender cases.

Therefore, in this case, the SAG level TC shall continue evaluating the financial bids- even though

the offers eligible for bulk orders were priced less than Rs.10 crores- since the first round of TC was handled by them.

24. Tender was floated for a directory item. However, it was felt that the rates quoted by the approved vendors in the tender were unreasonably high. What could be done in such a scenario?

Answer:

As stipulated in Railway Board letter no: 2001/RS(G)/779/7 Pt 1 dated 29th June 2017, in cases of suspected cartel situations or where available rates from approved sources are adjudged unreasonably high, despite fair efforts as permissible, after recording reasons, Railways may consider placing orders outside directory, even beyond prescribed limits, subject to rates being reasonable.

If the above condition was stipulated in the subject tender, then the offers from unapproved sources can be considered for bulk orders- subject to their capacity and reasonableness of rates- duly recording reasons. In case the above condition was

not stipulated in the subject tender, then the case shall be re-tendered, duly incorporating the above condition, if the tender could not be finalised owing to higher rates from approved vendors.

Notwithstanding the above, the case can be referred to Competition Commission of India (CCI) for investigating the issue of suspected cartel formation among the approved vendors.

25. In a tender, rate quoted by L1 vendor was found unreasonable, even though the offer was technically suitable. Counter-offer was hence extended to L1 vendor at the first instance, which was rejected by it. Can the original offer of L1 vendor be accepted thereafter?

Answer:

As per the terms of Railway Board letter no: 99/RS(G)/779/2 pt. dated 11th February 2016, if the rate quoted by L1 tenderer (suitable for bulk order) is not reasonable, the only option is to enter into negotiation with the bidder. It was explicitly stated in the aforesaid letter that counter-offer in lieu of aforesaid negotiation is not permitted. Thus, it is clear from the above that counter-offer ought not to have been extended to the vendor at the first instance in this case.

As further stipulated in the aforesaid Railway Board letter, the tender has to be discharged under normal

circumstances if the counter-offer is not accepted. In this case, therefore, the original rate quoted by L1 vendor cannot thereafter be accepted after rejection of counter-offer and the case shall be re-tendered.

26.Contract was concluded on a vendor for supply of an item at a fixed rate per unit. Before the supply was received against this contract, it was seen that the same vendor thereafter bagged another contract in another Railway for the same item at rates less than that of the aforesaid contract. Can the vendor be requested to match its rates in the subject contract with that of the other Railway's contract?

Answer:

The above issue of matching the rates by comparing with the rates of other contracts would fall within the purview of "Fall Clause". In terms of Railway Board letter no: 2008/RS(G)/779/8 dated 02nd June 2008 (which was reiterated in Railway Board letter no: 2022/RS(G)/779/2 dated 14th February 2022), Fall clause shall not be applicable to Fixed Qty. Contracts including Running Contracts. Therefore, in cases other than Rate

Contracts and Long-Term Contracts, Fall Clause is not applicable.

To sum up, the vendor cannot be requested in this case to match its rates with that of the other Railway's contract, unless the contract was a Rate Contract or a Long-Term Contract.

27. A tender was floated with eligibility criteria based on past performance. L1 vendor had enclosed a NS PO copy as proof of its credential. However, the supply status against the PO was not known. Can the vendor be requested to furnish proof regarding the supply status against the aforesaid PO, so as to ascertain its eligibility for bulk order? Can such post-tender clarification be obtained from the bidder?

Answer:

As stipulated in Railway Board letter no: 87/RS(G)/779/12 dated 19th/23rd June 1987, Officers dealing with evaluation of Tenders must be careful to ensure that they make direct and to-the-point queries while obtaining clarifications to the bids and try and get positive responses either affirming compliance with the requirements or clearly bringing out the deviations. It was also stipulated therein that the questioning should not be done in such a manner as to leave important issues

relating to Specifications unanswered or leave any bidder with an erroneous impression that the Evaluation Committee had found his bid to be acceptable.

Further, as per Railway Board letter no: 67-B(C)-PAC/III/72/16-17 dated 29th /31st July 1967, the scrutiny of the terms and conditions offered by the tenderers should be done at the initial stage of the tender scrutiny itself- so that all information necessary for the consideration of offers is called for at one time from the vendor.

The issue at hand has been explained in Manual for Procurement for Goods (June 2022 edition) also, wherein it has been stipulated that the shortfall information/ documents should be sought only in case of historical documents which pre-existed at the time of the tender opening and which have not undergone change since then.

This issue has been considered by the Judiciary in detail and has been termed as “Doctrine of Substantial Compliance”. It is a judicial invention, equitable in nature, designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but failed or faulted in some minor or inconsequential aspects which cannot be described as the “essence” or the “substance” of the requirements. While it seeks to preserve the need to comply strictly with the conditions or requirements that are important, it also aims to forgive non-compliance of tangential requirements. In such cases, an earnest effort at compliance of such tangential requirements should be accepted.

In this case, the bidder has submitted a supply order without its completion/ performance certificate. Therefore, such certificate can be asked for and considered. However, no new supply order should be asked for so as to qualify the bidder.

PVC

28. Tender is to be floated for an item for which PVC is applicable. However, the item is urgently required and hence the tender will be floated with lesser Delivery Period (DP) only, say 2 months. Since the DP is short, can such tender be floated without PVC in it?

Answer:

In terms of Railway Board letter no: 70/RS(G) 779/46 dated 13th March 1981, there should be no Price Variation Clause (PVC) in contracts with delivery period of less than 6 months. However, the aforesaid guideline was revised by Railway Board in its subsequent letter no: 70/RS(G) 779/46 dated 11th January 1982, wherein it was stipulated that PVC may be accepted in Stores Contracts irrespective of DP. Subsequent to the above, Railway Board has not stipulated anything related to PVC and DP- which means that PVC shall be adopted in tenders irrespective of DP.

As per the provisions of General Financial Rules (GFR), 2017, PVC can be provided only in long-term contracts, where the delivery period extends beyond 18 months. In short-term contracts, firm and fixed prices should be provided for. However, in the “Manual for Procurement for Goods” (Updated, June 2022) which was also issued by Ministry of Finance, it has been clarified that even for such shorter deliveries, the PVC may be stipulated for items with inputs which are prone to short-term price volatility- especially for critical or high value items.

To sum up, PVC is to be incorporated irrespective of DP requirements.

**29. Tender was floated without PVC in it.
However, L1 offer was with PVC. Can the
offer be accepted?**

Answer:

Since the tender was floated without PVC, any offer with PVC in it cannot be accepted thereafter.

Option Clause

30. PO released with (+)30% option clause. DP is available till the month end. However, supply received against the PO and was accepted on 10th of the month. Can option clause be still exercised in the PO?

Answer:

As per the terms of the option clause, it can be exercised on or before the original/ extended PO. Hence, the date of supply and acceptance is immaterial for exercising option clause.

To sum up, the option clause upto (+)30% of the PO qty. can be exercised in this case.

31.What is the minimum value of tender in which Qty. Option clause can be included?

Answer:

As per the terms of Railway Board letter no: 2021/RS(G)/779/5 dated 04th March 2022, the provision of (+)30% option clause is mandatory in all tenders as a Special Condition of Contract with a minimum purchase value of Rs. 1.5 crores. It was also stipulated in the aforesaid letter that Railways are not debarred from inclusion of the option clause in tenders valuing below Rs.1.5 crores, wherever required.

To sum up, the option clause can be included in any tender- irrespective of the value.

SOP

32.Can a single offer be accepted against a Limited Tender or against an Open Tender?

Answer:

If a single offer was received against a limited tender, the case is normally to be re-tendered. However, in case of urgent requirement of the item, such single offer can be accepted without re-tendering- if the rates are found to be reasonable. In terms of Railway Board letter no: 88/RS(G)/779/14 Pt. dated 6th January 2017, such urgency certificate shall be furnished by the Officer (not below JAG) of the Stores Department for Stock items and by the Officer of the Indenting Department for NS items. As per the extant provisions of SOP, JAG officers have powers to furnish such certificate upto Rs.10 lakhs- while HODs and PHODs have full powers.

In case a single offer was again received after re-tendering a limited tender, then such offer can be accepted, if the rates are reasonable.

In case a single offer was received against an Open Tender, the case need not be re-tendered. Such offer can be accepted- if the rates are reasonable.

33. Item was supplied after expiry of DP. Can such belated supply be accepted by the depot officer without extension of DP?

Answer:

As per the extant provisions of SOP, field Stores Officers can accept the belated supply (without extension of DP from Hqrs) as furnished below:

- a) Delay upto 6 months for order valued upto Rs.8 lakhs
- b) Delay upto 21 days for orders valued between Rs. 8 lakhs to Rs. 15 lakhs, provided the initial delivery period does not exceed 6 months

For all other orders, prior extension of DP from Hqrs is necessary.

34. Against the PO qty. of 20 nos., the contractor supplied 19 nos. only, which was found suitable and accepted. Consignee stated that the balance qty. of 1 no. is not required. Owing to the failure of the contractor, can the PO be cancelled with levy of GD for the unsupplied qty. of 1 no.?

Answer:

As per the extant provisions of SOP, depot officers are authorised to accept deliveries short or in excess upto 5% of the total contract value or Rs.8 lakhs whichever is less- without formal amendment to the contract- subject to the total receipt value not exceeding normal purchase powers of PCMM.

In this case, GD need not be levied for the unsupplied qty. of 1 no. since it is within the accepting power of the depot officer- provided the monetary limits stipulated in the aforesaid provision of SOP has not exceeded.

SD

35. Offer of the authorised dealer (whose OEM was one of the approved vendors) was accepted in a tender. Dealer was requested to furnish SD, which it refused. Can the dealer be exempted from payment of SD?

Answer:

In terms of Railway Board letter no: 2004/RS(G)/779/11/Pt. dated 23rd December 2019, SD shall be exempted for the vendor whose name is appearing on the approved vendor list. In this case, name of the dealer is not appearing in the vendor directory. However, name of the OEM- which is one of the approved vendors- is figuring in the vendor directory.

There exists a fiduciary relationship between the OEM and the dealer and is based on Latin Maxim “*qui facit per alium, facit per se*”, which means “*he who acts through another is deemed in law to do it himself*”.

Based on the above, it shall be construed that the dealer acts on behalf of the principal OEM. Hence, the benefit of SD exemption applicable to the principal OEM shall accrue to its dealer agent.

To sum up, the dealer in this case can be exempted from payment of SD.

36. Request for encashment of BG was made by Railways- for which the Bank is requesting to surrender the original BG in order to process the request. Original BG is however missing. What is required to be done?

Answer:

RBI in its Master Circular regarding Guarantees and Co-acceptances (DBOD. No. Dir. BC.12/13.03.00/2013-14 dated 01.07.2013) has stipulated a model format for bank guarantees which all banks follow.

Railways can submit such a request for BG encashment- even if it does not have the subject original BG on hand. This is evident from para 2 of the above model format of BG- which is furnished below:

“We _____ (Name of the bank) do hereby undertake to pay the amounts due and payable

*under this guarantee without any demur, merely
on a demand from the Government"*

Since it is not stated anywhere that the original BG must be turned over to the Bank in order to request its encashment, this action is not required. A valid claim from Railways is sufficient for the Bank to invoke the BG.

37. Contract was concluded on a vendor for which SD was furnished by it in the form of a Bank Guarantee (BG). Meanwhile, certain disputes arose in the contract and the vendor had requested for arbitration. While the appointment of arbitrator was in process, the vendor refused to supply the item till the issue was resolved through arbitration. Meanwhile the DP expired for the contract and the vendor was not willing to extend the currency of the BG, which was about to expire shortly. Can the BG be encashed immediately by Railways? What if the vendor opposes it stating that the BG cannot be encashed since the dispute is pending?

Answer:

Bank Guarantee (BG) is an undertaking issued by a bank to the beneficiary of such BG (i.e., Railways) that it will assume financial liability not exceeding the amount specified in the BG- in the event of any failure of the party (on whose behalf the guarantee

is given by the bank i.e., the contractor) to fulfil its obligation to the beneficiary of such BG, as stipulated in the contract between them.

RBI in its Master Circular regarding Guarantees and Co-acceptances (DBOD. No. Dir. BC.12/13.03.00/2013-14 dated 01.07.2013) has stipulated a model format for bank guarantees which all banks follow.

Bank Guarantee can be encashed by Railways, even if there is a dispute with the contractor and the issue is sub-judice. This is clear from para 3 of the above model format of BG- which is furnished below:

“We undertake to pay to the Government any money so demanded notwithstanding any dispute or disputes raised by the contractor(s)/supplier(s) in any suit or proceeding pending before any Court or

Tribunal relating thereto our liability under this present being absolute and unequivocal".

To sum up, BG can be encashed by Railways even if there is any dispute in the contract and the issue is pending for arbitration.

38. SD was furnished by a vendor in the form of BG (Bank Guarantee), after which the PO was released on it. Law branch recommended few corrections in the BG at the time of its vetting. Can the BG be sent directly to the contractor requesting to co-ordinate with the Bank to incorporate the recommended corrections in the BG?

Answer:

Bank Guarantee (BG) is a special form of contract entered into by the Bank with Railways as the beneficiary in this case. Therefore, intimation to correct the BG in this case should be made directly to the Bank by Railways, instead of routing it through the vendor.

39.What is the validity period of Security Deposit (SD) in Contracts for procurement of Goods?

Answer:

Prior to the latest revision of IRS conditions of contract (September 2022), the validity period of SD was 60 days beyond the delivery date of the contract. Therefore, in case of consideration of extension of delivery period of the contract, it was required to be ensured by the contracting authority that the validity of the SD was also extended accordingly.

However as per the latest IRS conditions of Contract (September 2022), the validity of SD shall be minimum 60 days beyond the end of the warranty period.

In other words, in the place of "delivery date" in the erstwhile version of IRS Conditions of Contract,

"warranty period" has been substituted in the latest version of IRS Conditions of Contract.

GD

40.What is the quantum of levy of General Damages (GD)?

Answer:

In terms of Railway Board letter no: 2001/RS(G)/779/14 dated 14th January 2016, GD could be imposed @ 10% of the outstanding value of the contract.

However, the above provision has been revised by Railway Board vide its circular no: 2004/RS(G)/779/11/Pt. dated 23rd December 2019 wherein it was stipulated that the purchaser shall have right to levy damages for failing to supply goods as per contractual obligations, not by way of penalty, an amount equal to SD amount. In other words, w.e.f. 23rd December 2019, the amount of GD has been linked with the amount of SD.

Since the SD amount as on date is 5% w.e.f. 01st April 2023 (as per Railway Board circular no: 2020/RS(G)/779/16 dated 31st December 2021),

the GD shall also be 5% of the outstanding value of the contract.

41. Vendor failed to supply the item as per PO. Meanwhile, indenting department has informed that the item is no longer required. Can the PO be cancelled with GD for the reason “Item not required”?

Answer:

This case has two elements- a) breach of the contract by the vendor in not supplying the item as per the PO and b) non-requirement of the subject item by Railways. The fact that the item was no longer required for Railways was intimated only after the expiry of DP of the PO. If the vendor had supplied the item within DP in this case, then the supply could not have been rejected on the grounds that the item was not required. In other words, the vendor was not precluded from supplying the item because of the non-requirement by Railways.

Therefore, the appropriate course of action in this case will be to cancel the PO with GD for the reason “Vendor failed to supply”. However, if the

contracting authority takes a lenient view, then the PO can be cancelled without Financial Repercussion for the reason “Item not required”- citing reasons for the same.

To sum up, the PO in this case cannot be cancelled with GD for the reason “Item not required”- the PO can either be cancelled with GD for the reason “Vendor failed to supply” or the PO can be cancelled without GD for the reason “Item not required”.

PAC

42. The description in a NS indent for an item is for a single make. However, three dealers are stated as “likely suppliers” for the item in the indent. Can this item be procured without PAC- since there is more than one likely supplier for the item?

Answer:

Even though there are three likely suppliers stated in the indent, all these likely suppliers are the dealers for the same make only. In other words, the OEM is the same entity- even though there are several dealers for the item in question. Therefore, the tender in this case could be processed- only if PAC was furnished for the item- since the PAC is issued on the basis of the make and not on the basis of the supplier.

43. A NS indent was given for procurement of a PAC item. However, the PAC was neither “A” certified nor “C” certified i.e., an uncertified PAC was given along with the indent. Can the item be procured?

Answer:

As per the extant provisions of SOP, the purchasing powers are different for PAC “A” certified and PAC “C” certified items. PAC with “A” certificate (also called as “Qualified PAC”) can be issued in cases where there are more than one make/brand available for the item, despite which the user desires to procure a particular make/brand. Therefore, the purchase powers are less for such PAC “A” certified items.

On the other hand, PAC with “C” certificate (also called as “Unqualified PAC”) can be issued in cases where it is clear that no other make/brand is manufactured which could be used in lieu of the make/brand for the item in question. Therefore, the purchase powers for such PAC “C” certified items

are on par with the powers of acceptance in normal cases.

If the PAC certificate is uncertified i.e., neither “A” certified nor “C” certified, then the item cannot be procured- since it is not clear from such PAC certificate as to whether more than one make/brand is available for the item and also since the powers of purchase will vary among PAC “A” certified and PAC “C” certified items.

To sum up, procurement action cannot be undertaken in this case- unless the PAC is appropriately certified.

Miscellaneous

44. Tender floated for three makes only. Lowest offer received for a make, which was not specified in the tender description. Whether such offer can be accepted, since its rate is the lowest?

Answer:

One of the fundamental principles of public procurement is that the description of the tender should be generic to the extent practicable. However, there may be situations where it is inevitable to indicate the preferred makes for the tendered item. In such cases, offers for the makes which were called for in the tender shall alone be accepted and the offers for the makes which were uncalled for in the tender shall invariably be passed over.

However, if the description of such tender contains the phrase “or equivalent” or “or similar” along with

the makes indicated in it, an offer which is for the make equivalent to the makes called for can be accepted, if such offer is technically suitable and its rate being reasonable.

**45.Tender has to be floated for a PAC item.
Estimated value of the tender is Rs.15 lakhs.
Can Single tender be floated in this case?**

Answer:

SRly Stores Policy Circular No: 140/2018 dated 22nd October 2018 mandates floating open tenders in all cases of estimated value exceeding Rs. 10 lakhs. Therefore, in the subject case, open tender has to be floated- since the estimated value of the tender has exceeded Rs.10 lakhs.

To sum up, open tender has to be floated in this case-even though this is a PAC item.

46.A vendor was included in the panel of a Limited Tender (LT)- whose eligibility criteria is based on past performance. After opening of the tender, can the offer of such included vendor be passed over based on the grounds of poor past performance?

Answer:

As explained in the “Manual for Procurement of Goods” (June 2022 edition), the selection of bidders in a LT should be done with due diligence, to ensure that bidders who do not meet eligibility criteria do not get shortlisted. At the evaluation stage, in LT, passing over of a duly shortlisted bidder on grounds of poor past performance or eligibility may raise questions about transparency.

To sum up, the tender accepting authority (TAA) shall ensure at the time of floating the tender that the panel of vendors in the LT meets the eligibility criteria and that none of the vendors in the panel are ineligible.

47. Supply made by a vendor was rejected during warranty period and the rejection was upheld during joint inspection. Vendor agreed to replace the defective qty. but failed to do so, despite several reminders. Moreover, the vendor had not refunded the payment received by it against the supply. There are no pending bills in any Zonal Railways for the vendor and hence no recovery could be made. Scrapping the item would likely to fetch 1/3rd of the amount paid to the vendor. What can be done in this case to ensure full recovery of amount from the vendor?

Answer:

It is clear that the vendor had committed a breach of contract in this case by failing to supply as per the contractual obligation. Therefore, Railways can request for referring this case for Arbitration in terms of Clause 2903 of IRS conditions of Contract

(September 2022 version). Such commercial disputes can be settled through Arbitration.

If the arbitrator in this case pronounces the Arbitral Award in favour of Railways- even after which the vendor has not paid back the amount to Railways as stipulated in the award, then Railways can file an Execution Petition (EP) before the appropriate court. If the petition is allowed, Hon'ble Court will pass orders for attachment of properties of such vendor in favour of Railways to the extent of the amount of arbitral award.

To sum up, seeking recourse to Arbitration is the appropriate solution in this case.

48. For GeM procurement, whether guidelines issued by Railway Board will be applicable automatically?

Answer:

The GeM procurement process is built on fundamental principles of public procurement. The following have been explicitly stated in the GeM handbook:

- Buyers shall abide by the GeM procurement guidelines for procurement made on GeM and shall not be subject to compliance issues arising from different policies that may be applicable to the buyers when they procure outside GeM.
- The procurement on GeM for all buying entities shall be exclusively subject to the GeM guidelines, terms and conditions of GeM, which shall override all concurrent processes differing from or in conflict to the process outlined by GeM.
- For procurement made on GeM, buyers shall not be subject to compliance issues arising from

different policies that may be applicable to them when they procure offline/outside GeM and are not applicable on the GeM platform.

To sum up, the guidelines issued by Railway Board will not be applicable automatically for GeM procurement.

49. Offer was received from a dealer who was authorised by an OEM to participate in the tender. The authorisation was general in nature and was valid for 3 months as on the date of opening of tender- while the DP as per the offer was for 6 months. Can this offer be considered?

Answer:

If the offer of the dealer was technically suitable and its rate being reasonable, such offer can be considered- since the authorisation of the OEM was valid. However, it shall be ensured that at the time of receipt of supply against such contract, the authorisation of the dealer by the OEM is still available.

50.Contract was concluded on a vendor for supply of an item. Towards the end of the delivery period, the vendor sent a sample to the consignee requesting to comment upon its suitability, so that the bulk supply will be made as per the approved sample. Can the request of the vendor be entertained by the consignee?

Answer:

In the absence of any sample clause- either in the tender or in the offer or ultimately in the contract, such request cannot be entertained. To sum up, the consignee should reject the request of the vendor in this case.

Notes

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**WISDOM IS A WEAPON TO
WARD OFF DESTRUCTION;
IT IS AN INNER FORTRESS
WHICH ENEMIES CANNOT
DESTROY.**

அறிவற்றங் காக்குங் கருவி செறுவார்க்கும்
உள்ளழிக்க லாகா அரண் -421