Chapter 6: Forms of Securities, Payment Terms and Price Variations

6.1 Forms of Security

6.1.1 Bid Security (*Rule 170 of GFR 2017*)

To safe guard against a bidder's with drawing or altering its/ his bid during the bid validity period in the case of advertised (OTE and GTE tenders) or limited tender enquiry Bid Security [also known as Earnest Money Deposit (EMD)] is to be obtained from the bidders along with their bids except Micro and Small Enterprises (MSEs) as defined in MSE Procurement Policy issued by Department of Micro, Small and Medium Enterprises (MSME) or are registered with the Central Purchase Organisation or the concerned Ministry of Department or Startups as recognized by Department for Promotion of Industry and Internal Trade (DPIIT). The bidders should be asked to furnish bid security along with their bids[67]..Amount of bid security should ordinarily range between two to five per cent of the estimated value of the goods to be procured. The amount of bid security, rounded off to the nearest thousands of Rupees, as determined by the Procuring Entity, is to be indicated in the bidding documents. The bid security may be obtained in the form of Insurance Surety Bonds[68],account payee demand draft, fixed deposit receipt, or banker's cheque or Bank Guarantee from any of the Commercial Banks or payment online in an acceptable form, safeguarding the purchaser's interest in all respects. . In case the bid security is more than a threshold (Rupees five lakh) and in case of foreign bidders in GTE tenders it may be in the form of a bank guarantee (in equivalent Foreign Exchange amount, in case of GTE) issued/confirmed from any of the scheduled commercial bank in India in an acceptable form, and so on.. The bid security is normally to remain valid for a period of 45(forty-five) days beyond the final bid validity period.

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[67]Notified vide OM No F.20/2/2014-PPD(Pt.) issued by Department of Expenditure dated 25.07.2017

[68]Notified vide OM No. F.1/1/2022-PPD issued by Department of Expenditure dated 02.02.2022

In exceptional cases, in place of a Bid security, Procuring Entities after seeking approval of the competent authority may consider asking Bidders to sign a Bid securing declaration accepting that if they withdraw or modify their Bids during the period of validity, or if they are awarded the contract and they fail to sign the contract, or to submit a performance security before the deadline defined in the request for bids/request for proposals document, they will be suspended for the period of time specified in the request for bids/request for proposals document from being eligible to submit Bids/Proposals for contracts with the procuring entity.

In appropriate cases, Submission of the bid security may be waived with the Competent Authority's (CA's) approval, especially in the case of indigenisation/development tenders, limited tenders and procurements directly from the manufacturer or authorised agents.

Tenderers that are currently registered will also continue to remain registered during the tender validity period with the Procuring Entity or MSEs (please refer to para 1.10.4 of Chapter 1) are exempt from payment of EMD. In case the tenderer falls in these categories, the bidder should furnish a certified copy of its valid registration details. Except for MSEs, this exemption is valid for the trade group and monetary value of registration only.

A bidder's bid security will be forfeited if the bidder withdraws or amends its/his tender or impairs or derogates from the tender in any respect within the period of validity of the tender or if the successful bidder fails to furnish the required performance security within the specified period.

Bid securities of the unsuccessful bidders should be returned to them at the earliest after expiry of the final bid validity period and latest by the 30th day after the award of the contract. Bid security should be refunded to the successful bidder on receipt of a performance security. However, in case of two packet or two stage bidding, Bid securities of unsuccessful bidders during first stage i.e. technical evaluation etc. should be returned within 30 days of declaration of result of first stage i.e. technical evaluation etc.[69]

[69]Notified vide OM No. F.1/2/2022-PPD issued by Department of Expenditure dated 01.04.2022

6.1.2 Performance Security (*Rule 171 of GFR 2017*)

i) To ensure due performance of the contract, performance security [or Performance Bank Guarantee (PBG) or Security Deposit (SD)] is to be obtained from the successful bidder awarded the contract. Unlike contracts of Works and Plants, in case of contracts for goods, the need for the Performance Security depends on the market conditions and commercial practice for the particular kind of goods. Performance security should be for an amount of five (5) to ten (10) per cent of the value of the contract as specified in the bid documents [The value has been reduced to three (3) percent till 31.03.2023. Refer to para 6.1.2 (iv) below]. Performance security may be furnished in the form of Insurance Surety Bond[70], account payee demand draft, fixed deposit receipt from a commercial bank, bank guarantee issued/confirmed from any of the commercial bank in India, or online payment in an acceptable form, safeguarding the purchaser's interest in all respects. In case of GTE tenders, the performance security should be in the same currency as the contract and must conform to Uniform Rules for Demand Guarantees (URDG 758) – an international convention regulating international securities[71].Unlike, procurement of Works, in procurement of Goods, the concept of taking part of Performance Guarantee as money retained from first or progressive bills of the supplier is not acceptable. Submission of Performance Security is not necessary for a contract value uptoRupees1 (one)lakh.

ii) Performance Security is to be furnished by a specified date (generally 14(fourteen) days after notification of the award) and it should remain valid for a period of 60 (sixty) days beyond the date of completion of all contractual obligations of the supplier, including warranty obligations.

iii) The performance security will be forfeited and credited to the procuring entity's account in the event of a breach of contract by the contractor. It

[70]Notified vide OM No. F.1/1/2022-PPD issued by Department of Expenditure dated 02.02.2022

[71] A set of rules developed by the International Chamber of Commerce first adopted in 1992. The latest version URDG 758 provides a framework for harmonising international trading practices and establishes agreed-upon rules for independent guarantees and counter-guarantees among trading partners for securing payment and performance in worldwide commercial contracts.

should be refunded to the contractor without interest, after he duly performs and completes the contract in all respects but not later than 60(sixty) days of completion of all such obligations including the warranty under the contract. Return of Bid/ Performance Securities should be monitored by the senior officers and delays should be avoided. If feasible, the details of these securities may be listed in the e-Procurement Portal, so make the process transparent and visible.

iv) On account of the COVID-19 pandemic, that caused slowdown in economy, it is decided to reduce Performance Security from existing five to ten percent to three (3) percent of the value of the contract for all existing contracts till 31.03.2023. However, the benefit of the reduced Performance Security will not be given in the contracts under dispute wherein arbitration/ court proceedings have been already started or are contemplated. All tenders/ contracts issued/ concluded till 31.03.2023 should also have the provision of reduced Performance Security. In all contracts, where Performance Security has been reduced to three percent, the reduced percentage shall continue for the entire duration of the contract and there should be no subsequent increase of Performance Security even beyond 31.03.2023. Similarly, in all contracts entered into with the reduced percentage of Performance Security of three percent, there will be no subsequent increase in Performance Security even beyond 31.03.2023. Where, there is compelling circumstances to ask for Performance Security in excess of three percent as stipulated above, the same should be done only with the approval of the next higher authority to the authority competent to finalise the particular tender, or the Secretary of the Ministry/ Department, whichever is lower. Specific reasons justifying the exception shall be recorded[72].

6.1.3 **Warranty Bank Guarantee**

In case of works and capital equipment, there is usually a defect liability/warranty clause against defects arising from design, material, workmanship or any omission on part of the vendor/ contractor during a specified period of months from the date of

[72]Notified vide OM No.F.9/4/2020-PPD issued by Department of Expenditure dated 30.12.2021

commissioning or from the date of dispatch in case of goods – whichever is earlier. In such cases, the performance guarantee is to be valid upto 60 (sixty) days beyond the warranty period. It is normally permissible in such a situation to allow Performance guarantee to be valid upto 60 (sixty) days beyond delivery/ commissioning period and the contractor may be allowed to submit a fresh Warranty Bank Guarantee of 10 (ten) per cent of the value of the goods in the currency of the contract valid upto 60 (sixty) days beyond the Warranty period. In such cases, the performance guarantee is to be returned only after satisfactory delivery/ commissioning and receipt of such a warranty bank guarantee. In procurement of other than Capital Equipment Goods (and in case of low value Capital Goods – say upto Rupees one Lakh), Warranty Clause is not called for.

6.1.4 Verification of Bank Guarantees

Bank guarantees submitted by the tenderers/suppliers as EMD/performance securities need to be immediately verified from the issuing bank before acceptance. There may not be any need to get the Bank Guarantee vetted from legal/ finance authority if it is in the specified format. Guidelines for verification of BGs submitted by the bidders/ contractors against EMD/ performance security/advance payments and for various other purposes are as follows:

i) BG shall be as per the prescribed formats
ii) The BG contains the name, designation and code number of the Bank officer(s) signing the guarantee(s);
iii) The address and other details (including telephone no.) of the controlling officer of the bank are obtained from the branch of the bank issuing the BG (this should be included in all BGs);
iv) The confirmation from the issuing branch of the bank is obtained in writing through registered post/speed post/courier. The bank should be advised to confirm the issuance of the BGs specifically quoting the letter of Procurement Entity on the printed official letterhead of the bank indicating address and other details (including telephone nos.) of the bank and the name, designation and code number of the officer(s) confirming the issuance of the BG;
v) Pending receipt of confirmation as above, confirmation can also be obtained with the help of responsible officer at the field office, which is close to the

issuing branch of the bank, who should personally obtain the confirmation from issuing branch of the bank and forward the confirmation report to the concerned procurement entity.

Bank guarantees, either received in physical form or electronic form, should be verified for its genuineness following prescribed method for the same and the Organisations should do due diligence on genuineness of the Bank Guarantees before acceptance of the same.

6.1.5 **Safe Custody and Monitoring of EMDs, Performance Securities and Other Instruments**

A suitable mechanism for safe custody and monitoring of EMDs and performance securities and other instruments should be evolved and implemented by each ministry/Department. The Ministries/ Departments shall also make institutional arrangements for taking all necessary actions on time for extension or encashment or refund of EMDs and performance securities, as the case may be. Monitoring should also include a monthly review of all bank guarantees and other instruments expiring in next three months, along with a review of the progress of the corresponding contracts. Extension of bank guarantees and other instruments, where warranted, should be sought immediately and implemented within their validity period. Bank Guarantee should never be handed over to the supplier for propose of extension of validity. Such a system of monitoring of securities and other instruments may be considered to be computerised with automatic alerts about lapse of validity etc.

6.2 Payment Clause

The elements of price included in the quotation of a tenderer depend on the nature of the goods to be supplied and the allied services to be performed, location of the supplier, location of the user, terms of delivery, extant rules and regulations about taxes, duties, and so on, of the seller's country and the buyer's country.

In case of indigenous goods, the main elements of price may include raw material, production cost, overhead, packing and forwarding charges, margin of profit, transit insurance, excise duty and other taxes and duties as applicable. In case of imported goods, in addition to similar elements of price as above (other than excise duty and

taxes), there may be elements of custom duty, import duty, landing and clearing charges and commission to Indian agents. Further, depending on the nature of the goods (whether domestic or imported), there may be cost elements towards installation and commissioning, operator's training, and so on.

It is, therefore, necessary that, to enable the tenderers to frame their quotations properly in a meaningful manner, the tender documents should clearly specify the desired terms of delivery and also the duties and responsibilities to be performed by the supplier in addition to supply of goods.

While claiming the payment, the supplier should also certify in the bill that the payment being claimed is strictly in terms of the contract and all obligations on the part of the supplier for claiming this payment have been fulfilled as required under the contract. There should also be a suitable provision for verification of the authenticity of the person signing the invoice, and so on, to claim the payment.

i) **Elements of Price:** Where the price has several components such as the price of the goods, cost of installation and commissioning, operators' training, and so on, bidders should be asked to furnish a cost break-up indicating the applicable prices and taxes for each of such components along with the overall price. The payment schedule and terms will be linked to this cost break-up; and

ii) **Currency:** The tender documents are to specify the currency (currencies) in which the tenders are to be priced. As a general rule, domestic tenderers are to quote and accept their payment in Indian currency; Indian agents of foreign suppliers are to receive their agency commission in Indian currency; costs of imported goods, which are directly imported against the contract, may be quoted in foreign currency (currencies) and paid accordingly in that currency; and the portion of the allied work and services, which are to be undertaken in India (like installation and commissioning of equipment) are to be quoted and paid in Indian currency.

iii) **Payment to Suppliers:** In a supply contract, delivery of goods is the essence of the contract for the purchaser. Similarly, receiving timely payment for the supplies is the essence of the contract for the seller. A healthy buyer-supplier relationship is based on the twin foundation of timely and quality supply, on

the one hand, and prompt and full payment to the supplier, on the other. It should be ensured that all payments due to the firm, including release of the performance security, are made on a priority basis without avoidable delay as per the tender/contract conditions. :

a) As far as possible, the payment terms and time schedule should be given in the contract and must be adhered to. Any foreseeable payment delays should be communicated to the suppliers in advance;

b) Prompt and timely provision of statutory certificates to the seller for taxes deducted at source, are as much a part of payment as the amount actually released. A detailed payment advice showing the calculations and reasons for the amounts disallowed and taxes deducted must be issued to the supplier along with payment. As soon as possible, but not later than the date of submission of Tax returns, the procuring entity must provide the statutory certificates for the taxes deducted to the Supplier, so that he is able to claim set-offs and refunds from the concerned authorities.

c) Release of payment and settlement of the final bill should be processed through the Associated/ integrated Finance as per the terms and conditions of the contract;

d) No payments to contractors by way of compensation or otherwise outside the strict terms of the contract or in excess of the contract rates should be allowed;

iv) Before the payment is made, the invoice should be cross-checked with the actual receipt of material/assets/services to ensure that the payment matches the actual performance;

v) While claiming the payment, the contractor must certify on the bill that the payment being claimed is strictly within terms of the contract and all the obligations on his part for claiming this payment have been fulfilled as required under the contract. There should also be a suitable provision for verification of the authenticity of the person signing the invoice, and so on, to claim the payment;

6.3 Terms of Payment for Domestic Goods

Where the terms of delivery are FOR Dispatching Station, the payment terms, depending on the value and nature of the goods, mode of transportation, and so on, maybe60 to 90 (sixty to ninety) per cent on proof of dispatch and other related documents and balance on receipt at site and acceptance by the consignee.

Where the terms of delivery is FOR destination/delivery at site, the usual payment term is 100 (hundred) per cent on receipt and acceptance of goods by the consignee and on production of all required documents by the supplier.

Where goods to be supplied also need installation and commissioning by the supplier, the payment terms are generally:

i) For a contract with terms of delivery as FOR dispatching station -- 60 (sixty) per cent on proof of dispatch along with other specified documents, 30 (thirty) per cent on receipt of the goods at site by the consignee and balance 10 (ten) per cent on successful installation and commissioning and acceptance by the consignee; and

ii) For a contract with terms of delivery as FOR destination/delivery at site -- 90 (ninety) per cent on receipt and acceptance of goods by the consignee at destination and on production of all required documents by the supplier and balance 10 (ten) per cent on successful installation and commissioning and acceptance by the consignee.

Note: Generally (especially for goods requiring installation and commissioning at site by the supplier), the desirable terms of delivery are FOR destination/delivery at site, so that the supplier remains responsible for safe arrival of the ordered goods at the site. Therefore, unless otherwise decided ex-works or FOR dispatching station terms should be avoided.

6.3.1 **Modes of Payment for Domestic Goods**

Payments to domestic suppliers are usually made by cheque/demand draft drawn on a Government treasury or branch of RBI or any Scheduled Commercial Bank authorised by RBI for transacting Government business. Such payment can also be made to the supplier's bank, if the bills are endorsed in favour of the bank with a pre-receipt embossed on the bills with the words, "received payment" and both the endorsement and pre-receipt are authenticated by the supplier. In addition, an

irrevocable power of attorney is to be granted by the supplier in favour of the bank. In such of those cases where there has been global tendering, in order to have uniform payment clauses, if domestic suppliers, especially against high value contracts for sophisticated equipment/machinery, desire payment through LC, depending on the merits of the case, this may be agreed to. However procuring entities should switch over to more transparent electronic payment systems like Electronic Clearance System (ECS), Real-time gross settlement systems (RTGS) National Electronic Funds Transfer (NEFT) or Electronic Payment Gateways.

6.3.2 **Documents for Payment for Domestic Goods**

i) Supplier's Invoice indicating, *inter alia* description and specification of the goods, quantity, unit price, total value;

ii) Packing list;

iii) Insurance certificate;

iv) Railway receipt/consignment note;

v) Manufacturer's guarantee certificate and in-house inspection certificate;

vi) Inspection certificate issued by purchaser's inspector; and

vii) Any other document(s) as and if required in terms of the contract.

6.4 Terms of Payment for Imported Goods

6.4.1 Usual payment terms, unless otherwise directed by CA, are indicated below:

i) Cases where installation, erection and commissioning (if applicable) are not the **responsibility of the supplier** -- 100 (hundred) per cent net FOB/FAS/CFR/CIF/CIP price is to be paid against invoice, shipping documents, inspection certificate (where applicable), manufacturers' test certificate, and so on;

ii) Cases where installation, erection and commissioning are the responsibility of the supplier -- 80 - 90 (eighty to ninety) per cent net FOB/FAS/CFR/CIF/CIP price will be paid against the invoice, inspection certificate (where applicable), shipping documents, and so on, and balance within 21-30 (twenty-one to

thirty) days of successful installation and commissioning at the consignee's premises and acceptance by the consignee; and

iii) Payment of agency commission, if payable, against FOB/FAS/CFR/CIF/CIP contract – the entire 100 (hundred) per cent agency commission is generally paid (in non-convertible Indian Rupees on the basis of BC selling rate of exchange) after all other payments have been made to the supplier in terms of the contract.

6.4.2 Modes of Payment for Imported Goods

It should be ensured that the imports into India are in conformity with the export-import policy in force: FEMA; FEMA (Current Account Transactions) Rules, 2000 framed by Procuring Entity; and directions issued by RBI under FEMA from time to time.

For imported goods, payment usually happens through the LC opened by the State Bank of India or any other scheduled/authorised bank as decided by the procuring entity. The amount of LC should be equal to the total payable amount, and be released as per the clauses mentioned above. Provisions of Uniform Customs and Practices for Documentary Credits[73] should be adhered to while opening the LC for import into India. If the LC is not opened, payment can also be made to the seller through a direct bank transfer for which the buyer has to ensure that payment is released only after the receipt of prescribed documents.

6.4.3 Documents for Payment for Imported Goods

The documents, which are needed from the supplier for release of payment, are to be clearly specified in the contract. The paying authority is also to verify the documents received from the supplier with corresponding stipulations made in the contract before releasing the payment. Documents, which the supplier is to furnish while claiming payment, are specified in the Letter of Credit, but usually are:

[73]The **Uniform Customs and Practice for Documentary Credits** is a set of rules regarding techniques and methods for handling LCs in international trade finance which has been standardised by the International Chamber of Commerce, the current version being the UCP600.

i) Supplier's original invoice giving full details of the goods including quantity, value, and so on;
ii) Packing list;
iii) Certificate of country of origin of the goods to be given by the seller or a recognised chamber of commerce or another agency designated by the local Government for this purpose;
iv) Certificate of pre-dispatch inspection by the purchaser's representative;
v) Manufacturer's test certificate and guarantee;
vi) Certificate of insurance;
vii) Bill of lading/airway bill/rail receipt or any other dispatch document, issued by a Government agency (like the Department of Posts) or an agency duly authorised by the concerned ministry/Department, indicating:

a) Name of the vessel/carrier;
b) Bill of lading/airway bill;
c) Port of loading;
d) Date of shipment;
e) Port of discharge and expected date of arrival of goods; and

Any other document(s) as and if required in terms of the contract.

6.4.4 **Air Freight Charges**

Goods that are required to be airlifted are to be dispatched on a 'charge forward basis'. All air freight charges, which are shown on the relevant consignment note as chargeable to the consignee, are to be paid to the Airline in Rupees. Some organizations need to import sophisticated instruments, tools and kindred goods. These are usually small in size and very delicate/fragile in nature. Such goods, invariably, need to be airlifted. But, quite naturally, form a small part of the Air Cargo carried by an Aircraft. For such imports, procuring entities may engage Air Freight Consolidators who consolidate the small Air Cargos of different customers, to be airlifted from one Airport to another. Hiring of services of Airfreight Consolidators should be done in a transparent manner, following standard principles of Public Procurement.

6.4.5 **Letter of Credit**

Two banks are involved in payment to the supplier by LC: – the purchaser's bank and supplier's bank. The purchaser is to forward the request to its bank in the prescribed format as formulated by the Bank, along with all relevant details including an authenticated copy of the contract. Based on this, the purchaser's bank opens the LC on behalf of the purchaser for transacting payment to the supplier through the supplier's bank. Care should be taken to ensure that the payment terms and documents to be produced for receiving payments through LC are identical with those shown in the contract. Generally, the irrevocable LC is opened so that the supplier is fully assured of his payment on fulfilling his obligations in terms of the contract. In case the delivery date of the contract is extended to take care of delay in supply, for which the supplier is responsible, the tenure of the LC is also to be extended, but the expense incurred for such an extension (of LC) is to be borne by the supplier. Provisions of Uniform Customs and Practices for Documentary Credits (UCP 600)[74] should be adhered to the while opening the LC for import into India.

6.5 Advance Payment

6.5.1 Ordinarily, payments for services rendered or supplies made should be released only after the services have been rendered or supplies made. However, it may become necessary to make advance payments in the following types of cases:

i) Advance payment demanded by firms holding maintenance contracts for servicing of air-conditioners, computers, other costly equipment, etc.;
ii) Advance payment demanded by firms against fabrication contracts, turn-key contracts; and so on;

Such advance payments should not exceed the following limits except in case of procurement of arms and ammunitions from ordinance factories:

a) Thirty per cent of the contract value to private firms;
b) Forty per cent of the contract value to a state or central Government agency or PSU; or

[74]The Uniform Customs and Practice for Documentary Credits (UCPDC or simply UCP) is a set of rules regarding techniques and methods for handling LCs in international trade finance which has been standardised by the International Chamber of Commerce – the current version being the UCP600.

c) In case of the maintenance contract, the amount should not exceed the amount payable for six months under the contract.

d) In exceptional cases, the Administrative Department may relax the ceilings mentioned above with prior concurrence of the Associated/ integrated Finance. While making any advance payment as above, adequate safeguards in the form of a bank guarantee, and so on, should be obtained from the firm. However, the bank guarantee need not be insisted upon in case of procurement of arms and ammunitions from ordinance factories. Further, such advance payments should be generally interest bearing, suitable percentages for which are to be decided on a case to case basis.

6.5.2 **Documents for Advance Payments**

Documents, needed from the supplier for release of payment, are to be clearly specified in the contract. The paying authority should also verify the documents received from the supplier with corresponding stipulations made in the contract before releasing the payment.

6.5.3 **Insurance**

In every case where advance payment or payment against dispatch documents is to be made or LC is to be opened, the condition of insurance should invariably be incorporated in the terms and conditions. Wherever necessary, the goods supplied under the contract, shall be fully insured in a freely convertible currency against loss or damage incidental to manufacture or acquisition, transportation, storage and delivery in the manner specified in the contract. If considered necessary, insurance may cover "all risks" including war risks and strike clauses. The amount to be covered under insurance should be sufficient to take care of the overall expenditure to be incurred by the procuring entity for receiving the goods at the destination. Where delivery of imported goods is required by the purchaser on CIF/CIP basis, the supplier shall arrange and pay for marine/air insurance, making the purchaser the beneficiary. Where delivery is on FOB/FAS basis, marine/air insurance shall be the responsibility of the purchaser.

(*Rule 172 of GFR 2017*)

6.6 Firm Price vis-à-vis Variable Price

Short-term contracts where the delivery period does not extend beyond 18 (eighteen) months should normally be concluded with a firm and price fixed by inviting tenders accordingly. However, even for shorter deliveries, the PVC may be stipulated for items with inputs (raw material, labour, etc.), prone to short-term price volatility - especially for critical or high value items – otherwise there is a possibility of the contract failing or the purchaser having to pay a higher price if prices fall. For high value (more than Rupees three crore) tenders with deliveries longer than 18 (eighteen) months, PVC may be provided to protect the purchaser's interests also.

Where it is decided to conclude the contract with a variable price, an appropriate clause incorporating, inter-alia, a suitable price variation formula should also be provided in the tender documents, to calculate the price variation between the base level and scheduled delivery date. It is best to proactively provide our own PVC in the tender document to discourage different bidders quoting different formulae and different base dates, which may lead to problems on bringing their prices on a common comparable footing.

The variations are to be calculated periodically by using indices published by Governments/ chambers of commerce/London Metal Exchange / any other neutral and fair source of indices. Suitable weights are to be assigned to the applicable elements, that is, fixed overheads and profits, material and labour in the price variation formula. If the production of goods needs more than one raw material, the input cost of material may be further sub-divided for different categories of material, for which cost indices are published.

The following are important elements of PVC:

i) The price agreed upon should specify the base date, that is, the month and year to which the price is linked to enable variations being calculated with reference to the price indices prevailing in that month and year. The raw materials used in manufacture are procured some weeks before the goods' submission for inspection. This period is called the time lag for price variation. It applies both for base date and date of supply. This time lag at both ends must be specified;

ii) The price variation formula must also stipulate a minimum percentage of variation of the contract price, only above which the price variation will be

admissible (for example, where the resultant increase is lower than, say, two per cent of the contract price, no price adjustment will be made in favour of the supplier);

iii) The price variation clause should provide for a ceiling on price variations, particularly where escalations are involved. It could be a percentage per annum or an overall ceiling or both;

iv) Where advance or stage payments are made there should be a further stipulation that no price variations will be admissible on such portions of the price, after the dates of such payment;

v) Where deliveries are accepted beyond the scheduled delivery date subject to levy of liquidated damages as provided in the contract. The LD (if a percentage of the price) will be applicable on the price as varied by the operation of the PVC;

vi) No upward price variation will be admissible beyond the original scheduled delivery date for defaults on the part of the supplier. However, a downward price variation would be availed by the purchaser as per the denial clause in the letter of extension of the delivery period;

vii) Price variation may be allowed beyond the original scheduled delivery date, by specific alteration of that date through an amendment to the contract in cases of force majeure or defaults by Government;

viii) Where contracts are for supply of equipment, goods, and so on, imported (subject to customs duty and foreign exchange fluctuations) and/or locally manufactured (subject to excise duty and other duties and taxes), the percentage and element of duties and taxes included in the price should be specifically stated, along with the selling rate of foreign exchange element taken into account in the calculation of the price of the imported item;

ix) The clause should also contain the mode and terms of payment of the price variation admissible; and

x) The buyer should ensure a provision in the contract for the benefit of any reduction in the price in terms of the PVC being passed on to him.

xi) An illustrative PVC clause is available in Annexure 15.

xii) Care should be exercised in contracts providing for price variation to finalise the price before final payment is made, after obtaining data and documents in support of claims for escalation, if any. Where no such claims are submitted by the suppliers, an examination of whether there has been a downward trend in the cost, which the contractor may not bring out, is required. At any rate, an undertaking should be obtained from the contractor to the following effect in case it becomes necessary to make the final payment before he has submitted the required data/documents related to the PVC:

"It is certified that there has been no decrease in the price of price variation indices and, in the event of any decrease of such indices during the currency of this contract, we shall promptly notify this to the purchaser and offer the requisite reduction in the contract rate."

xiii) Notwithstanding the above formalities, it should be appreciated that it is in the interest of the purchaser to be vigilant about downward variation and it is, therefore, the basic responsibility of the purchase officers to make sure that the benefits of downward variation, wherever it occurs, are fully availed of.

6.7 Exchange Rate Variation

6.7.1 In case of a contract involving substantial import content(s) and having a long delivery period (exceeding one year from the date of contract), an appropriate Foreign Exchange Variation clause may be formulated by the procuring entity in consultation with its Associated/ integrated Finance, as needed, and incorporated in the tender enquiry document. In that clause, the tenderers are to be asked to indicate import content(s) and the currency (ies) used for calculating the value of import content(s) in their total quoted price, which (that is, the total quoted price) will be in Indian Rupees. The tenderers may be asked to indicate the Base Exchange rate for each such foreign currency used for converting the foreign exchange content into Indian Rupees and the extent of foreign Exchange Rate Variation (ERV) risk they are willing to bear.

To work out the variation due to changes (if any) in the exchange rate(s), the base date for this purpose will be the due date of opening of tenders/seven days prior to the due date of opening of tenders (the purchase organisation is to decide and adopt a suitable date). The variation may be allowed between the above base date and

date of remittance to the foreign principal/mid-point of manufacture of the foreign component (the purchase organization is to choose the appropriate date). The applicable exchange rates as above will be according to the TT selling rates of exchange as quoted by authorised exchange bankers approved by RBI on the dates in question. No variation in price in this regard will be allowed if the variation in the rate of exchange remains within the limit of plus/minus _____per cent (the purchase organisation is to decide the limit, say plus/ minus band of 2.5% (Two point Five percent)).

Any increase or decrease in the customs duty by reason of the variation in the rate of exchange in terms of the contract will be to the buyer's account. In case the delivery period is revised/extended, ERV will not be admissible, if this is due to the supplier's default; however, ERV benefits arising out of downward trends should be passed on to Procuring Entity. The procuring entity may formulate an appropriate ERV clause on similar lines as above in consultation with their Finance Wing.

6.7.2 Documents for Claiming ERV

i) A bill of ERV claim enclosing the working sheet;
ii) Banker's certificate/debit advice detailing the foreign exchange paid and exchange rate;
iii) Copies of the import order placed on the supplier; and
iv) Supplier's invoice for the relevant import order.

6.8 Taxes, Duties and Levies

6.8.1 Statutory Duties and Taxes on Domestic Goods

The duties and taxes including excise duty and VAT levied by the Government on domestic goods vary from product to product. Unless a different intention appears from the terms of the contract, statutory variation in duties or taxes are to be borne by the buyer (procuring entity) as per the section 64A of the Sales of Goods Act, 1930. As a general policy, the statutory variations in such duties and taxes are to be allowed during the period from the date of the tender to the date of acceptance of the tender (that is, placement of the contract) and during the original/re-fixed delivery period of the contract so that both the supplier and purchaser are equally

compensated for rise or fall in the price of the goods on account of such statutory variations.

(Note: Re-fixed delivery period means the fresh delivery period which is arrived at by recasting the original contractual delivery period after taking care of the lost period, for which the supplier was not responsible.)

In the tender enquiry conditions, the tenderers, wherever applicable, should be asked to specifically state in their offer whether they intend to ask for the duties and taxes as extra over and above the prices being quoted. In the absence of any indication to this effect by the tenderers, it is to be assumed that the prices quoted include these elements and no claim for the taxes or duties or statutory variations thereon should be entertained after opening of tenders and during the currency of the resultant contract. If a tenderer chooses to quote price inclusive of excise duty/ Sales Tax/ VAT, it should be presumed that the duties/ taxes so included is firm unless he has clearly indicated the rate of duties/ taxes included in his price and also sought adjustment on account of statutory variation thereon. If a tenderer is exempted from payment of excise duty upto a certain value of turnover, he should clearly state that no excise duty will be charged by him upto the limit of exemption enjoyed by him. If any concession is available in regard to rate/quantum of Central Excise Duty, it should be brought out clearly. It should also be clearly indicated whether increase in rate of excise duty due to increase in turn over will be borne by the tenderer. Stipulation like, "excise duty is presently not applicable but the same will be charged if it becomes leviable later on", should not be accepted unless in such cases it is clearly stated by the tenderer that excise duty will not be charged by him even if the same becomes applicable later on due to increase in turnover. If a tenderer fails to comply with this requirement, his quoted price shall be loaded with the quantum of maximum excise duty which is normally applicable on the item in question for the purpose of comparison with the prices of other tenderers. The tenderers should indicate in their offer whether they are availing VAT/ Tax credits or not. If they are availing VAT/ Tax credits, they should take into account the entire credit on inputs available under such Schemes while quoting the price and furnish a declaration to this effect along with a confirmation that any further benefit available in future on account of such schemes would be passed on to the purchaser.

Note: Sales tax/ VAT are not levied on transactions of sale in the course of import. Categories of cases constituting sale in course of import are:

i) Where the movement of goods from the foreign country to India is occasioned directly as a result of the sale;
ii) Where the Indian supplier acts as the agent of the foreign manufacturer in the agreement of the sale.

6.8.2 Octroi and Local Taxes

In case the goods supplied against contracts placed by Procuring Entity are exempted from levy of town duty, Octroi duty, terminal tax and other levies of local bodies, the suppliers should be informed accordingly by incorporating suitable instructions in the tender enquiry document and in the resultant contract. Wherever required, the supplier should obtain the exemption certificate from the Purchasing Department to avoid payment of such levies and taxes.

In case such payments are not exempted (or are demanded in spite of the exemption certificate), the supplier should make the payment to avoid delay in supplies and forward the receipt to the Purchasing Department for reimbursement and for further necessary action.

6.8.3 Customs Duty on Imported Goods

On imported goods, the tenderers shall also specify separately the total amount of custom duty included in the quoted price. The tenderers should also indicate correctly the rate of custom duty applicable for the goods in question and the corresponding Indian customs tariff number. Where customs duty is payable, the contract should clearly stipulate the quantum of duty payable, and so on, in unambiguous terms. The standard clauses to be utilised for this purpose are to be incorporated in the tender enquiry documents. Any import of materials directly from the supplier or manufacturer should be in the name of Procuring Entity. In this regard, all formalities will be completed by Procuring Entity engaging a Custom House Agent (CHA) and payment in this regard will be borne by Procuring Entity.

The Government has allowed exemption from payment of customs duty on certain types of goods for use by the following organisations:

i) Scientific and technical instruments imported by research institutes;
ii) Hospital equipment imported by Government hospitals; and

iii) Consumable goods imported by a public-funded research institution or a university.

However, to avail of such exemptions, the organisations are required to produce a "Custom Duty Exemption" certificate and "Not Manufactured in India" certificate at the appropriate time.

The relevant contemporary instructions covering these aspects should be incorporated in the tender enquiry document and in the resultant contract.

6.8.4 Duties/Taxes on Raw Materials

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. A clause to this effect should also form part of the tender documents

6.9 Incoterms Terms of Delivery

Table 1: Incoterms and their applications	
INCOTERMS Options	**Applicable to**
Ex-Group of Terms	Buyer takes full responsibility from point of departure
EXW – Ex-Works	Any mode of transport
Free Group of Terms	freight is not paid by the seller
FCA – Free Carrier	Any mode of transport
FAS – Free Alongside Ship	Sea and inland waterway transport only
FOB – Free On Board	
C Group of Terms	Freight is paid by the seller
CPT – Carriage Paid To	Any mode of transport
CIP – Carriage and Insurance Paid to	Any mode of transport
CFR – Cost and Freight	Sea and inland waterway transport only
CIF – Cost, Insurance and Freight	
Delivered Group of Terms	Seller takes responsibility from an intermediate point onwards

DAT – Delivered At Terminal	Any mode of transport
DAP – Delivered At Place	Any mode of transport
DDP – Delivered Duty Paid	Any mode of transport

Incoterms rules mainly describe the tasks, costs and risks involved in the delivery of goods from the seller to the buyer. The risk to goods (damage, loss, shortage, and so on) is the responsibility of the person who holds the 'title of goods' at that point of time. This may be different from actual physical possession of such goods. Normally, unless otherwise defined, the title of goods passes from the supplier to the purchaser in accordance with the terms of delivery (FOR, CFR, among others). The terms of delivery, therefore, specify when the ownership and title of goods pass from the seller to buyer, along with the associated risks. Incoterms as described by the International Chamber of Commerce are an internationally accepted interpretation of the terms of delivery. These terms of delivery allocate responsibilities to the buyer and seller, with respect to:

i) Control and care of the goods while in transit;
ii) Carrier selection, transfers and related issues;
iii) Costs of freight, insurance, taxes, duties and forwarding fees; and
iv) Documentation, problem resolution and other related issues.

In use since 1936, Incoterms have been revised in 2010. Out of the 11 Incoterms options, seven apply to all modes of transportation whereas four apply only to water transportation.

The options range from one extreme – the buyer takes full responsibility from point of departure – to the other extreme: the seller is responsible all the way through delivery to the buyer's location. It is easiest to understand terms as per their nomenclature groupings: 'ex' group of terms where the buyer takes full responsibility from point of departure; 'free' group of terms in which the freight is not paid by the seller; 'C' group of terms in which the freight is paid by the seller; and 'delivered' group of terms where the seller takes full responsibility from an intermediate point to an arrival point (Annexure 16).

Within national transportation, certain terms have assumed acceptance due to usage. FOR has two versions: FOR/dispatching and FOR/destination (the buyer is

responsible from the nominated point mentioned till arrival point, as in Delivery at Terminal). Infrequently, it is also used in road transport as FOT.

6.10 e-Payment

e -Banking and e-payments are now used by various banks by adopting Electronic Clearing System (ECS) and Electronic Fund Transfer (NEFT/ RTGS) procedure. Payments to suppliers may be made through such mechanism where such facilities are available. As per RBI guidelines, ECS mandate in RBI's format may be obtained at the time of registration of suppliers and in the bid document. The Format is available with all Banks.

6.11 Deduction of Income Tax, Service Tax, and so on, at Source from Payments to Suppliers

This will be done as per the existing law in force during the currency of the contract.

6.12 Recovery of Public Money from Supplier's Bill

Sometimes, requests are received from a different ministry/Department for withholding some payment of a supplier out of the payment due to it against a contract. Such requests are to be examined by the ministry/Department (which has received the request) on the merits of the case for further action. It will, however, be the responsibility of the ministry/Department asking for withholding of payment to defend the Government against any legal procedure arising out of such withholding as also for payment of any interest thereof.

6.13 Refund from Supplier

Sometimes, the supplier, after claiming and receiving reimbursements for sales tax, excise duty, custom duty, and so on, from the purchaser, applies to the concerned authorities for refunds, on genuine grounds, of certain portions of such duties and taxes paid by it and receives the allowable refunds. Such refunds contain the purchaser's share also (out of the payments already made by the purchaser to that supplier). The tender enquiry document and the contract are to contain suitable provisions for obtaining such refunds from the supplier.

6.14 Payment against Time Barred Claims

Ordinarily, all claims against the Government are time barred after a period of three years calculated from the date when the payment falls due unless the payment claim has been under correspondence. However, the limitation is saved if there is an admission of liability to pay, and fresh period of limitation starts from the time such admission is made. The drill to be followed while dealing with time barred claims will be decided by the ministry/Department concerned in consultation with the paying authority. The paying authority is to ensure that no payment against such time barred claim is made till a decision has been taken in this regard by the CA.

Chapter 7: Evaluation of Bids and Award of Contract

7.1 Tender Evaluation

7.1.1 The evaluation of tenders is one of the most significant areas of purchase management and the process must be transparent. All tenders are to be evaluated strictly on the basis of the terms and conditions incorporated in the tender document and those stipulated by the tenderers in their tenders. The Contracting Authority may include quality, price, technical merit, aesthetic and functional characteristics, environmental characteristics, running costs, cost- effectiveness, after-sales service and technical assistance, delivery date and delivery period or period of completion etc. No criteria shall be used for evaluation of tenders that cannot be verified. No hearsay information or hitherto undeclared condition should be brought in while evaluating the tenders. Care should be taken that preferences provided to any category of bidders on certain specified grounds should not result in single vendor selection. Similarly, no tender enquiry condition (especially the significant/essential ones) should be overlooked/ relaxed while evaluating the tenders. The aim should be ensure that no tenderer gets undue advantage at the cost of other tenderers and/or at the cost of Procuring Entity. Information relating to evaluation of tenders and the Tender Committee's (TC's) deliberations should be confidential and not be shared with persons not officially connected with the process. TC should normally comprise of three members including Financial Adviser or his representative and a representative of the user as per SoPP in order to carry out evaluation of the tenders. TC should not be very large as it may slow down the evaluation process. However, suitable domain/ technical experts may be included in the committee to render assistance in evaluation of the bids. There is no need to constitute any other committee for technical evaluation, preliminary evaluation, etc. The representative of the user Department will work as a convenor of the TC. As per Rule 173 (xxii) of GFR 2017 no member of the tender committee should be reporting directly to any other member of such committee in case estimated value of the procurement exceeds Rs. 25 lakh. Though the GFR stipulates this provision only when the estimated value of procurement exceeds Rs 25 lakh, it is desirable that the same provision should be followed in the constitution of all purchase committees

irrespective of the value of procurement. The process of tender evaluation proceeds is described in the subsequent paras.

7.1.2 Schedule of Procurement Powers (SoPP)

There are delegations upto a threshold value below which the evaluation of the Bids may be entrusted solely and directly by individual competent authority, without involvement of a Tender committee or any evaluation report. He would himself carry out all the steps in evaluation described below, instead of the TC and directly records reasons and decision on the file itself. He may ask for a Technical Suitability report from User Departments, if so needed. In procurements above such a threshold, evaluation is by Tender Committee consisting of three or more officers, however no member of the Committee should be reporting directly to any other member of such Committee. Procuring Entity should lay down a Schedule of Procurement Powers (SoPP) detail such thresholds. It can also lay down the powers jurisdiction and composition of different levels of Tender Committee and corresponding Accepting Authority for different categories of procurement and different threshold values of procurements. A suggested format for SoPP is at Annexure 2B/2C, however exact values of threshold would have to be decided by Procuring Entity themselves. Competent authority, in direct acceptance case; and member secretary of the Tender Committee will receive the bids opened along with other documents from the tender opening officials and are responsible for safe-custody of the documents and for processing involved at all steps in finalising the Procurement.

7.2 Preparation and Vetting of Comparative Statement

Except in cases upto Rs 25 Lakh (Rupees Twenty Five Lakh) the Procuring Entity should prepare a comparative statement of quotations received in the order in which tenders were opened. In case of Techno-Commercial bid comparative statement will have information about deciding responsiveness and eligibility of bids and evaluation of Technical suitability of offers. In case of Financial bid it would have information about rates quoted (including taxes or otherwise), discount, if any, and any other information having implications on ranking of bids etc. The comparative statement so prepared should be signed by the concerned officers. It may also be vetted by the associated/ integrated Finance for veracity of information.

7.3 Preliminary Examination

7.3.1 Unresponsive Tenders

Tenders that do not meet the basic requirements specified in the bid documents are to be treated as unresponsive and ignored. All tenders received will first be scrutinised by the TC to see whether the tenders meet the basic requirements as incorporated in the Bid document and to identify unresponsive tenders, if any. Some important points on the basis of which a tender may be declared as unresponsive and be ignored during the initial scrutiny are:

i) The tender is not in the prescribed format or is unsigned or not signed as per the stipulations in the bid document;

ii) The required EMD has not been provided or exemption from EMD is claimed without acceptable proof of exemption;

iii) The bidder is not eligible to participate in the bid as per laid down eligibility criteria(example: the tender enquiry condition says that the bidder has to be a registered MSE unit but the tenderer is a, say, a large scale unit);

iv) The tenderer has quoted for goods manufactured by a different firm without the required authority letter from the proposed manufacturer;

v) The bid departs from the essential requirements specified in the bidding document (for example, the tenderer has not agreed to give the required performance security); or

vi) Against a schedule in the list of requirements in the tender enquiry, the tenderer has not quoted for the entire requirement as specified in that schedule (example: in a schedule, it has been stipulated that the tenderer will supply the equipment, install and commission it and also train the purchaser's operators for operating the equipment. The tenderer has, however, quoted only for supply of the equipment).

7.3.2 Non-conformities between Figures and Words

Sometimes, non-conformities/errors are also observed in responsive tenders between the quoted prices in figures and in words. This situation normally does not arise in case of e-Procurement. This should be taken care of in the manner indicated below:

i) If, in the price structure quoted for the required goods, there is discrepancy between the unit price and total price (which is obtained by multiplying the unit price by the quantity), the unit price shall prevail and the total price corrected accordingly;

ii) If there is an error in a total corresponding to the addition or subtraction of sub-totals, the sub-totals shall prevail and the total shall be corrected; and

iii) If there is a discrepancy between words and figures, the amount in words shall prevail.

iv) Such a discrepancy in an offer should be conveyed to the tenderer asking him to respond by a target date and if the tenderer does not agree to Procuring Entity's observation, the tender is liable to be rejected.

7.3.3 Discrepancies between Original and Additional/ Scanned Copies of a Tender

Discrepancies can also be observed in responsive tenders between the original copy and other copies of the same tender set. In such a case, the text, and so on, of the original copy will prevail. Here also, this issue is to be taken up with the tenderer in the same manner as above and subsequent actions taken accordingly. In e-Procurement there could be discrepancies between the uploaded scanned copies and the Originals submitted by the bidder. However normally no submission of original documents in physical format (other than Cost of Bid Documents (if any, refer Para *5.2.1*Cost and Availability of Tender Documents), Bid Security and statutory certificates if any) should be asked for in e-Procurement

7.3.4 Minor Infirmity/Irregularity/Non-conformity

During the preliminary examination, some minor infirmity and/or irregularity and/or non-conformity may also be found in some tenders. Such minor issues could be a missing pages/ attachment or illegibility in a submitted document; non-submission of requisite number of copies of a document. There have been also cases where the bidder submitted the amendment Bank Guarantee, but omitted to submit the main portion of Bid Document. The court ruled that this is a minor irregularity. Such minor issues may be waived provided they do not constitute any material deviation (please refer to Para 7.4.1 (d)) and financial impact and, also, do not prejudice or affect the ranking order of the tenderers. Wherever necessary, observations on such 'minor'

issues (as mentioned above) may be conveyed to the tenderer by registered letter/speed post, and so on, asking him to respond by a specified date also mentioning therein that, if the tenderer does not conform Procuring Entity's view or respond by that specified date, his tender will be liable to be rejected. Depending on the outcome, such tenders are to be ignored or considered further.

7.3.5 Clarification of Bids/Shortfall Documents

During evaluation and comparison of bids, the purchaser may, at his discretion, ask the bidder for clarifications on the bid. The request for clarification shall be given in writing by registered/speed post, asking the tenderer to respond by a specified date, and also mentioning therein that, if the tenderer does not comply or respond by the date, his tender will be liable to be rejected. Depending on the outcome, such tenders are to be ignored or considered further. No change in prices or substance of the bid shall be sought, offered or permitted. No post-bid clarification at the initiative of the bidder shall be entertained. 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. These should be called only on basis of the recommendations of the TC. (Example: if the Permanent Account Number, registration with sales tax/ VAT has been asked to be submitted and the tenderer has not provided them, these documents may be asked for with a target date as above). So far as the submission of documents is concerned with regard to qualification criteria, after submission of the tender, only related shortfall documents should be asked for and considered. For example, if the bidder has submitted a supply order without its completion/performance certificate, the certificate can be asked for and considered. However, no new supply order should be asked for so as to qualify the bidder.

7.4 Evaluation of Responsive Bids and Decision on Award of Contract

All responsive bids are evaluated by the TC with a view to select the lowest (L1) bidder who meets the qualification criteria and techno-commercial aspects. In case of single stage single envelop bidding, the evaluation of qualification of bidders, technical, commercial and financial aspect is done simultaneously. In single stage multiple envelops, initially only the techno-commercial bids would be opened and

evaluated for bids which successfully meet the qualification criteria and techno-commercial aspects. Financial bids of such successful bidders only would be opened for selecting the L1 bidder among these and in case of manual tenders, financial bids of unsuccessful bidders would be returned unopened to them. In two stage bids, the PQB/ EoI stage would have already been evaluated as detailed in Chapter 4 and this second stage is for evaluation of responses to the Second Stage multiple envelops from the shortlisted qualified bidders. Evaluation of techno-commercial and financial aspects are, however, discussed separately below. It is of utmost importance that the authenticity, integrity and sanctity of unopened Financial Bids must be ensured, before their opening. All the financial bids may preferably be put in a large envelop, which may be dated, sealed and signed (including by some of the bidders present), to show that none of the bids were accessed during the custody.

7.4.1 Evaluation of Techno-commercial Bid

In evaluation of the techno-commercial bid, conformity of the eligibility/qualification, technical and commercial conditions of the offered goods to those in the bid document is ascertained. Additional factors, if any, incorporated in the tender documents may also be considered in the manner indicated therein. Evaluation has to be based only on the conditions included in the tender document and any other condition should not form the basis of this evaluation.

i) **Evaluation of eligibility/ qualification Criteria:** Procuring Entity will determine, to its satisfaction, whether the tenderers are eligible, qualified and capable in all respects to perform the contract satisfactorily. Tenders that do not meet the required eligibility/qualification criteria prescribed will be treated as unresponsive and not considered further. This determination will, inter-alia, take into account the tenderer's financial, technical and production capabilities for satisfying all of Procuring Entity's requirements as incorporated in the tender document. Such determination will be based upon scrutiny and examination of all relevant data and details submitted by the tenderer in its/his tender as well as such other allied information as deemed appropriate by Procuring Entity.

ii) **Evaluation of Technical Suitability:** The description, specifications, drawings and other technical terms and conditions are examined by TC in

general and a technical member of the TC in particular. Nobody outside the TC should be allowed to determine this evaluation. The tender document should clearly state whether alternative offers/makes/models would be considered or not and, in the absence of an express statement to the effect, these should not be allowed. An important document is the exceptions/deviation form submitted by the tenderer. It is important to judge whether an exception/deviation is minor or major. Minor exceptions/deviations may be waived provided they do not constitute any material deviation and do not have significant financial impact and, also, would not prejudice or affect the ranking order of the price bid. Exceptions/deviations should not grant the tenderer any undue advantage vis-à-vis other tenders and Procuring Entity.

iii) **Evaluation of Commercial Conditions:** The TC will also evaluate the commercial conditions quoted by the tenderer to confirm that all terms and conditions specified in the GCC/SCC have been accepted without reservations by the tenderer. Only minor deviations may be accepted/allowed, provided these do not constitute material deviations without financial impact and do not grant the tenderer any undue advantage vis-à-vis other tenders and Procuring Entity.

iv) **Considering Minor Deviations:** Court has consistently taken a view that procuring entity is entitled to consider and allow minor deviations, which do not amount to material deviations. A material deviation, reservation, or omission which should not be waived are those that:

a) Affects, in any substantial way, the scope, quality or performance of the goods and related services specified in the contract;

b) Limits, in any substantial way, inconsistent with the tendering documents, the procuring entity's rights or the tenderer's obligations under the contract; or

c) If rectified, would unfairly affect the competitive position of other tenderers quoting substantially responsive tenders.

v) **Declaration of Successful Bidders:** If it is a multiple envelop tender, then the TC prepares a recommendation of techno-commercial bid (Annexure 11) to declare successful bidders. In such cases, after the approval of CA, the

results of the Techno-commercial bid evaluation are to be announced (including informing the failed Bidders). Price bids are opened in the presence of technically suitable bidders, who are willing to attend the bid opening, at a pre-publicised date, time and place or on the portal in case of e-procurement. In single envelop/cover tender, TC proceeds to evaluate the price aspects without a reference to CA at this stage.

7.4.2 **Right of Bidder to question rejection at Techno-commercial Stage**

A tenderer shall have the right to be heard in case he feels that a proper procurement process is not being followed and/or his Techno-commercial bid has been rejected wrongly. The tenderer is to be permitted to send his representation in writing. On receipt of representation it may be decided whether to withhold opening of the financial bids and bidder may be expeditiously replied. Certain decisions of the procuring entity in accordance with the provision of internal guidelines shall not be subject to review as mentioned in para 7.6.3 below.

7.4.3 **Evaluation of Financial Bids and Ranking of Tenders In general:**

i) If the price bid is ambiguous so that it may very well lead to two equally valid total price amounts, then the bid should be treated as unresponsive;

ii) Sometime certain bidders offer suo motu discounts and rebates after opening of the tender (techno-commercial or financial). Such rebates/discounts should not be considered for the purpose of ranking the offer but if such a firm does become L1 at its original offer, such suo motu rebates can be incorporated in the contracts. This also applies to conditional rebates, for example, rebate for faster payments, and so on;

iii) Unless announced beforehand explicitly in the tender documents, the quoted price should not be loaded on the basis of deviations in the commercial conditions. If it is decided to incorporate such clauses, these should be unambiguous and clear – and thereafter there should be no relaxation during evaluation. Moreover, sometimes, while purchasing sophisticated and costly equipment, machinery, and so on, the procuring entity also gives special importance to factors such as high quality performance, environmental-friendly features, low running cost, low maintenance cost, and so on. To take care of this, relevant details are to

be incorporated in the bid document and the criteria adopted to assess the benefit of such features while evaluating the offers are also to be clearly stipulated in the tender enquiry document so that the tenderers are aware of it and quote accordingly. While evaluating such offers, these aspects are also to be taken into account. Such details, whenever considered necessary, should be evolved by the competent technical authority for incorporation in the tender document, so that there is no ambiguity and/or vagueness in them;

iv) Normally, the comparison of the responsive tenders shall be on total outgo from the Procuring Entity's pocket, for the procurement to be paid to the supplier or any third party, including all elements of costs as per the terms of the proposed contract, including any taxes, duties, levies etc, freight insurance etc. Therefore it should normally be on the basis of CIF/ FOR destination basis, duly delivered, commissioned, as the case may be:

v) In the case of goods manufactured in India or goods of foreign origin already located in India, VAT/sales tax and excise duty and other similar taxes and duties, which will be contractually payable (to the tenderer) on the goods are to be added;

vi) In the case of goods of foreign origin offered from abroad, customs duty and other similar import duties/taxes, which will be contractually payable (to the tenderer) on the goods, are to be added;

vii) As per policies of the Government from time to time, the purchaser reserves his option to give price/ purchase preferences as indicated in the tender document;

viii) In case the list of requirements contains more than one schedule, the responsive, technically suitable tenders will be evaluated and compared separately for each schedule. The tender for a schedule will not be considered if the complete requirements prescribed in that schedule are not included in the tender. However, tenderers have the option to quote for any one or more schedules and offer discounts for combined schedules. Such discounts, wherever applicable, will be taken into account to for deciding the lowest evaluated cost for Procuring Entity in deciding the

successful tenderer for each schedule, subject to that tenderer(s) being responsive; and

ix) If the tenders have been invited on a variable price basis, the tenders will be evaluated, compared and ranked on the basis of the position prevailing on the day of tender (Technical Bid) opening and not on the basis of any future date.

GTE Tenders

Special aspects of evaluation of the financial offer in GTE tenders are:

i) **Currency of Tender**

In GTE tenders, the price in the quotation could be in US Dollar or Euro or Pound Sterling or Yen or in currencies under the RBI's notified basket of currencies, in addition to the Indian Rupees, except for expenditure incurred in India (including agency commission if any) which should be stated in Indian Rupees. All offers are to be converted to Indian Rupees based on the "Bill currency selling" exchange rate on the date of tender opening (Techno-commercial offer) from a source as specified in the tender document.

ii) **Currency of Payment**

The contract price will be normally paid in the currency/currencies in which the price is stated in the contract.

iii) **Evaluation of Offers**

As per Government policy, Ministries/Departments/Public Sector Undertakings (PSUs) should ensure imports on FOB/FAS basis failing which a No Objection Certificate (NOC) should be obtained from the Ministry of Surface Transport (Chartering Wing).

The foreign bidders are normally asked, in the bid documents, to quote both on FAS/FOB basis and also on Cost and Freight (CFR)/CIF basis duly indicating the break-up of prices for freight, insurance, and so on, with purchasers reserving the right to order on either basis. They should also to indicate the custom tariff number and custom duty applicable in India. In the case of FAS/FOB offers, the freight and insurance shall be (after ascertaining, if not quoted) added to make up the CIF cost. To arrive at the Free On Rail (FOR) cost, one per cent shall be added over and above CIF as port handling charges, custom duty, countervailing duty and

surcharges, as applicable on the date of opening of the tender, as well as clearing agency charges, inland freight and Octroi/ entry tax, as assessed, may be added to make it a FOR/Free On Truck (FOT) destination. The FOR/FOT destination price for domestic offers may be calculated as in OTE tenders. For bids with Letter of Credit (LC) payment, the likely LC charges (as ascertained from Procuring Entity's bankers) should also be loaded.

In case both Indian and foreign bidders have quoted in the tender, the comparison of the offers would be done on the basis of FOR/FOT destination including all applicable taxes and duties (on the principle of the total outgo from Procuring Entity's pockets). In case there are no domestic bidders, a comparison of offers can be made on the basis of CIF/landed costs since the rest of costs would be same for all bidders.

7.5 Deliberations by the Tender Committee for Award of Contract.

7.5.1 Timely Processing of Tenders (Rule 174 (i) of GFR 2017)

Delays in finalising procurement deprive the public of the intended benefits and results in lost revenues and cost over-run. To enable timely decision making, complete Time schedule of finalising the Tender process from the date of issuing the tender to date of issuing the contract, should be published in the Bid Documents. Every official in the chain of the procurement operation is accountable for taking action in a specified time so that the tender is finalised on time. Any deviation from the schedule may be monitored and explained, by way of system of Management Reporting (Appendix 4 and 5). As a check, the proposed schedule of tender process may be printed on the inside cover of the Procurement File, where actual date of completion of various stages may be recorded. The suggestive time schedule in Table 2 is a guideline for finalising contracts against various modes of procurements.

SL. No.	Table 2. Indicative time schedule		
	Mode of Procurement	**Indigenous**	**Imported**
1	Open tender/ (e-tendering)	45days	60 days
2	Procurement through registered vendors/ (Special) limited tenders	30 days	45days
3	Proprietary basis/nomination basis	21days	30 days

This time schedule is only indicative and the schedule shall be subject to change based on the nature of requirements, sourcing, sample evaluation, site visit/pre-bid meeting with prospective bidders and Government, guidelines, and so on.

7.5.2 Extension of Tender Validity Period

The entire process of scrutiny and evaluation of tenders, preparation of ranking statement and notification of award must be done expeditiously and within the original tender validity period (*Rule 174 (iii) of GFR 2017*). The validity period should not be unreasonably long as keeping the tender unconditionally valid for acceptance for a longer period entails the risk of getting higher prices from the tenderers.

If, however, due to some exceptional and unforeseen reasons, the purchase organisation is unable to decide on the placement of the contract within the original validity period, it may preferably request, before expiry of the original validity period, all the responsive tenderers to extend their tenders up to a specified period. While asking for such extension, the tenderers are also to be asked to extend their offers as it is, without any changes therein. They may also be told to extend the validity of the EMD for the corresponding additional period (which is to be specified in the request). A tenderer may not agree to such a request and this will not be tantamount to forfeiture of its EMD. But the tenderers, who agree to extend the validity, are to do so without changing any terms, conditions, and so on, of their original tenders.

7.5.3 Variation of Quantities at the Time of Award

At the time of awarding the contract, the quantity to be procured must be re-judged based on the current data, since the ground situation may have very well changed. The tendered quantity can be increased or decreased by 25 (twenty-five) per cent for ordering, if so warranted. This may be mentioned in the tender documents. Any larger variation may throw up issues about transparency.

7.5.4 Option clause

In case of long running, yearly procurements, to take care of any change in the requirement during the currency of the contract, a plus/minus option clause[normally 25 (twenty-five) per cent] is incorporated in the tender document, reserving purchaser's right to increase or decrease the quantity of the required goods up to that limit without any change in the terms and conditions and prices quoted by the

tenderers. Higher the option limit more is the uncertainty for the tenderers in formulating their prices and more is the chance of loading on the prices quoted to take care of such uncertainties.

7.5.5 Splitting of Contracts/ Parallel Contracts

After due processing, if it is discovered that the quantity to be ordered is far more than whatL1aloneiscapableofsupplyingand there was no prior decision/ declaration in the bidding documents to split the quantities, then the quantity being finally ordered may be distributed among the other bidders by counter offering the L1 rate in a manner that is fair, transparent and equitable based on objective data available in the bids e.g. eligibility data, Quantity/ Delivery etc.

However, in case of critical/ vital/ safety/ security nature of the item, large quantity under procurement, urgent delivery requirements and inadequate vendor capacity it may be advantageous to decide in advance to have more than one source of supply. In such cases a parallel contract clause should be added to the bid documents, clearly stating that Procuring Entity reserves the right to split the contract quantity between suppliers. The manner of deciding the relative share of lowest bidder (L1) contractor and the rest of the contractors/tenderers should be clearly defined, along with the minimum number of suppliers sought for the contract. In case of splitting in two and three, the ratio of 70:30; 50:30:20, respectively, may be used – a different ratio may also be justified.

Before splitting the quantity, it should be ensured that the L1 price is reasonable. If it is not reasonable, negotiation with the L1 party may be carried out, if justifiable, with the approval of the CA. The following guidelines are to be considered while opting for parallel contracts:

i) L1 should be awarded at least the percentage mentioned above or his spare supply capacity, whichever is lower; and

ii) For the rest of the contract quantity, the lowest rate accepted will be counter offered to the L2 party. On acceptance of the counter offer, the order will be placed on L2 for the respective percentage or the spare supply capacity of the L2 bidder, whichever is lower, and so on, to other tenderers. In case of non-acceptance of the counter offer by the L2 party, a similar offer shall be made to L3 and L4, and so on.

7.5.6 **Reasonableness of Prices**

In every recommendation of the TC for award of contract, it must be declared that the rates recommended are reasonable.

[For more details on judging reasonableness of prices, please see para 2.1.1 (iii)(e) in Chapter 2 above].

Where there is no estimated cost, a comparison with Last Purchase Price (LPP - the price paid in the latest successful contract) is the basis for judging reasonableness of rates. The following points may be kept in mind before LPP is relied upon as a basis for justifying rate reasonableness:

i) The basic price, taxes, duties, transportation charges, Packing and Forwarding charges should be indicated separately;
ii) Where the firm holding the LPP contract has defaulted, the fact should be highlighted and the price paid against the latest contract placed prior to the defaulting LPP contract, where supplies have been completed, should be used;
iii) Where the supply against the LPP contract is yet to commence, that is, delivery is not yet due, it should be taken as LPP with caution, especially if the supplier is new, the price paid against the previous contract may also be kept in view;
iv) Where the price indicated in the LPP is subject to variation or if it is more than a year old, the updated price or as computed in case of the Price Variation Clause (PVC) may also be indicated;
v) In the case of wholly imported stores, the comparison of the last purchase rate should be made with the net CIF value at the current foreign exchange rate;
vi) It is natural to have marginal differences in prices obtained at different cities/offices for the same item, due to their different circumstances. The prices obtained are greatly influenced by quantity, delivery period, terms of the contract, these may be kept in view; and
vii) Prices paid in emergencies or prices offered in a distress sale are not accurate guidelines for future use. Such purchase orders and TC proceedings should indicate that “these prices are not valid LPP for comparison in future procurement”.

7.5.7 Consideration of Abnormally Low Bids

An Abnormally Low Bid is one in which the Bid price, in combination with other elements of the Bid, appears so low that it raises material concerns as to the capability of the Bidder to perform the contract at the offered price. Procuring Entity may in such cases seek written clarifications from the Bidder, including detailed price analyses of its Bid price in relation to scope, schedule, allocation of risks and responsibilities, and any other requirements of the bids document. If, after evaluating the price analyses, procuring entity determines that the Bidder has *substantially failed* to demonstrate its capability to deliver the contract at the offered price, the Procuring Entity may reject the Bid/Proposal. However it would not be advisable to fix a normative percentage below the estimated cost, which would be automatically be considered as an abnormally low bid. Due care should be taken while formulating the specifications at the time of preparation of bid document so as to have a safeguard against the submission of abnormally low bid from the bidder.

In the case of predatory pricing as well, procuring entities may refer to the above consideration of Abnormally Low Bids to assist themselves in finalization of tenders[75].

No provisions should be kept in the Bid Documents regarding the Additional Security Deposit/ Bank Guarantee (BG) in case of Abnormally Low Bids. Wherever, there are compelling circumstances to ask for Additional Security Deposit/ Bank Guarantee (BG) in case of ALBs, the same should be taken only with the approval of the next higher authority competent to finalise the particular tender, or the Secretary of the Ministry/ Department, whichever is lower[76].

7.5.8 Cartel Formation/Pool Rates

It is possible that sometimes a group of bidders quote the same rate against a tender. Such pool/cartel formation is against the basic principle of competitive bidding and defeats the very purpose of an open and competitive tendering system. Such and similar tactics to avoid/control true competition in a tender leading to "Appreciable Adverse Effect on Competition" (AAEC) have been declared as an

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[75] In reference to OM No.F.12/17/2019-PPD issued by Department of Expenditure dated 06.02.2020

[76] Notified vide OM No. F.9/4/2020-PPD issued by Department of Expenditure dated 12.11.2020

offence under the Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007. Such practices should be severely discouraged with strong measures. In case of evidence of cartel formation, detailed cost analysis may be done by associating experts if necessary. Besides, suitable administrative actions can be resorted to, such as rejecting the offers, reporting the matter to trade associations, the Competition Commission or NSIC, etc., and requesting them, inter-alia, to take suitable strong actions against such firms. New firms may also be encouraged to get themselves registered for the subject goods to break the monopolistic attitude of the firms forming a cartel. Changes in the mode of procurement (GTE instead of OTE) and packaging/slicing of the tendered quantity and items may also be tried. A warning clause may also be included in the bid documents to discourage the bidders from indulging in such practices.

7.5.9 **Negotiations (*Rule 173 (xiv) of GFR 2017*)**

i) Normally, there should be no negotiation. Negotiations should be a rare exception rather than the rule and may be resorted to only in exceptional circumstances. If it is decided to hold negotiations for reduction of prices, they should be held only with the lowest acceptable bidder (L1), who is techno-commercially responsive for the supply of a bulk quantity and on whom the contract would have been placed but for the decision to negotiate. In no case, including where a cartel/pool rates are suspected, should negotiations be extended to those who had either not tendered originally or whose tender was rejected because of unresponsiveness of bid, unsatisfactory credentials, inadequacy of capacity or unworkable rates. The circumstances where negotiations may be considered could be:

   a) Where the procurement is done on nomination basis;

   b) Procurement is from single or limited sources;

   c) Procurements where there is suspicion of cartel formation which should be recorded; and

   d) Where the requirements are urgent and the delay in re-tendering for the entire requirement due to the unreasonableness of the quoted rates would jeopardise essential operations, maintenance and safety, negotiations with

L1 bidder(s) may be done for bare minimum quantum of requirements. The balance bulk requirement should, however, be procured through a re-tender, following the normal tendering process.

ii) The decision whether to invite fresh tenders or to negotiate and with whom, should be made by the tender accepting authority based on the recommendations of the TC. Convincing reasons must be recorded by the authority recommending negotiations. The CA should exercise due diligence while accepting a tender or ordering negotiations or calling for a re-tender and a definite timeframe should be indicated.

iii) Normally all counter offers are considered negotiations by other means and the principles of negotiations should apply to such counter offers. For example, a counter offer to L1, in order to arrive at an acceptable rate, shall amount to a negotiation. However, any counter offer to L2, L3, and so on (at the rates accepted by L1) in case of splitting of quantities shall not be deemed to be a negotiation.

iv) After the CA has decided to call a specific bidder for negotiation, the following procedure should be adopted:

a) It must be understood that, if the period of validity of the original offer expires before the close of negotiations, the original offer will not be available for acceptance. The period of validity of the original offer must, therefore, be extended, wherever necessary, before negotiations;

b) The tenderer to be called in for negotiations should be addressed as per the format of letter laid down in Annexure 12, so that the rates originally quoted by him shall remain open for acceptance in the event of failure of the contemplated negotiation;

c) A negotiations meeting should be started only after obtaining a signed declaration from the negotiating supplier as per Annexure 12; and

d) Revised bids should be obtained in writing from the selected tenderers at the end of the negotiations in the format of letter laid down in Annexure 13. The revised bids so obtained should be read out to the tenderers or their representatives present, immediately after completing the negotiations. If necessary, the negotiating party may be given some time to submit its

revised offer. In case, however, the selected bidder prefers to send a revised bid instead of being present at the negotiation, the offer should be taken into account. In case a bidder does not submit the revised bid, its original bid shall be considered.

7.5.10 **Consideration of Lack of Competition in OTE/ GTE and LTE** [Rule 173 (xix) and (xxi) of GFR 2017]

Sometimes, against advertised/limited tender cases, the procuring entity may not receive a sufficient number of bids and/or after analysing the bids, ends up with only one responsive bid – a situation referred to as 'Single Offer'. As per Rule 21 of DFPR (explanation sub-para), such situation of 'Single Offer' is to be treated as Single Tender. It has become a practice among some procuring entities to routinely assume that open tenders which result in single bids are not acceptable, and to go for re-tender as a 'safe' course of action. This is not correct. Re-bidding has costs: firstly the actual costs of retendering; secondly the delay in execution of the work with consequent delay in the attainment of the purpose for which the procurement is being done; and thirdly the possibility that the re-bid may result in a higher bid[77]. Even when only one Bid is submitted, the process may be considered valid provided following conditions are satisfied:

i) The procurement was satisfactorily advertised and sufficient time was given for submission of bids.

ii) The qualification criteria were not unduly restrictive; and

iii) Prices are reasonable in comparison to market values

However restricted powers of Single tender mode of procurement would apply. In case of price not being reasonable, negotiations (being L1) or retender may be considered as justifiable.

Unsolicited offers against LTEs should be ignored, however Ministries/Departments should evolve a system by which interested firms can register and bid in next round of tendering. However, under the following exceptional circumstances, these may be considered for acceptance at the next higher level of competency:

[77]As stated under para 11.8 of OM No.F.1/1/2021-PPD issued by Department of Expenditure dated 20.10.2021

a) Inadequate Competition
b) Non-availability of suitable quotations from registered vendors
c) Urgent demand and capacity/capability of the firm offering the unsolicited being known, etc.

7.5.11 **Cancellation of Procurement Process/ Rejection of All Bids/Re-tender** [Rule 173 (xix) of GFR 2017]

i) The Procuring Entity may cancel the process of procurement or rejecting all bids at any time before intimating acceptance of successful bid under circumstances mentioned below. In case where responsive bids are available, the aim should be to finalise the tender by taking mitigating measures even in the conditions described below. If it is decided to rebid the tender, the justification should balance the perceived risks in finalisation of tender (marginally higher rates) against the certainty of resultant delays, cost escalations, loss of transparency in re-invited tender. After such decision, all participating bidders would be informed and bids if not opened would not be opened and in case of manual tenders be returned unopened:
    a) If the quantity and quality of requirements have changed substantially or there is an un-rectifiable infirmity in the bidding process;
    b) when none of the tenders is substantially responsive to the requirements of the Procurement Documents;
    c) none of the technical Proposals meets the minimum technical qualifying score;
    d) If effective competition is lacking. However lack of competition shall not be determined solely on the basis of the number of Bidders. (Please refer to para above also regarding receipt of a single offer).
    e) the Bids'/Proposals' prices are substantially higher than the updated cost estimate or available budget;
    f) If the bidder, whose bid has been found to be the lowest evaluated bid withdraws or whose bid has been accepted, fails to sign the procurement contract as may be required, or fails to provide the security as may be required for the performance of the contract or

otherwise withdraws from the procurement process, the Procuring Entity shall re-tender the case[78].

ii) Approval for re-tendering should be accorded by the CA after recording the reasons/proper justification in writing. The decision of the procuring entity to cancel the procurement and reasons for such a decision shall be immediately communicated to all bidders that participated in the procurement process. Before retendering, the procuring entity is first to check whether, while floating/issuing the enquiry, all necessary requirements and formalities such as standard conditions, industry friendly qualification criteria, and technical and commercial terms, wide publicity, sufficient time for bidding, and so on, were fulfilled. If not, a fresh enquiry is to be issued after rectifying the deficiencies.

7.5.12 **Handling Dissent among Tender Committee**

Tender Committee duties are to be discharged personally by the nominated officers. They may take help of their subordinate officers by way of reports/ evaluations, but they would still be answerable for such decisions. TC members cannot co-opt or nominate others to attend deliberations on their behalf. TC deliberations are best held across the table and not through circulation of notes.

All members of the TC should resolve their differences through personal discussions instead of making to and fro references in writing. In cases where it is not possible to come to a consensus and differences persist amongst TC members, the reasons for dissent of a member should be recorded in a balanced manner along with the majority's views on the dissent note. The final recommendations should be that of the majority view. However, such situations should be rare. The Competent Authority (CA) can overrule such dissent notes after recording reasons for doing so clearly. His decision would be final.

In cases where the CA does not agree with the majority or unanimous recommendations of the TC, he should record his views and, if possible, firstly send it back to TC to reconsider along the lines of the tender accepting authority's views.

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[78] Notified vide OM No. F.1/1/2021-PPD issued by Department of Expenditure dated 21.04.2022

However, if the TC, after considering the views of the CA, sticks to its own earlier recommendations, the CA can finally decide as deemed fit, duly recording detailed reasons. He will be responsible for such decisions. However, such situations should be rare.

7.5.13 Independence, Impartiality, Confidentiality and 'No Conflict of Interest' at all Stages of Evaluation of Bids

All technical, commercial and finance officials who have contributed to the techno-commercial or financial evaluation of bids, even though they may not be part of the TC should deal with the procurement in an independent, impartial manner and should have no conflict of interest with any of the bidder involved in the procurement. They should also maintain confidentiality of the information processed during the evaluation process and not allow it to reach any unauthorised person. They should sign a declaration at the end of their reports/notings stating that, "I declare that I have no conflict of interest with any of the bidder in this tender". TC members may make such a declaration at the end of their reports.

7.5.14 Tender Committee Recommendations/Report

The TC has to make formal recommendations (Annexure 11)for the award of the contract to the bidder whose bid has been determined to be substantially responsive and the lowest evaluated bid, provided further that the bidder is determined to be qualified to perform the contract satisfactorily and his credentials have been verified. It is a good practice that TC should spell out salient terms and conditions of the offer(s) recommended for acceptance. It should also be ensured by the TC that any deviation/variation quoted by the supplier in his bid are not left undiscussed and ruled upon in the TC; otherwise there may be delay in acceptance of the contract by the supplier. These recommendations are submitted for approval to the tender accepting authority. Since a nominee of Financial Adviser of the Department is usually a member of the Tender Committee, there is no need for the CA to consult the FA of the Department before accepting the TC recommendations. In any purchase decision, the responsibility of the CA is not discharged merely by selecting the cheapest offer or accepting TC recommendations but ensuring whether:

i) Offers have been invited in accordance with this manual and after following fair and reasonable procedures in prevailing circumstances;

ii) He is satisfied that the selected offer will adequately meet the requirement for which it is being procured;

iii) The price of the offer is reasonable and consistent with the quality required; and

iv) The accepted offer is the most appropriate taking all relevant factors into account in keeping with the standards of financial propriety.

After the acceptance of these recommendations by the tender accepting authority, the Letter (Notification) of Award (LoA) can be issued.

7.6 Award of Contract

7.6.1 LoA to Successful Bidder

Prior to the expiry of the period of bid validity, the successful bidder will be notified (briefly indicating therein relevant details such as quantity, specification of the goods ordered, prices, and so on) in writing by a registered letter or any other acknowledgeable and fool proof method that his bid has been accepted. Legally communication of acceptance of offer is considered complete as soon as it is submitted to Postal authorities (please refer to Para 2.9.1 of Appendix 2). A template for the Letter of Acceptance (or Notice of Award, or Acceptance of Tender) is given in Annexure 14. In the same communication, the successful tenderer is to be instructed to furnish the required performance security within a specified period (generally 14(fourteen) days).

In respect of contracts for purchases valued Rupees two and a half lakh and above, where tender documents include the GCC, SCC and schedule of requirements, the letter of acceptance will result in a binding contract. All delivery liabilities would be counted from the date of LoA.

7.6.2 Publication of Tender Results and Return of EMD of Unsuccessful Bidders [Rule 173 (xviii) of GFR 2017]

The details of award of contract and name of the successful tenderer should be mentioned mandatorily on the CPPP and also in the notice board/bulletin/website of the concerned Ministry or Department/e-Procurement Portal. In case publication of such information is sensitive from commercial or security aspects, dispensation may be sought from publishing of such results by obtaining sanction from the Secretary of

the Department with the concurrence if associated Finance. Upon the successful bidder furnishing the signed agreement and performance security, each unsuccessful bidder will be promptly notified and their bid security be returned without interest within 30 (thirty) days of notice of award of contract. The successful supplier's bid security shall be adjusted against the SD or returned as per the terms of the tender documents. In cases, where PSUs compete with private firms in public tenders, publication of details of contracts awarded by the PSU concerned to various sub-vendors, suppliers, technology providers and other associates before firming up their offer, may hurt the interest of the PSU as the competitors may get to know the details of sub-venders, suppliers, technology providers and other associates as well as the price at which the contracts are placed. Therefore, in such cases, publication of details of contracts awarded may be dispensed with.

7.6.3 **Bidder's right to question rejection at this stage**

A tenderer shall have the right to be heard in case he feels that a proper procurement process is not being followed and/or his tender has been rejected wrongly. The tenderer is to be permitted to send his representation in writing. Bidding documents should explicitly mention the name, designation and contact details of officers nominated to receive representations in this regard. But, such representation has to be sent within 10(ten) days from the date of LoA. The procuring entity should ensure a decision within 15 (fifteen) days of the receipt of the representation. Only a directly affected bidder can represent in this regard:

i) Only a bidder who has participated in the concerned procurement process i.e. pre-qualification, bidder registration or bidding, as the case may be, can make such representation

ii) In case pre-qualification bid has been evaluated before the bidding of Technical/ financial bids, an application for review in relation to the technical/ financial bid may be filed only by a bidder has qualified in pre-qualification bid;

iii) In case technical bid has been evaluated before the opening of the financial bid, an application for review in relation to the financial bid may be filed only by a bidder whose technical bid is found to be acceptable

iv) Following decisions of the procuring entity in accordance with the provision of internal guidelines shall not be subject to review:

a) Determination of the need for procurement;
b) Selection of the mode of procurement or bidding system;
c) Choice of selection procedure;
d) Provisions limiting participation of bidders in the procurement process;
e) The decision to enter into negotiations with the L1 bidder;
f) Cancellation of the procurement process except where it is intended to subsequently re-tender the same requirements;
g) Issues related to ambiguity in contract terms may not be taken up after a contract has been signed, all such issues should be highlighted before consummation of the contract by the vendor/contractor; and
h) Complaints against specifications except under the premise that they are either vague or too specific so as to limit competition may be permissible.

7.6.4 Performance Security

The supplier receiving the LoA is required to furnish the required performance security, if it is part of tender conditions, in the prescribed form by the specified date; failing this necessary action including forfeiture of EMD will be taken against the supplier.

7.6.5 Acknowledgement of Contract by Successful Bidder and Execution

After the successful bidder is notified that his bid has been accepted, he will be sent an agreement for signature and return, incorporating all agreements between the parties.

The supplier should acknowledge and unconditionally accept, sign, date and return the agreement within 14 (fourteen) days from the date of issue of the contract in case of OTE and 28 (twenty-eight) days in case of GTE. Such acknowledgements may not be required in low value contracts, below Rupees two and a half Lakh or when the bidders offer has been accepted in entirety, without any modifications. While acknowledging the contract, the supplier may raise issues and/or ask for modifications against some entries in the contract; such aspects shall be immediately be looked into for necessary action and, thereafter, the supplier's unconditional acceptance of the contract obtained. If both parties (Procuring Entity and the supplier) simultaneously sign the contract across the table, further acknowledgement from the supplier is not required. It should also be made known to

the successful tenderer that in case he does not furnish the required performance security or does not accept the contract within the stipulated target dates, such non-compliance will constitute sufficient ground for forfeiture of its EMD and processing the case for further action against it (the successful tenderer).

All contracts shall be signed and entered into after receipt and verification of the requisite performance security, by an authority empowered to do so by or under the orders of the President of India in terms of Article 299 (1) of the Constitution of India. The words "for and on behalf of the President of India" should follow the designation appended below the signature of the officer authorised on this behalf. The various classes of contracts and assurances of property, which may be executed by different authorities, are specified in the DFPR. No contract on behalf of an organisation of Procuring Entity should be entered into by any authority which has not been empowered to do so under the orders of the state Government.

7.6.6 **Framing of Contract**

The following general principles should be observed while entering into contracts:

i) Any agreement shall be issued strictly as per approved TC recommendations, be vetted by the Associated/ integrated Finance and approved by CA. The terms of contract must be precise, definite and without any ambiguities. The terms should not involve an uncertain or indefinite liability, except in the case of a cost plus contract or where there is PVC in the contract. In other words, no contract involving an uncertain or indefinite liability or any condition of an unusual character should be entered into without the previous consent of the Associated/ integrated Finance.

ii) All contracts shall contain a provision for
    a) Recovery of liquidated damages (LD) for delay in performance of the contract on the part of the contractor;
    b) A warranty clause/defect liability clause should be incorporated in contracts for plant and machinery, above a threshold value, requiring the contractor to, without charge, replace, repair or rectify defective goods/ works/services;

iii) All contracts for supply of goods should reserve the right of the Government to reject goods which do not conform to the specifications;

iv) Payment of all applicable taxes by the contractor or supplier; and

v) When a contract is likely to endure for a period of more than two years, it should, wherever feasible, include a provision for an unconditional power of revocation or cancellation by the Government at any time on the expiry of six months' notice to that effect.

vi) Standard forms of contracts should be invariably adopted, except in following cases:

a) Authorities competent to make purchases may, at their discretion, make purchases of value up to Rupees two and a half lakh by issuing purchase orders containing basic terms and conditions;

b) In cases where standard forms of contracts are not used or where modifications in standard forms are considered necessary in respect of individual contracts, legal and financial advice should be taken in drafting the clauses in the contract and approval of CAs is to be obtained; and

c) Copies of all contracts and agreements for purchases of the value of Rs. 25 (Rupees twenty-five) lakh and above, and of all rate and running contracts entered into by civil Departments of the Government should be sent to the Accountant General.

7.6.7 **Procurement Records**

The Procurement file should start with the Indent and related documents. All subsequent documents relating to procurement planning; Copy of Bid Document and documents relating to its and formulation, publishing and issue/ uploading; Bid Opening; Bids received; Correspondence and documents (including Technical Evaluation and TC report) relating to pre-qualification, evaluation, Award of Contract; and finally the Contract copy, should be kept on the file. In case of bulky Bids received, all bids received may be kept in a separate volume, with a copy of accepted bids later being put on the main volume. To maintain integrity of the records relating to Procurement, these files should be kept secure and for contract management a new volume of file may be opened to obviate frequent exposure of sensitive procurement file. In contract management volume, copies of successful bid,

Tender Committee Report, Contract may also be kept for ready reference, besides correspondence and documents relating to Contract Management and its closure.

7.6.8 **Evaluation of Bids and Award of Contract - Risks and Mitigations**	
Risk	***Mitigation***
Evaluation of bids is subjective or leaves room for manipulation and biased assessments. Some TC members may not be independent or neutral or may have conflict of interest.	TC should give an undertaking at the appropriate time that none of the members has any personal interest in the companies/agencies participating in the tender process. Any member having an interest in any company should refrain from participating in the TC. Some members of a TC may be subordinate to or related others in a strictly hierarchical organisation, so that they are not free to express independent views – such a situation must be avoided when constituting the TC.
Discriminating against a Best Value Bid: In case a bidder's bid (not in the good books of the procuring entity) becomes the best value bid as per the evaluation criteria, some of the following actions may have risks of misuse. There is also a reverse risk in these actions if a favourite becomes best value bid:	Mitigation for each type of risk is mentioned below.
Unwarranted rebidding: Rejecting all bids and calling for rebidding on the pretext of prices being high, change of specifications, budget not being available, and so on.	**In case a procurement is rebid more than once**, approval of one level above the CA may be taken. Please also see the complaint mechanism.
Sudden quantity reduction/increase or splitting of quantity work at the time of award: Many organisations have provisions for change/ splitting in the bid quantity at the time of award. Some organisations vary quantity even without such provisions	**Bid conditions must specify a limit** beyond which originally announced quantity/scope cannot be reduced/increased. If parallel contracts are envisaged, clear criteria for the splitting may be specified in the bid documents beforehand.
Unwarranted negotiations: negotiations are called without justification. Sometimes a counter-offer is made to discourage lowest acceptable bidder.	Normally, there should be no post-tender negotiations. In certain exceptional situations, for example, procurement of proprietary items, items with limited sources of supply, and items where there is suspicion of a cartel formation, negotiations may be held with L-1. In case of L-1 backing out, there should be re-tendering.
Unwarranted delays in finalizing or varying the terms of preannounce	**A target timeline of** finalisation of procurement should be laid down.

7.6.8 **Evaluation of Bids and Award of Contract - Risks and Mitigations**	
Risk	***Mitigation***
contract agreement: even after the TC recommendations are accepted, signing of the contract is delayed on one pretext or the other. Although there is a standard contract form in the bid documents, the contract may be drafted in a fashion to favour or discourage the successful bidder.	Delays and reasons thereof should be brought out before the CA on the file at the time of TC's acceptance or contract signing. The contract should be strictly as per the bid conditions and accepted offer.
Anti-competitive practices: Bidders, that would otherwise be expected to compete, secretly conspire to frustrate the buyer's attempts to get VfM in a bidding process. Anti-competitive conspiracies can take many forms. Sometimes the officers involved in procurement may be part of such collusion. **Bid coordination:** The bidders collude to the quote same or similar rates that are much higher than the reasonable price to force the buyer to settle the procurement at exorbitant prices. **Cover bidding:** Cover bidding is designed to give the appearance of genuine competition by way of supporting bids for the leading bid-rigger. **Bid suppression:** Bid suppression means that a company does not submit a bid for final consideration in support of the leading bid-rigger. **Bid rotation:** In bid-rotation schemes, conspiring firms continue to bid but they agree to take turns being the winning (i.e., lowest qualifying) bidder in a group of tenders of a similar nature. **Market allocation:** Competitors carve up the market and agree not to give competitive bids for certain customers or in certain geographic areas.	These strategies, in turn, may result in patterns that procurement officials can detect and steps can be taken to thwart such attempts. Such anti-competitive activities come under the purview of the competition law, where there is provision of stringent penalties. Regular training should be held for officers involved in procurement to detect and mitigate such practices and also use of the competition law against such bidders.

Chapter 8: Rate Contract and other Procurements with special features

8.1 Rate Contracts

8.1.1 **Definition:** A Rate Contract (commonly known as RC) is an agreement between the purchaser and the supplier for supply of specified goods (and allied services, if any) at specified price and terms & conditions (as incorporated in the agreement) during the period covered by the Rate Contract. No quantity is mentioned nor is any minimum drawal guaranteed in the Rate Contract. The Rate Contract is in the nature of a standing offer from the supplier firm. The firm and/or the purchaser are entitled to withdraw/cancel the Rate Contract by serving an appropriate notice on each other giving 15 (fifteen) days time. However, once a supply order is placed on the supplier for supply of a definite quantity in terms of the rate contract during the validity period of the rate contract, that supply order becomes a valid and binding contract.

8.1.2 **Merits of Rate Contract**-The Rate Contract system provides various benefits to both the Purchaser (i.e. user) and the Supplier and the same are indicated below:

i) **Benefit to Users**

a) Competitive and economical price due to aggregation of demands.

b) Saves time, efforts, man-hours and related costs involved in time consuming as well as repetitive tendering process. It thus reduces lead time for procurement.

c) Availability of quality goods with full quality assurance back-up.

d) Enables procurement as and when required and thus reduces inventory carrying cost.

e) Advantageous even to small users and those located in remote areas.

f) Provides one single point of contact to procure such items.

ii) **Benefit to Suppliers:**

a) Reduces marketing cost and efforts.

b) Eliminates repetitive tendering and follow-up actions with multiple authorities.
c) Provides single point contact for Govt. supplies.
d) Aggregation of Govt. demand leads to economic production.
e) Lends credibility.
f) Promotes quality discipline.

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8.1.7 **Period of Rate Contract:** The period of a Rate Contract should normally be one year for stable technology products. However, in special cases, shorter or longer period not more than two years may be considered. As far as possible, validity period of rate contracts should be fixed in such a way as to ensure that budgetary levies would not affect the price and thereby frustrate the contracts. Attempts should also be made to suitably stagger the period of rate contracts throughout the year.

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8.1.9 **Special Conditions applicable for Rate Contract-** Some conditions of rate contract differ from the usual conditions applicable for ad hoc contracts. Some such important special conditions of rate contract are given below:

i) ii) In the Schedule of Requirement, no quantity is mentioned; only the anticipated drawl is mentioned without any commitment.
iii) The purchaser reserves the right to conclude one or more than one rate contract for the same item.
iv) The purchaser as well as the supplier may withdraw the rate contract by serving suitable notice to each other. The prescribed notice period is generally fifteen days.
v) The purchaser has the option to renegotiate the price with the rate contract holders.
vi) In case of emergency, the purchaser may purchase the same item through ad hoc contract with a new supplier.

vii) The purchaser and the authorized users of the rate contract are entitled to place online supply orders up to the last day of the validity of the rate contract and, though supplies against such supply orders will be effected beyond the validity period of the rate contract, all such supplies will be guided by the terms & conditions of the rate contract.

viii) The rate contract will be guided by "Fall Clause" (as described later in this chapter).

8.1.10 **Parallel Rate Contracts:** Since, the rate contracts concluded are to take care of the demands of various Departments and Organizations, PSUs, Autonomous Organizations etc. spread all over the country, generally a single supplier does not have enough capacity to cater to the entire demand of an item. Therefore, the rate contracts are concluded with different suppliers for the same item. Such rate contracts are known as Parallel Rate Contracts.

8.1.11 **Conclusion of Rate Contracts including Parallel Rate Contracts-** Techniques for conclusion of rate contract is basically identical to that of ad hoc contract (as discussed in Chapter 7 of the Manual). Identical tender documents may be utilized for conclusion of rate contracts subject to inclusion therein the special terms & conditions as applicable for rate contracts. In the first instance, the rate contract is to be awarded to the lowest responsive tenderer (L1). However, depending on the anticipated demand of the item, location of the users, capacity of the responsive bidders, reasonableness of the prices quoted by the responsive bidders, etc. it may become necessary to award parallel rate contracts also. Efforts should be made to conclude parallel rate contracts with suppliers located in different parts of the country. For the sake of transparency and to avoid any criticism, all such parallel rate contracts are to be issued simultaneously.

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8.1.13 **Cartel Formation / Pool Rates/Bid rigging/Collusive bidding etc.:** Quoting of pool rates/Cartel formation, bid rigging/collusive bidding is against the basic principle of competitive bidding and defeats the very purpose of open and competitive tendering system. Such practices should be severely discouraged with strong measures. Suitable administrative actions like rejecting the offers, reporting the matter to Competition Commission of India, , on case to case basis, as decided by the competent authority. Ministries/Departments may also bring such unhealthy

practice to the notice of the concerned trade associations like FICCI, ASSOCHAM, NSIC, etc. requesting them, inter alia, to take suitable strong actions against such firms. The Ministries/Departments may also encourage new firms to get themselves registered to break the monopolistic attitude of the firms giving pool rate/ forming cartel. Purchaser may also debar the tenderers indulging in cartel formation/collusive bidding/bid rigging for a period of two years from participation in the tenders of the Purchaser.

8.1.14 **Fall Clause:** Fall clause is a price safety mechanism in rate contracts. The fall clause provides that if the rate contract holder reduces its price or sells or even offers to sell the rate contracted goods or services following conditions of sale similar to those of the rate contract, at a price lower than the rate contract price, to any person or organization during the currency of the rate contract, the rate contract price will be automatically reduced with effect from that date for all the subsequent supplies under the rate contract and the rate contract amended accordingly. Other parallel rate contract holders, if any, are also to be given opportunity to reduce their price as well, by notifying the reduced price to them and giving them 07 (seven) days time to intimate their revised prices, if they so desire, in sealed cover to be opened in public on the specified date and time and further action taken as per standard practice. On many occasions, the parallel rate contract holders attempt to grab more orders by unethical means by announcing reduction of their price (after getting the rate contract) under the guise of Fall Clause. This situation is also to be dealt with in similar manner as mentioned in the preceding paragraph. It is however, very much necessary that the purchase organizations keep special watch on the performance of such rate contract holders who reduce their prices on one pretext or other. If their performances are not up to the mark, appropriately severe action should be taken against them including deregistering them, suspending business deals with them, debarring them for two years from participating against the tender enquiry floated by concerned purchase organization etc.

The provisions of fall clause will however not apply to the following:

i) Export/Deemed Export by the supplier;
ii) Sale of goods or services as original equipment prices lower than the price charged for normal replacement;
iii) Sale of goods such as drugs, which have expiry date;

iv) Sale of goods or services at lower price on or after the date of completion of sale/placement of order of goods or services by the authority concerned, under the existing or previous Rate Contracts as also under any previous contracts entered into with the Central or State Government Departments including new undertakings (excluding joint sector companies and or private parties) and bodies.

8.1.15 **Performance Security:** Depending on the anticipated overall drawal against a rate contract and, also, anticipated number of parallel rate contracts to be issued for an item, Department shall consider obtaining Performance Security @ 5% (five percent) of the value of supply order in the supply orders issued against rate contracts on the rate contract holder.

8.1.16 **Renewal of Rate Contracts:** It should be ensured that new rate contracts are made operative right after the expiry of the existing rate contracts without any gap for all rate contracted items. In case, however, it is not possible to conclude new rate contracts due to some special reasons, timely steps are to be taken to extend the existing rate contracts with same terms, conditions etc. for a suitable period, with the consent of the rate contract holders. Rate contracts of the firms, who do not agree to such extension, are to be left out. Also, while extending the existing rate contracts, it shall be ensured that the price trend is not lower.

8.1.17 Deleted

8.2 Handling Procurement in urgencies/ Emergencies and Disaster Management

There are sufficient fast track procurement modalities to tackle procurements in urgent/ emergent and Disaster Management situations. Enhanced delegations of procurement powers in SoPP may be considered to handle such situations. Use of following modes of procurements may be utilised in order of speed(under Disaster Management situations, threshold limits of modes of procurement may be increased for higher level of officers, with the sanction of Secretary of the Department):

i) Direct Procurement Without Quotation
ii) Direct Procurement by Purchase Committee
iii) SLTE/ Limited/ Single Tender Enquiry, with reduced time for submission of Bids

To speed up procurement, advance cash may be drawn for direct procurement modes and made available to the Committees/ officer, with accounts and vouchers to be submitted after purchase.

8.3 Buy Back Offer

When it is decided to replace an existing old item(s) with a new/better version, the Department may trade the existing old item while purchasing the new one by issuing suitable bidding documents for this purpose. The condition of the old item, its location and the mode of its handing over to the successful bidder are also to be incorporated in the bidding document. Further, the bidder should be asked to quote the prices for the item (to be offered by them) with rebate for the old item and also, without any rebate (in case they do not want to lift the old item). This will enable the Department either to trade or not to trade the old item while purchasing the new one.(Rule 176 of GFR 2017)

8.4 Capital Goods/ Equipment (Machinery and Plant – M&P)

Capital goods are Machinery and Plant (M&P) which create new Fixed Assets/ utility/ functionality or benefit to the organisation and has a long useful life. Special features of procurement of Capital Goods are:

i) Since the cost is generally high, there are detailed procedures for approval of technical, administrative and budgetary provisions – before an indent is generated. Unlike consumable items (which are procured if a non-specific budgetary provision is there), Capital Goods are procured after an item specific Budgetary provision is included in the budget. Thus the acquisition of Capital Goods is also an Investment decision and may require some form of Investment Justification. Some of the higher value Capital Goods may be accounted in the Capital Block of the Organization. However these features may not apply to Capital goods procurement of smaller threshold values;
ii) There are also alternative to outright purchasing/ owning such equipment like hiring/ hire-purchase/ leasing or acquiring the functionality as a service;
iii) The procurement involves elements of Works and Services like Installation, Commissioning, Training, prolonged trials, Warranty, After Sales Services like post-warranty Maintenance and assured availability of spares. All such

elements have costs may be quoted explicitly or implicitly. A suitable warranty clause should indicate the period of warranty and service levels as well as penalties for delays in restoration of defects. Clauses for including essential initial spares for two years' maintenance to be supplied along with equipment may be provided. If necessary appropriate number of years' (say three to five or more years depending on the lifespan of the equipment) AMC may be included in the procurement detailing its conditions;

iv) The cost of operations, maintenance and disposal of the equipment over its life cycle may far outweigh the initial procurement cost over the life cycle of the capital equipment. Hence value for money becomes an important consideration – which can be addressed in Public Procurement by way of appropriate Description, specification, Contract conditions like inclusion of cost of supply of initial essential spares and total present value (as per DCF technique) of Annual Maintenance Contracts (AMC) for specified number of years within the estimated cost and also the evaluation criteria of procurement contract;

v) In case the Plant and Equipment consists of a number of machines which work in tandem or if it includes services/ works to be done by third party, an all encompassing Turnkey contract may be better alternative;

vi) Because of complexity of specification evaluation of Technical suitability of offers in procurement of Capital Goods involves complex issues about acceptance of alternatives, deviations and compliance with various particulars of specification. Acceptance or otherwise of alternatives should be made explicit. A statement of deviation including detailed justification for the deviations from each clause of specification should be asked for from the bidder in the Bid documents. A schedule of Guaranteed Particulars of specification indicating the values of each parameter may be included in the Specification, where the bidder can quote the offered value of the Parameters. In complex cases Pre-bid conference may help in reducing disputes and complexity at the time of evaluation;

vii) Past experience, Capacity and Financial strength of a supplier is an important determinant of quality, after sales support of the Capital Goods; such procurements are a fit case for Pre-Qualification bidding.

8.5 Turnkey Contract

In the context of procurement of goods, a turnkey contract may include the manufacture, supply, assembly, installation/ commissioning of equipment (or a group of plant and machines working in tandem – even though some of the machines may not be manufactured by the supplier himself) and some incidental works or services. Generally, in the tender enquiry documents for a turn key contract, the purchase organization specifies the performance and output required from the plant proposed to be set up and broadly outlines the various parameters it visualizes for the desired plant. The inputs and other facilities, which the purchase organization will provide to the contractor, are also indicated in the tender enquiry document. The contractor is to design the plant and quote accordingly. The responsibility of the contractor will include supplying the required goods, machinery, equipment etc. needed for the plant; assembling, installing and erecting the same at site as needed; commissioning the plant to meet the required output etc., as specified in the tender enquiry documents.

8.6 Annual Maintenance Contract (AMC)

i) Some goods, especially sophisticated equipment and machinery need proper maintenance for trouble-free service. For this purpose, the purchase organisation may enter into a maintenance contract. It must, however, be kept in mind that maintenance contract is to start after the expiry of the warranty period, during which period the goods are to be maintained free of cost by the supplier.

ii) The maintenance contract may be entered into either with the manufacturer/supplier of the goods or with a competent and eligible firm, not necessarily the manufacturer/supplier of the goods in question. The purchase organisation should decide this aspect on case to case basis on merit.

iii) If the maintenance contract is to be entered into with the supplier of the goods, then suitable clauses for this purpose are to be incorporated in the tender enquiry document itself and while evaluating the offers, the cost component towards maintenance of the goods for specified number of years is also to be added in the evaluated tender value on overall basis to decide the inter se ranking of the responsive tenderers. Equipment with a lower

quoted price may carry a higher maintenance liability. Therefore, the total cost on purchase and maintenance of the equipment over the period of the maintenance contract should be assessed to consider its suitability for purchase. While evaluating the tenderers for maintenance of goods covering a longer period (say, three to five or more years depending on the life-span of the equipment), the quoted prices pertaining to maintenance in future years are to be discounted (as per DCF technique) to the net present value as appropriate for comparing the tenders on an equitable basis and deciding the lowest evaluated responsive tender.

iv) However, if the maintenance contract is to be entered into with a competent and eligible supplier separately, then a separate tender enquiry is to be floated for this purpose and tenders evaluated and ranked accordingly for placement of the maintenance contract. Here, the supplier of the goods may also quote and his quotation, if received, is to be considered along with other quotations received.

v) The details of the services required for maintenance of the goods, the required period of maintenance and other relevant terms and conditions, including payment terms, are to be incorporated in the tender enquiry document. The terms of payment for the maintenance service will depend on the nature of the goods to be maintained as well as the nature of the services desired. Generally, payment for maintenance is made on a half-yearly or quarterly basis.

vi) A Service Level Agreement (SLA) may be incorporated in complex and large maintenance contracts. SLA should indicate guaranteed levels of service parameters like - %age uptime to be ensured; Performance output levels to be ensured from the equipment; channel of registering service request; response time for resolving the request, Channel for escalation of service request in case of delay or unsatisfactory resolution of request, monitoring of Service Levels etc. This would include provision of help lines, complaint registration and escalation procedures, response time, percentage of uptime and availability of equipment, non-degradation in performance levels after maintenance, maintenance of an inventory of common spares, use of genuine spares, and so on. The maintenance contract may also include penalties

(liquidated Damages) for unacceptable delays in responses and degradation in performance output of machines, including provisions for terminations.

vii) It should be indicated in the bid documents, whether the maintenance charges would be inclusive of visiting charges, price of spares (many times, consumables such as rubber gasket, bulbs, and so on, are not included, even though major parts may be included), price of consumables (fuel, lubricants, cartridges, and so on). If costs of spares are to be borne by the procuring entity, then a guaranteed price list should be asked for along with the bids. It should also be clarified, whether room/space, electricity, water connection, and so on, would be provided free of cost to the contractor. The bidding document should also lay down a service level agreement to ensure proper service during the maintenance period.

viii) A suitable provision should be incorporated in the tender enquiry document and in the resultant maintenance contract indicating that the prices charged by the maintenance contractor should not exceed the prevailing rates charged by him from others for similar services. While claiming payment, the contractor is also to give a certificate to this effect in his bill.

ix) If the goods to be maintained are sophisticated and costly, the tender enquiry document should also have a provision for obtaining performance security. The amount of performance security will depend on the nature of the goods, period of maintenance, and so on. It generally varies from two and a half to five per cent of the value of the equipment to be maintained.

x) Sometimes, the maintenance contractor may have to take the goods or some components of the goods to his factory for repair, and so on. On such occasions, before handing over the goods or components, valuing more than Rupees One Lakh, a suitable bank guarantee is to be obtained from the firm to safeguard the purchaser's interest.

xi) Sometimes, during the tenure of a maintenance contract, especially with a longer tenure, it may become necessary for the purchase organisation to withdraw the maintenance contract due to some unforeseen reasons. To take care of this, there should be a suitable provision in the tender document and in the resultant contract. Depending on the cost and nature of the goods to be

maintained, a suitable notice period (say one to three months) for such cancellation to come into effect is to be provided in the documents. A model clause to this effect is provided below:

"The purchaser reserves its right to terminate the maintenance contract at any time after giving due notice without assigning any reason. The contractor will not be entitled to claim any compensation against such termination. However, while terminating the contract, if any payment is due to the contractor for maintenance services already performed in terms of the contract, these would be paid to it/him as per the contract terms".

(Rule 169 of GFR 2017)

Chapter 9: Contract Management

9.1 Contract Management

9.1.1 The Purpose of Contract Management

The purpose of contract management is to ensure that the contract delivers the desired outcomes as per the terms and conditions of the contract. It also ensures that the payments made to the contractor match the performance. Implementation of the contract should be strictly monitored and notices issued promptly whenever a breach of provisions occurs. Monitoring should ensure that contractor adhere to contract terms, performance expectations are achieved (such as timely deliveries, quality of goods supplied, adherence to proper procedure for submitting invoices, and so on) and any problems are identified and resolved in a timely manner. Without a sound monitoring process, there can be no assurance that "*we get what we pay and contract for and pay for only for what we get*". Normally, the following issues are handled during this phase:

i) Amendments to the contract;
ii) Operation of the option clause;
iii) Safeguards for handing over Procuring Entity materials/equipment to contractors;
iv) Payments to the contractor and handling of securities;
v) Monitoring of supplier performance;
vi) Delays in performance of the contract;
vii) Breach of contract, remedies and termination of contract;
viii) Dispute resolution;
ix) Contract closure upon completion;
x) Goods receiving;
xi) Quality assurance;
xii) Accountal and payment of bills; and
xiii) Storage and issue of inspected goods.

9.1.2 Costs of delay in Contract Management Decisions: Delays

Payments and decisions in contract management requested by the suppliers should be made within a reasonable time. An atmosphere of lackadaisical dilatory

functioning in such matters is liable to lead to bidders quoting higher prices in future bids, besides delays in supplies and disputes in the contract.

9.2 Amendment to the Contract

Once a contract has been concluded, the terms and conditions thereof should not be varied. No amendment to the contract should be made that can lead to a vitiation of the original tender decision or bestow an undue advantage on the contractor. However, due to various reasons, changes and modifications are needed in the contract. Where it becomes necessary/ inescapable, any modification will be carried out with the prior approval of the CA with the Associated/ integrated Finance's concurrence.

Requests for such changes and modifications mostly emanate from the supplier. Any amendment to the contract may have, inter alia, financial/technical/legal implications. The indenter may be consulted regarding the technical implications. Financial concurrence should be obtained before issuing any amendment that has financial implications/repercussions. Further, if considered necessary, legal opinion may also be sought.

An amendment can concern any of the clauses of the contract but, in supply contracts, amendments often relate to the following:

i) Increase or decrease in the quantity required, exercise of quantity option clause;
ii) Changes in schedule of deliveries and terms of delivery;
iii) Changes in inspection arrangements;
iv) Changes in terms of payments and statutory levies; and
v) Change due to any other situation not anticipated.

Post contract variation carried out in the form of an amendment shall be published by the purchaser on the same e-procurement portals/Websites that were used for publication of the original tender enquiry. No change in the price quoted shall be permitted after the purchase order has been issued, except on account of price variation, ERV and statutory variations.

9.3 Operation of Option Clause

9.3.1 Option Clause

Under this clause, the purchaser retains the right to place orders for an additional quantity up to a specified percentage of the originally contracted quantity at the same rate and terms of the contract, during the currency of the contract. This clause and percentage should be part of the Bid Document and the contract and ideally should not exceed 25-30%. Approval should be taken from the CA (who originally approved the tender decision) to exercise the option clause based on the value of the contract with the increased quantity. In case the recalculated value of the contract goes beyond the delegation of powers of the original CA, approval of the CA for the enhanced value may be taken.

Normally, for raw materials/consumables of regular and year-on-year recurrent requirements, all tenders of value above Rs. 50 (Rupees fifty) lakh should invariably include this clause. However, the CA may approve the inclusion of such a clause in lower denomination tenders if such items have a history of frequent disruptions in continuity of supplies. The clause may be framed along following lines:

"The purchaser reserves the right to increase/decrease the ordered quantity by up to [25]per cent at any time, till final delivery date (or the extended delivery date of the contract), by giving reasonable notice even though the quantity ordered initially has been supplied in full before the last date of the delivery period (or the extended delivery period)."

9.3.2 Conditions Governing Operation of Option Clause

Additional demands should be available for coverage and over-provisioning may be avoided by keeping the officers concerned with provisioning/tender evaluation for the next cycle of procurement informed. The following points must be kept in mind while operating the option clause:

i) In case of decrease in the ordered quantity, it would be fair to allow the firm to supply work-in-progress or goods already put up for inspection;
ii) There should be no declining trend in the price of the stores as evidenced from the fact that no order has since been placed at lower rates and no tender has been opened since the time offers have been received at lower rates – even if not finalised;
iii) If the option clause exists, during provisioning of the next cycle and during tender evaluation in the next cycle of procurement, application of the option

clause must be positively taken into account. The contract management authority must also keep a watch on delivery against contract, if other conditions are satisfied, the option clause must be exercised;

iv) The option clause is normally exercised after receipt of 50 (fifty) per cent quantity but if the delivery period is going to expire and other conditions are fulfilled, it can be exercised even earlier;

v) The option clause shall be exercised during the currency of the contract such that the contractor has reasonable time/notice for executing such an increase and can be exercised even if the original ordered quantity is completed before the original last date of delivery. If not already agreed upon, the delivery period shall be fixed for the additional quantity on the lines of the delivery period in the original order. This will satisfy the requirement of giving reasonable notice to the supplier to exercise the option clause;

vi) The quantum of the option clause will be excluded from the value of tenders for the purpose of determining the level of CA in the original tender;

vii) There should be no option clause in development orders;

viii) This provision can also be exercised in case of PAC/single supplier OEM cases; and

ix) However, where parallel contracts on multiple suppliers are available, care should be taken in exercising the option clause, so that the original tender decision of splitting quantities and differential pricing is not upset or vitiated. Other things being equal, the supplier with the lower rate should first be considered for the option quantity.

9.4 Safeguards for Handing over Procuring Entity Materials/Equipment to Contractors

For performance of certain contracts, Procuring Entity may have to loan stores, drawings, documents, equipment and assets (such as accommodation, identity cards and gate passes, and so on) to the contractor. In certain situations, the contractor may also be supplied electricity, water, cranes, and weighing facilities on payment/hire basis. As a measure of transparency, the possibility of provision of such resources by Procuring Entity should have been announced in the tender document or at least requested by the contractor in the tender and written in the

contract. Whenever stores or prototypes or sub-assemblies are required to be issued to the firm/contractor for guidance in fabrication, these should be issued against an appropriate bank guarantee. In addition to the bank guarantee, appropriate insurance may be asked for if it is considered necessary. Before the final payment or release of PBG/SD, a certificate may be taken from the concerned Department that the contractor has returned all documents, drawings, protective gear, material, equipment, facilities and assets loaned, including all ID cards and gate passes, and so on, in good condition. Further, it should be certified that payment from the contractor has been received for usage of electricity, water, crane, accommodation, weighing facility, and so on. For low value items of less than Rs. 1,00,000 (Rupees One Lakh), or for sending spares for repairs to the OEMs, this stipulation of the bank guarantee may be waived and, if feasible, an indemnity bond may be taken.

9.5 Payments to the Contractor and Handling of Securities

9.5.1 It should be ensured that all payments due to the firm, including release of the performance security, are made on a priority basis without avoidable delay as per the tender/contract conditions. Before the payment is made, the invoice should be cross-checked with the actual receipt of material to ensure that the payment matches the actual performance.

9.5.2 Proper procedures for safe custody, monitoring and return of bank guarantees and other instruments may be followed. Chapter 6 has more details in this regard. Before making a final payment or before releasing the performance bank guarantee, a 'No Claim Certificate' (Annexure 21) may be insisted upon from the supplier to prevent future claims. Whenever a bank guarantee is released following due procedure and safeguards, acknowledgement thereof should also be taken from the contractor.

9.5.3 **Delay in payment to the contractors:** Public authorities may put in place a provision for payment of interest in case of delayed payment of bills by more than 30 working days after submission of bill by the contractor. Where interest is to be paid, the rate of interest should be the rate of interest of General Provident Fund.

In case of unwarranted discretionary delays in payments, as prescribed above, responsibility shall be fixed on the concerned officers. There should have a system to monitor delays in payments and to identify such unwarranted delays including an

online system for monitoring of the bills submitted by contractors. Such system shall have the facility for contractors to track the status of their bills. It shall be mandatory for all contractors bills to be entered into the system with date of submission and date of payment.

9.6 Monitoring of Supplier Performance

As soon as the order is issued, entry shall be made in the progress of supply order register (Annexure 17) recording therein the name of the supplier, items, rate, quantity, amount, delivery schedule, and so on. Monitoring should ensure that suppliers adhere to contract terms, performance expectations are achieved (such as timely deliveries, quality of goods supplied, and adherence to proper procedure for submitting invoices, and so on) and any problems are identified and resolved in a timely manner. Without a sound monitoring process, there can be no assurance that the buyer has received what was contracted. A sound system for monitoring the performance of the suppliers in a contract would also be useful in selecting a good supplier in future procurement of the same or similar materials. Purchase order-wise data will be maintained in this register regarding execution by and performance of the supplier. The register shall form the basis for the Management Information System report on unexecuted purchase orders beyond scheduled deliveries, reports on performance of suppliers, and so on.

9.7 Delays in Performance of Contract

9.7.1 Delivery Period

The period for delivery of the ordered goods and completion of any allied service(s) thereof (such as installation and commissioning of the equipment, operators' training, and so on) are to be properly specified in the contract with definite dates and these shall be deemed to be the essence of the contract. The delivery period stipulated in contracts should be specific and practical. Vague and ambiguous terms such as 1,000/5,000 (one to five thousand) numbers per month, 2to 16 (two to sixteen) weeks from the date of receipt of order, 'immediate', 'ex-stock', 'as early as possible', 'off the shelf', 'approximately' and the like should be scrupulously avoided as these will not be legally binding.

In case of items such as raw material which is delivered throughout the year, a delivery schedule of the monthly rate of supply should be specified. It is usual in

such cases that there is a slight deviation from such monthly rate of supply. It should be clarified in such cases that the variation in the periodic rate of supply beyond +/- 10 (ten) per cent in any calendar month; or +/- seven per cent cumulative in any calendar quarter; or +/- five per cent cumulative in any calendar year would be considered as delay in delivery attracting imposition of LD.

Unless otherwise agreed, the buyer of goods is not bound to accept the delivery thereof in instalments.

9.7.2 Terms of Delivery

Terms of delivery (FOR, FOB, CIF, and CFR, and so on), inter alia, determine the delivery point of the ordered goods from where the purchaser is to receive/collect the goods. It also decides the legally important issue of when the 'titles of the goods' have passed to the purchaser. The delivery period is to be read in conjunction with the terms of delivery, therefore the delivery is taken to have been made at the time when goods reach the delivery point as per the delivery terms. Chapter 6 has more details in this regard.

9.7.3 Severable and Entire Delivery Contracts

Such contracts, where instalments are not specified or not intended, are known as entire contracts. In such cases, even non-delivery of a part quantity can lead to a breach of contract. However, a variation of five per cent of the contract quantity is usually exempted in the contract conditions. In the case of an entire contract, even if providing a delivery schedule, it is not necessary to grant an extension in the delivery period in the case of delay in intermediate instalments. Such extension would be necessary only in case of a delay beyond the final date for the completion of the delivery.

Contracts with clearly laid out instalment deliveries mentioning the exact dates and where each instalment is paid for separately are known as severable contracts. In effect, each of such instalments is a separate independent contract by itself. In severable contracts, delay or breach of one instalment does not affect other instalments, since each instalment is considered as a separate contract. In the case of severable contracts, extension in the delivery period is necessary for each instalment separately.

The legal position, however, is not very straightforward, since the mere mention of monthly/ quarterly rate of delivery, called delivery schedule, is not sufficient to make it a severable contract. However, instalments specifying exact dates, that is, 310 (three hundred and ten) numbers by June 20, 2016 would be amounting to a severable contract.

The delivery cannot be re-fixed to make a contract a 'severable' contract without the specific agreement of the supplier, if the delivery originally stipulated in the contract was in the form of an 'entire' contract.

9.7.4 **Extension of Delivery**

Suppliers shall be required to adhere to the delivery schedule specified in the purchase order and, if there is delay in supplies, LD shall be levied wherever there is failure by the party. Extension of the delivery date amounts to amendment of the contract. Such an extension can be only done with the consent of both parties (that is, the purchaser and supplier). No extension of the delivery date is to be granted suo motu unless the supplier specifically asks for it. However, in a few cases, it may be necessary to grant an extension of the delivery period suo motu in the interest of the administration. In such cases, it is legally necessary to obtain clear acceptance of the extension letter from the supplier.

No correspondence should be entered into with the supplier after expiry of the contract delivery period or towards the end of it, which has the legal effect of condoning the delay/breach of contract. When it is necessary to obtain certain information regarding past supplies, it should be made clear that calling for such information is not intended to keep the contract alive and that it does not waive the breach and that it is without prejudice to the rights and remedies available to the purchaser under the terms of the contract. The last line of such a communication should therefore be: "*This letter is issued without any prejudice to Procuring Entity's rights and remedies under the terms and conditions of the subject contract and without any commitment or obligation."*

If at any time during the currency of the contract, the supplier encounters conditions hindering timely delivery of goods, he shall promptly inform the concerned officer in writing. He should mention its likely duration and make a request for extension of the schedule accordingly. On receiving the supplier's communication, the procuring

entity shall examine the proposal (refer to Annexure 18) and, on approval from the CA, may agree to extend the delivery schedule, with or without LD and with or without the denial clause (as defined in Para 9.7.8 below), for completion of the contractor's contractual obligations, provided:

i) That a higher rate in the original tender was not accepted against other lower quotations in consideration of the earlier delivery; and
ii) That there is no falling trend in prices for this item as evidenced from the fact that, in the intervening period, neither orders have been placed at rates lower than this contract nor any tender been opened where such rates have been received even though the tender is not yet decided. In cases of certain raw material supplies, where prices are linked to the PVC, extension may be granted even in case of a falling trend in price indices, since the purchaser's interests are protected by the price variation mechanism. However, in such cases it should be ensured that extensions are done with the denial clause.

When it is decided to extend the delivery period subject to recovery of LD for delay in supplies, contractors must be given a warning to this effect in writing at the time of granting extensions. It is not correct to grant extensions without any mention of the LD if it is proposed to recover such charges eventually. It is also not correct to grant an extension of the delivery period by merely stating that the extension is granted "without prejudice to the rights of the purchaser under the terms and conditions of the contract" as this would mean that all the options given in the conditions of the contract would be available to the purchaser on expiry of the extended delivery period and would not amount to exercise of the option to recover LD. To take care of complex legalities brought out above, extension of the delivery period when granted should only be done in writing in the laid down format given in Annexure 19.

Organsations may put in place a graded authority structure whereby extension of time for completion of contract, beyond a specified threshold value of contract, may be granted by the next higher authority.

9.7.5 **Delay in Supplies for which Supplier is not Responsible**

Normally, in the following circumstances, the contractual delivery period needs to be re-fixed to take care of the lost period, without imposing any penalty to the supplier:

i) Cases where the manufacture of stores is dependent on the approval of the advance sample and delay occurs in approving the sample though submitted by the supplier in time;
ii) Where extension in the delivery period is granted on account of some omission on the part of the purchaser which affects the due performance of the contract by the supplier; and
iii) Cases where the purchaser controls the entire production.

9.7.6 **Performance Notice**

A situation may arise where the supply/services has not been completed within the stipulated period due to negligence/fault of the supplier; however, the supplier has not made any request for extension of the delivery period but the contracted goods/services are still required by the purchaser and the purchaser does not want to cancel the contract at that stage. In such a case, a performance notice (also known as notice-cum-extension letter) may be issued to the supplier by suitably extending the delivery date and by imposing LD with denial clauses, and so on, along identical lines as in para 9.7.4 above. The supplier's acceptance of the performance notice and further action thereof should also be processed in the same manner as mentioned above. The text of the performance notice will be on similar lines to the Annexure 19.

9.7.7 **Force Majeure Clause**

A Force Majeure (FM) means extraordinary events or circumstance beyond human control such as an event described as an act of God (like a natural calamity) or events such as a war, strike, riots, crimes (but not including negligence or wrong-doing, predictable/seasonal rain and any other events specifically excluded in the clause). An FM clause in the contract frees both parties from contractual liability or obligation when prevented by such events from fulfilling their obligations under the contract. An FM clause does not excuse a party's non-performance entirely, but only suspends it for the duration of the FM. The firm has to give notice of FM as soon as it occurs and it cannot be claimed ex-post facto. There may be a FM situation affecting the purchase organisation only. In such a situation, the purchase organisation is to communicate with the supplier along similar lines as above for further necessary action. If the performance in whole or in part or any obligation under this contract is

prevented or delayed by any reason of FM for a period exceeding 90 (ninety) days, either party may at its option terminate the contract without any financial repercussion on either side.

Notwithstanding the punitive provisions contained in the contract for delay or breach of contract, the supplier would not be liable for imposition of any such sanction so long as the delay and/or failure of the supplier in fulfilling its obligations under the contract is the result of an event covered in the FM clause.

9.7.8 **Denial Clause**

Since delay in delivery is a default by the seller, the buyer should protect himself against extra expenditure during the extended period by stipulating a denial clause (over and above levy of LD) in the letter informing the supplier of extension of the delivery period. In the denial clause, any increase in statutory duties and/or upward rise in prices due to the PVC clause and/or any adverse fluctuation in foreign exchange are to be borne by the seller during the extended delivery period, while the purchaser reserves his right to get any benefit of a downward revisions in statutory duties, PVC and foreign exchange rate. Thus, PVC, other variations and foreign exchange clauses operate only during the original delivery period. The format of the denial clause is available in Annexure19.

9.7.9 **Liquidated Damages**

Compensation of loss on account of late delivery (actually incurred as well as notional) where loss is pre-estimated and mutually agreed to is termed as LD. Law allows recovery of pre-estimated loss provided such a term is included in the contract and there is no need to establish actual loss due to late supply [MallaBaux Vs. UOI (1970)].

9.7.10 **Quantum of LD**

While granting extension of the delivery period, where the delivery of stores or any instalment thereof is accepted after expiry of the original delivery period, the CA may recover from the contractor, as agreed, the LD a sum equivalent to 0.5 (half) per cent of the prices of any portion of stores delivered late, for each week or part thereof of delay. The total damages shall not exceed 10 (ten) per cent of the value of delayed goods. The LD cannot exceed the amount stipulated in the contract [NC Sanyal Vs. Calcutta Stock Exchange (1971)].

In contracts governed by any type of variation (PVC, ERV or statutory variations), LDs (if a percentage of the price) will be applicable on the price as varied by the operation of the PVC. LDs accrue only in case of delayed supplies. Where or in so far as no supplies have been made under a contract, upon cancellation, recovery of only the loss occasioned thereby can be made, notwithstanding the fact that prior to the cancellation one or more extensions of the delivery period with reservation of the right to LD are granted.

Government establishments/Departments, as distinct from PSUs, that execute contract work should not be dealt with as ordinary contractors and not generally be penalised for late delivery and claims for loss on risk-purchase should not be enforced against them. Serious cases of defaults should, however, be brought to the notice of the HOD or the Government Department concerned.

Relaxations allowed to Government establishments/Departments, as above, will not apply to PSUs as a matter of course. Each case should be decided on merits and the decision to waive the recovery of LDs or risk purchase expenditure should be taken on merit.

In the case of development/indigenisation contracts, LDs are not levied. However, the nature of such contracts should be declared at the time of placing them.

In case of entire (non-severable) contracts, even where staggered deliveries have been indicated, it may happen that supplies are not received according to the delivery schedule. In such cases, keeping in mind the fact that the deliveries indicated under the contract are non-severable, no question of LDs or enforcement of risk purchase would arise so long as there has been no delay in the completion of supplies with reference to the total delivery period.

9.7.11 **Waiver of LD**

There should normally be no system of waiver of LDs for delayed supplies in supply contracts and it may be strictly be an exception rather than a rule. For an extension of the delivery date with waiver of LD, approval of the CA with consultation of associated Finance may be taken and justifications recorded.

9.7.12 **Handling Deliveries after the Expiry of Delivery Period**

As per law, if stores are accepted after expiry of the delivery date of a particular instalment without extension in delivery period having being given, duly reserving our rights to levy LD, it amounts to voluntary abrogation of our legal rights under the contract to claim LDs or other remedies.

If the contractor makes supplies locally after the expiry of delivery period, the supplies may be provisionally retained under a franking clause reserving rights and the contractor may be asked to obtain an extension of the delivery period from an authorised officer with or without any LD/denial clause.

"Please note that materials have been supplied after the expiry of contracted delivery date and its provisional retention does not acquiesce or condone the late delivery and does not intend or amount to an extension of the delivery period or keeping the contract alive. You may apply for an extension of delivery date from the procuring entity. The goods are being retained without prejudice to the rights of the Government of India under the terms and conditions of the contract."

As regards supplies coming from outside contractors, if the contractor dispatches the stores after expiry of the delivery period, the consignee should, after the receipt of the railway receipt or lorry receipt or goods consignment note or airway bill, send an intimation to the contractor stating that the action taken by him in dispatching the goods after expiry of delivery date is at his own risk and responsibility, and that the consignee is not liable for any demurrage, wharfage and deterioration of goods at the destination station and, in his own interest, the contractor should get an extension of the delivery period from the purchasers. A copy of the communication sent to the contractor should also be sent to the purchaser.

In case of imports, the contractor must not dispatch the consignment after expiry of the delivery period without taking prior extension of the delivery period. In any case, the terms of LC should be such that if there are dispatches beyond the delivery period, payment should be denied without levy of full LD and without formal extension of the delivery period by the purchaser.

9.8 Breach of Contract, Remedies and Termination

In case the contractor is unable to honour important stipulations of the contract, or gives notice of his intention of not honouring or his inability to honour such a

stipulation, a breach of contract is said to have occurred. Mostly, such breaches occur in relation to the performance of the contract in terms of inability to supply the required quantity or quality. It could also be due to breach of ethical standards or any other stipulation that affects Procuring Entity seriously.

The purchaser or its authorised representative is not to enter into correspondence after expiry of the delivery date stipulated in the contract because such a correspondence will keep the contract alive and would amount to abrogation of the purchaser's right and remedies for delays by the contractor. This situation will not allow the purchaser to cancel the contract straight away without first serving a performance notice to the supplier. However, even after expiry of the delivery period of the contract, the purchaser may obtain information regarding past supplies, and so on, from the supplier, simultaneously making it clear to the supplier that calling of such information is not intended to keep the contract valid and it does not amount to waiving the breach and that it is without prejudice to the rights and remedies available to the purchaser under the terms of the contract. A model communication which may be issued by the purchaser to ascertain the supply position after expiry of the delivery period is given at Annexure 20. As soon as a breach of contract is noticed, a show cause notice should be issued to the contractor reserving the right to implement contractual remedies. If there is an unsatisfactory resolution, remedial action may be taken immediately. The CA may terminate a contract in the following cases.

9.8.1 **Cancellation of Contract for Default**

Without prejudice to any other remedy for breach of contract, such as removal from the list of registered supplier, by written notice of default sent to the supplier, the contract may be terminated in whole or in part:

i) If the supplier fails to deliver any or all of the stores within the time period(s) specified in the contract, or any extension thereof granted; and
ii) If the supplier fails to perform any other obligation under the contract within the period specified in the contract or any extension thereof granted;
iii) If the contract is terminated in whole or in part, recourse may be taken to any one or more of the following actions:
    a) Forfeiture of the performance security;

b) Upon such terms and in such manner as it deems appropriate, goods similar to those undelivered may be procured and the supplier shall be liable for all available actions against him in terms of the contract (popularly called risk purchase); and
c) However, the supplier shall continue to fulfil the contract to the extent not terminated.

Before cancelling the contract and taking further action, it may be desirable to obtain legal advice.

9.8.2 Termination of Contract for Insolvency

If the supplier becomes bankrupt or becomes otherwise insolvent or undergoes liquidation or loses substantially the technical or financial capability (based on which he was selected for award of contract), at any time, the contract may be terminated, by giving a written notice to the supplier, without compensation to the supplier, provided that such termination will not prejudice or affect any right of action or remedy which has accrued or will accrue thereafter to Procuring Entity.

9.8.3 Termination of Contract for Convenience

After placement of the contract, there may be an unforeseen situation compelling Procuring Entity to cancel the contract. In such a case, a suitable notice has to be sent to the supplier for cancellation of the contract, in whole or in part, for its (Procuring Entity's) convenience, inter alia, indicating the date with effect from which the termination will to become effective. This is not Procuring Entity's legal right– the contractor has to be persuaded to acquiesce. Depending on the merits of the case, the supplier may have to be suitably compensated on mutually agreed terms for terminating the contract. Suitable provisions to this effect should be to be incorporated in the tender document as well as in the resultant contract.

9.9 Dispute Resolution

Normally, there should not be any scope for dispute between the purchaser and supplier after entering into a mutually agreed valid contract. However, due to various unforeseen reasons, problems may arise during the progress of the contract leading to a disagreement between the purchaser and supplier. Therefore, the conditions governing the contract should contain suitable provisions for settlement of such

disputes or differences binding on both parties. The mode of settlement of such disputes/differences should be through arbitration. However, when a dispute/difference arises, both the purchaser and supplier should first try to resolve it amicably by mutual discussion, mediation, and conciliation[79]. If the parties fail to resolve the dispute within 21 (twenty-one) days, then, depending on the position of the case, either the purchaser or supplier should give notice to the other party of its intention to commence arbitration. When the contract is with a domestic supplier, the applicable arbitration procedure shall be as per the Indian Arbitration and Conciliation Act, 1996 [Amended 2015[80] and 2021[81]]. While processing a case for dispute resolution/litigation/arbitration, the procuring entity is to take legal advice, at appropriate stages.

9.9.1 Arbitration Clause

If an amicable settlement is not forthcoming, recourse may be taken to the settlement of disputes through arbitration as per the Arbitration and Conciliation Act 1996. For this purpose, when the contract is with a domestic supplier, a standard arbitration clause may be included in the SBD indicating the arbitration procedure to be followed. The venue of arbitration should be the place from where the contract has been issued.

Arbitration and dispute resolution

i) During operation of the contracts, issues and disputes arising due to lack of clarity in the contract become the root cause of litigation. Litigation has adverse implications on the timelines and overall cost of the project. Before resorting to arbitration/litigation, the parties may opt for mutual discussion, mediation, and Conciliation for the resolution of disputes.

ii) Arbitration /court awards should be critically should be critically reviewed. In cases where there is a decision against government / public sector enterprise (PSE), the decision to appeal should not be taken in a routine manner, but only when the case genuinely merits going for the appeal and there are high chances of winning in the court/ higher court. There is a perception that such appeals etc.

[79] As notified under para 16 of OM No.F.1/1/2021-PPD issued by Department of Expenditure dated 29.10.2021
[80] https://lawmin.gov.in/sites/default/files/ArbitrationandConciliation.pdf
[81] https://egazette.nic.in/WriteReadData/2021/225832.pdf

are sometimes resorted to postpone the problem and defer personal accountability. Casual appealing in arbitration / court cases has resulted in payment of heavy damages / compensation / additional interest cost, thereby causing more harm to the exchequer, in addition to tarnishing the image of the Government.

iii) The Organisation should monitor the success rate of appealing against arbitration awards. There should be a clear delegation to empower officials to accept arbitration / court orders. A special board / committee may be set up to review the case before an appeal is filed against an order. Arbitration /court awards should not be routinely appealed without due application of mind on all facts and circumstances including realistic probability of success. The board / committee or other authority deciding on the matter shall clarify that it has considered both legal merits and the practical chances of success and after considering the cost of, and rising through, litigation / appeal / further litigation as the case may be, it is satisfied that such litigation / appeal / further litigation cost is likely to be financially beneficial compared to accepting the arbitration / court award.

iv) Statistics have shown that in cases where the arbitration award is challenged, a large majority of cases are decided in favour of the contractor. In such cases, the amount becomes payable with the interest, at a rate which is often far higher than the government's cost of funds. This results in huge financial losses to the government. Hence, in aggregate, it is in public interest to take the risk of paying a substantial part of the award amount subject to the result of the litigation, even if in some rare cases of insolvency etc. recovery of the amount in case of success may become difficult. Instructions have been issued in this matter in the past, but have not been fully complied with.

v) The only circumstances in which such payment need not be made is where the contractor declines, or is unable, to provide the requisite bank guarantee and/or fails to open a escrow account as required. Persons responsible for not adhering to are liable to be held personally accountable for the additional interest arising, in the event of the final court order going against the procuring entity[82].

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[82] As notified under para 16.1 to 16.5 of OM No.F.1/1/2021-PPD issued by Department of Expenditure dated 29.10.2021

9.9.2 Foreign Arbitration

The Arbitration and Conciliation Act 1996 has provisions for international commercial arbitration, which shall be applicable if one of the parties has its central management and control in any foreign country.

When the contract is with a foreign supplier, the supplier has the option to choose either the Indian Arbitration and Conciliation Act, 1996 or arbitration in accordance with the provisions of the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.

The arbitration clause with foreign firms should be in the form of self-contained agreements. This is true especially for large value contracts or those for costly plant and machinery. The venue of arbitration should be in accordance with UNCITRAL or arbitration rules of India, whereby it may be in India or in any neutral country.

9.9.3 Arbitration Awards

i) In cases where the Ministry/ Department has challenged an arbitral award and, as a result, the amount of the arbitral award has not been paid, 75% of the arbitral award (which may include interest up to date of the award) shall be paid by the Ministry/ Department to the contractor/ concessionaire against a Bank Guarantee (BG). The BG shall only be for the said 75% of the arbitral award as above and not for the interest which may become payable to the Ministry/ Department should the subsequent court order require refund of the said amount.

ii) The payment may be made into a designated Escrow Account with the stipulation that the proceeds will be used first, for payment of lenders' dues, second, for completion of the project and then for completion of other projects of the same Ministry/ Department as mutually agreed/ decided. Any balance remaining in the escrow account subsequent to settlement of lenders' dues and completion of projects of the Ministry/ Department may be allowed to be used by the contractor/ concessionaire with the prior approval of the lead banker and the Ministry/ Department. If otherwise eligible and subject to contractual provisions, retention money and other amounts withheld may also be released against BG.][83]

[83]New rule 227A of GFR, 2017 notified vide OM No. F./1/9/2021-PPD issued by Department of Expenditure dated 29.10.2021.

9.10 Closure of Contract

While making the final payment to the contractor and before releasing the PBG, it should be ensured that there is nothing outstanding from the contractor, because it would be difficult to retrieve such amounts after releasing the bank guarantee/final payment. Before the bank guarantee is released a "no claim certificate" may be taken from the contractor as per the format given in Annexure 21. At least in large contracts [above Rs. 25(Rupees twenty-five)lakh], it should be ensured that before the release of the bank guarantee (final payment, if there is no bank guarantee), the following reconciliations should be done across Departments involved in the execution of the contract:

9.10.1 **Materials Reconciliation**

The stores and/or the indenter should confirm that all materials ordered in the contract and paid for have been received in good condition and there is no shortfall. Full reconciliation of all raw material, part, assembly provided to the contractor should be done including wastages and return of scrap/off-cuts.

9.10.2 **Reconciliation with the User Department**

Besides material reconciliation, the user Department should certify in writing that the following activities (wherever applicable) have been completed by the contractor, to the Department's satisfaction, as per the contract:

i) Achievement of performance standards of material/equipment supplied;
ii) Installation and commissioning;
iii) Support service during the warranty period which has ended on _____;
iv) Training of operators/maintenance staff;
v) Return of all ID cards, gate passes, documents, drawings, protective gear, material, equipment, facilities and assets loaned to contractor; and
vi) Support during annual maintenance contract (if it was part of the contract) which has ended on _____.

9.10.3 **Payment Reconciliation**

The indenting/materials management Departments may reconcile payments made to the contractor to ensure that there is no liability outstanding against the contractor on account of:

i) LD;
ii) Price reduction enforced on account of shortfall in performance of material/equipment;
iii) Variations/deviations from the scope of the contract;
iv) Overpayments/duplicate payments, if any;
v) Services availed from Procuring Entity and vacation thereof such as accommodation, electricity, water, security, transport, cranes and other machinery, and so on,
vi) Demurrage, insurance premiums or claims, customs duties, and so on;
vii) Material reconciliation;
viii) Price and exchange rate variations;
ix) Statutory duties paid on behalf of the contractor by Procuring Entity; and
x) Inspection charges or loss of material in testing.

On satisfactory reconciliation and against a "no claim certificate" from the contractor, the bank guarantee may be released and its acknowledgement taken from the contractor.

On completion of all activities against a contract, the purchase file should be preserved for a period of five years in the record room and then destroyed after expiry of the applicable mandatory retention period with the approval of the CA. However, Procuring Entity, at its discretion, may retain important records for future reference.

9.11 Goods Receiving

9.11.1 **Transportation of Goods**

Where critical equipment of high value is involved, suitable special instructions shall be conveyed to the supplier about the mode of transport, loading, avoidance of transhipment and, if necessary, provision of escorts. In case of chemicals, powdery materials, liquid materials, and so on, parties may be advised on proper packaging to avoid spillage en route, so as to avoid pollution problems and also to conform to the ISO 14001 standard. In case transport is arranged by Procuring Entity, suitable instructions may be incorporated in the transportation contract accordingly.

Wherever the items make a full truck load, the suppliers should be advised to dispatch such items in a full truck direct to the consignee on a door delivery basis to the site. In such cases, Procuring Entity shall advise the supplier to send a

consignee copy of the lorry receipt to the consignee along with the consignment and the consignment shall be booked to Procuring Entity and not "self". The supplier shall be specifically asked to dispatch the consignments to the designated consignee. All dispatch documents, that is, railway/lorry receipt, goods consignment note, airway bill, invoices, packing list, freight memos, test certificate, and so on, shall be sent to the Associated/ integrated Finance which will arrange to make the payment. If the payment is to be made through the bank, all original documents are to be sent through the designated bank.

9.11.2 **Distribution of Dispatch Documents for Clearance/Receipt of Goods**

The supplier shall send all the relevant dispatch documents well in time to the purchaser to enable the purchaser to clear or receive (as the case may be) the goods in terms of the contract. Necessary instructions for this purpose are to be incorporated in the contract. Within 24 (twenty-four) hours of dispatch, the supplier shall notify the purchaser or consignee (others concerned), the complete details of dispatch and also supply the following documents by registered post/ speed post/air mail/courier (or as instructed in the contract).

The supplier should submit five copies of his invoice. The invoices must be pre-stamped and shall indicate the details of the lorry receipt or railway receipt number, as the case may be, and also the details of the packing list and items dispatched. The invoice must also indicate the purchase order number and date, unit rate and net total price; the packing list shall include the total weight of the consignment and items dispatched. All documents are to be duly signed by the supplier's representative. Bank charges towards processing of the bills for payment shall be as per terms and conditions of the purchase order.

9.11.3 **Receipt of Consignment**

At the time of the delivery at the stores, the storekeeper should receive the goods on a "subject to inspection" basis and should issue the preliminary receipt after a preliminary inspection as an acknowledgement of having received the claimed quantity (not the quality) of consignment.

i) **Preliminary Inspection on Receipt**

On opening the packages (if applicable), the storekeeper should initiate preliminary inspection of the goods received. This should include checks for any obvious damage in transit and other physical or visual checks specific to the functional characteristics of the product. The quantity of the goods received should also be verified at this stage against the purchase order and the supplier's invoice. When goods are supplied in boxes, bundles or coils as in the case of tools, rope, canvas, barbed wire, and so on, each of which is required to contain a specified quantity, a reasonable number of such packages should be opened up and checked for quantity per package. The quantity received should also be mentioned in the preliminary receipt to be given to the supplier. Any discrepancies in packages or quantity should be mentioned therein.

ii) **Detailed Inspection on Receipt**

Before accepting the ordered goods, the storekeeper must ensure that the goods have been manufactured as per the required specifications and are capable of performing the functions as specified in the contract. To achieve this, the tender document and the subsequent contract should include references to standards or specifications that specify the details of inspection and tests to be carried out and stages and manner of carrying out these tests.

The required inspections and tests should be carried out by technically qualified and competent personnel. If the procurement agency does not have such qualified personnel, it may engage competent professionals from other Departments or even outside agencies.

9.12 Quality Assurance and Inspection

In the context of procurement of goods, the Quality Assurance (QA) process is needed to provide adequate confidence that a procured product will satisfy the laid down standards of quality and serve the purpose for which it is being procured. QA consists of three components:

i) Defining quality standards;
ii) Planning assurance of quality; and
iii) Measurement of quality.

The description and TS define the quality standards expected from the product.

Planning for QA is done by way of specifying the qualifications criteria for the suppliers to ensure that they do have the technical, infrastructure and financial capabilities to meet the required quality standards. Specifications also lay down quality control requirements to indicate parameters, target values, tolerances and method of measurement of various parameters that constitute the standards of quality. This also involves laying down the type of inspection, agency for inspection.

Measurement of quality is done though a scheme of inspections at the contract management stage and laying down the actual process of inspection.

9.12.1 Inspections – Measuring Quality Standards

The stages and modes of inspection may vary depending on the nature of the goods, total value of the contract, location of the supplier, location of the user, and so on. Depending on the nature of goods being procured, usually, the following types of inspection may be adopted:

9.12.2 Types of Inspection

i) **Pre-dispatch Inspection**

A pre-dispatch inspection may be conducted either during various stages of the production process (which is known as stage inspection) or on production of the finished products, but before dispatch of the goods from the supplier's premises. Stage inspection may be used for highly technical goods whose quality of the manufacturing process is likely to have considerable effect on the final quality and durability of the goods. Even after pre-dispatch inspections, these materials should be inspected again on receipt, as a matter of abundant precaution.

Inspection of the materials before dispatch shall be carried out by the inspection agency nominated in the contract or by its representative at the premises of the supplier in accordance with the inspection procedure laid down and incorporated in the purchase order.

The testing charges for samples should be borne by the supplier and this should be made clear at the enquiry stage itself to avoid claims at a later date/or effect on his position in comparative statement of offers. Any special testing involving financial implications shall be settled prior to placement of the order and such cost should form part of the evaluation.

In case of offshore supplies, the inspection clause shall be incorporated in the purchase order wherever required:

a) Procuring Entity may depute its representative or a third party inspection agency to the supplier's manufacturing premises to carry out/witness inspection and testing, performance testing at its discretion;

b) Alternatively, Procuring Entity shall retain an option to waive the above and accept the material based on the supplier's internal test report, guarantee and fitment certificate. In this regard, the written approval of the HOD of the Indenting Department should be obtained recording the reasons for it; and

c) Whenever the inspection is carried out at the supplier's manufacturing premises, an inspection on receipt of goods at Procuring Entity shall also be carried out by an officer of the Indenting Department or a third party inspection agency, as the case may be, on receipt of the goods.

d) It has been brought to the notice of Department of Expenditure that in the contracts signed with suppliers by some of the Ministries/ Departments have clauses of pre-inspection at the firm's premises, where there is a provision that the suppliers or the vendors will pay for the travel, stay, hospitality and other expenses of the Inspecting officials. This is not in keeping with need to safeguard the independence of the inspecting teams. Such provisions win contracts need to be discouraged, so that Inspections are not compromised. Necessary steps may be taken to strictly avoid such provisions in the contracts with suppliers/ vendors[84].

ii) **Inspection of Goods on Receipt at Consignee/User's Site**

Post-delivery inspection is carried out on receipt of goods before accepting them. This should be typically done for goods that are available off-the-shelf and are BIS marked. All final goods that may be directly consumed or utilised on delivery (excluding machinery installations, and so on) and for which

[84] Notified vide OM No.F.11/13/2017-PPD issued by Department of Expenditure dated 24.10.2017

detailed inspection of the manufacturing process is not required and only a physical inspection regarding their physical characteristics is required, may be inspected using this method. On receipt of goods at stores, the storekeeper should immediately notify the officer nominated for inspection, requesting to schedule an inspection. The inspecting officer should then fix a date for inspection.

The consignee has the right to reject the goods on receipt during the final inspection on delivery even though the goods have already been inspected and cleared at the pre-dispatch stage by Procuring Entity's inspector. However, such rejection should be strictly within the contractual terms and conditions and no new condition should be adopted while rejecting the goods during final inspection.

Goods accepted by the purchaser at the initial and final inspections, in terms of the contract, shall in no way dilute the purchaser's right to reject them later, if found deficient in terms of the warranty clause of the contract.

In case of rejection of goods at this stage, the material rejection advice/rejection memo should be issued. In case of pre-inspected goods, a joint inspection of the rejected lot of goods should be held with the pre-inspecting agency and firm. In case of failure of the firm to associate with a joint inspection, it should be held with the pre-inspecting agency.

In case of rejection of the pre-inspected supply of goods at the consignee end, the material rejection advice/rejection memo should be sent to all concerned, which is, the firm, purchaser, pre-inspecting agency, paying authority, associate bill paying authority, and so on, without fail. The concerned paying authority as per the contract and associate bill paying authority should note the rejection advice details in its recovery register for effecting recovery of payments made, as the case may be. In case of replacement supply against the rejected lot of goods, the process should remain exactly the same in terms of sequence of pre-inspection/inspection as laid down in the contract, prior to acceptance by the consignee. In case of acceptance of the replacement supply/rejected supply after rectification, the

earlier issued material rejection advice/ rejection memo should be withdrawn under advice to all concerned.

iii) **Manufacturer's Quality Self-certification**

Reputed manufacturers could be relied upon with respect to certain goods for quality products. These may not be subjected to physical inspection and the materials may be accepted under the firm's quality self-certification. The physical inspection clause stipulating the inspection authority and inspecting officer in such cases should not be included in the contracts entered into. Waiver of pre-dispatch inspection and acceptance of materials under the firm's quality self-certification may be considered where:

a) The user Departments indicate, in their indent, that physical inspection is not necessary and that the materials can be accepted on the firm's quality self-certification;

b) The user Department requests for a waiver of inspection to meet urgent requirement and where the firm is agreeable to 100 (hundred) per cent payment against the consignee's receipt and acceptance. In such cases, the user Departments themselves should be responsible for ensuring the quality of goods supplied;

c) In case of goods to be imported from abroad, pre-dispatch inspection of goods at the supplier's premises involves considerable expenditure to the purchaser. In such a situation, the purchaser may substitute pre-dispatch inspection by its own inspector with manufacturer's in-house inspection report and warranty. However, before adopting this procedure, the nature and cost of the goods ordered, the reputation of the supplier, and so on, should also be kept in view and appropriate decision taken. For checking the reputation and background of the supplier, the purchase organisation may also request the Indian embassy located in that country for a report on the technical and financial competence of the firm. Further, trustworthy publications such as Thomas Register, Dun and Brad Street Register, and so on, are also available in the USA and Europe which provide authentic technical and financial data and details of the manufacturing companies located in those countries. Such publications may also be relied upon for this purpose; and

d) However, the right of waiver of inspection may be reserved only for specific requirements. Justification for the waiver should be recorded. Also, a suitable clause may be incorporated in the conditions of contract.

iv) **Inspection on Installation and Commissioning**

This method is adopted to check the performance and output of equipment or machinery after it is commissioned and operational at site.

9.12.3 Types of Inspection Agencies

Normally, inspection modalities or agencies for inspections specified in the contract should not be changed. In rare cases, when this becomes inescapable, it should be done with the approval of the CA, justifying the rare circumstances, ensuring that no undue benefit accrues to the contractor.

i) **Internal Inspection Authorities**

Wherever there is technical expertise available in-house, an internal officer of the Indenting Department is nominated for inspection. The consignee should be the final authority for acceptance of goods.

ii) **External Inspecting Authorities**

In case Procuring Entity does not have technical expertise or for other relevant reasons, inspection may also be entrusted to a third-party inspection authority. The procuring entity, however, retains the right to reject the consignment, even if it is cleared by third party inspection authorities.

Sometimes, it becomes necessary to conduct a type test, acceptance test or special test at external laboratories, when facilities for these tests are not available in-house with the supplier or carrying out of confirmatory tests is considered desirable before accepting the goods. The Procuring Entity should draw up a list of approved laboratories for this purpose, to which the samples drawn from the lots offered by the supplier can be sent for tests. The list should also contain approved laboratories, which can be used as referral/appellate laboratories for retest, when samples tested at one laboratory are decided to be re-tested. The following guidelines should apply to such cases:

a) External testing may invariably be done by national accredited or reliable laboratories, preference being given to National Test House (NTH). For testing the samples drawn from the lots offered by the supplier, an inspection agent qualified to conduct random sampling in accordance with Quality Assurance requirements should do the selection of samples;

b) Test reports must contain the values obtained in the tests besides fail/pass results. The laboratory must preserve the sample and test records for a period of three years;

c) The Department should lay down a liability statement for costs expended on tests, dispatch of samples, transportation costs, test charges, and so on., in respect of samples tested at outside laboratories as may be applicable; and

d) In cases where the samples are to be tested at the supplier's cost because of non-availability of his own testing arrangements, the responsibility of depositing the testing fees would rest with the supplier.

e) Normally unless otherwise intended in the contract, charges of routine testing prior to dispatch of materials are to be borne by the supplier and charges of testing of materials after receipt by consignee are to be borne by the procuring agency. Contract should be clear about responsibility of cost of materials expended in tests and charges of special tests e.g. type test or tests at external labs. Even where procuring entity is responsible for testing charges, if the material fails in the test, the charges would become the responsibility of the seller.

iii) **Joint Inspection on Complaint**

In case a written complaint is received from the supplier disputing the rejection of goods by the Procuring Entity's inspecting officer, it should be jointly investigated by a team consisting of an authorised representative of the Procuring Entity, a senior representative of the inspecting agency who is conversant with the goods and an authorised representative of the supplier.

9.12.4 **Issue of Inspection Report**

After satisfactory inspection and tests, the acceptable goods shall be stamped, labelled, marked or sealed, in such a way as to make subsequent identification and tally with the inspection report of accepted lots easy for the consignee/user. The following guidelines should be used for inspection reports to be issued:

i) Each inspecting officer shall be supplied with acceptance stamps, lead seals, pliers, rubber stamps, stencils, labels, stickers, holograms, and so on, according to requirements, for sealing and marking the inspected goods in terms of the contract. He will be responsible for safekeeping of these articles and shall ensure that they are not misused by unauthorised persons. Unserviceable seals, pliers, stamps, stickers, holograms, and so on, shall be returned to the concerned issuing official. The procuring entity shall lay down detailed guidelines covering all these aspects. For reasons of security and to avoid irregular or incorrect issue, inspection notebooks should be machine numbered and, wherever possible, different coloured copies marked for each user. An account of the inspection notes issued with serial number-wise details shall be maintained in an appropriate register. Procuring Entity should also develop a fool proof system to avoid any fraudulent and unauthorised use of the inspection notes;

ii) There should not be any initial provisional acceptance at a lower level. A time limit shall be fixed for the issue of inspection documents. The inspection note shall also indicate the validity period, by which period the supplier must dispatch the accepted goods to the consignee in terms of the contract. The number of copies of the inspection notes and their distribution for different types of inspections will be as prescribed by the procuring entity/indenter Department;

iii) Inspection reports should be prepared detailing the inspection done, samples examined, requirements as per the relevant specification/contract and the observations jointly with the representative of the firm. Each inspection note copy issued should invariably bear the individual's name, stamp along with his designation and code number of the officer authorised to sign and issue inspection documents. Facsimiles of the inspection stamps and their position should be put on the inspected material to help identify the inspected goods at the consignee's end. Inspection note copies meant for payments should be

attested with full signature in ink by the inspecting officer. The Accounts Department will make payments only against copies so attested, not against any other copy. Corrections, if any, on the inspection note should be duly authenticated by the officer issuing it. Similarly, each continuation sheet, if attached to the inspection note, should be signed by the inspecting officer at the relevant places and any correction duly authenticated;

iv) Departmental instructions should invariably prescribe that paying authorities will keep a record of specimen signatures of authorised inspecting authorities for verification with the signature in the inspection note while authorising payment;

v) A separate inspection report must be prepared for each consignment. In the case of large consignments, the issue of the inspection report may not be held up until the inspection of the full consignment is completed. These must be issued for lots inspected every day or every two days. If the contract is in terms of 'sets' or 'number' and materials are such that they comprise a number of components or accessories, the inspection report should be issued only when all parts, components and accessories forming a set are inspected and accepted. When plant and equipment are ordered with spares, the inspection report for spares should not be issued before acceptance of the main equipment. In the case of contracts for imported materials that involve initial inspection in the country of origin and final inspection in India, the final inspection note should be issued giving reference of the certificate issued abroad;

vi) In respect of materials which have been rejected by the inspecting officer, the rejection inspection report should be issued immediately following the completion of inspection. In case of total rejections, no copies meant for payments or the accounts office should be issued. All the reasons for rejection and deviations against the governing specifications, drawings or other particulars should invariably be noted in detail in the "remarks" column of the rejection inspection note. The rejected material should be given a yellow paint mark to avoid it being submitted again for inspection or supplied to other customers. Such copies should be cancelled across by the inspecting officer

with his signature and retained in the inspection file along with the office copy of the rejection inspection note; and

vii) No 'certified true copy' of the lost original payment copies should be issued until a 'non-payment certificate' has been received from the accounts officer concerned or stating that payment has not been made and should not be made against the original inspection report even if received subsequently. This copy must be endorsed as "certified copy". This endorsement should be attested in full in indelible ink by the officer proving a cross reference to the accounts officer's non-payment certificate with the name stamp with the designation and code number of the officer issuing the duplicate copy.

9.12.6 **Material put up for Inspection towards the End of Delivery**

As far as possible, the inspection should be commenced and finished and the inspection report issued during the validity period of the contract. In cases where the supplier offers materials for inspection during the last few days of the contract delivery period or even on the last day of the contract delivery period, efforts should be made by the inspecting officer to commence the inspection before the expiry of the delivery period.

In cases where it is not possible to commence or conclude the inspection before the expiry of the delivery period, the inspecting officer should, immediately, on receipt of the intimation or request for inspection of the materials, bring this to the notice of the supplier orally as well as in writing. He must mention that the materials have been submitted for inspection at a very late stage and that it is not possible to commence/conclude the inspection before the expiry of the delivery period.

The supplier should also be informed that the goods offered for inspection should, however, be inspected until the completion of the inspection which can be after the expiry of the delivery period and that such an inspection continuing after the expiry of the delivery period is neither intended nor to be construed as condoning the delay or keeping the contract alive.

In such cases, the inspection note, whether accepting or rejecting the goods, should be duly franked as per the franking clause given below:

9.12.7 **Franking Clause on Acceptance and Rejection**

"The issue of this inspection/rejection report does not acquiesce or condone the late delivery and does not intend or amount to an extension of the delivery period or keeping the contract alive. The goods are being passed/ rejected without prejudice to the rights of the Government of India under the terms and conditions of the contract."

This clause may also be incorporated in conditions of the contract.

9.12.8 **Approval of Acceptable Deviations**

Under no circumstances will the inspecting officer have the authority to modify the governing specifications, approved drawings or samples during inspection without reference to the CA that approved the tender. For all cases of acceptance with deviation, the nature of deviation along with a justification for acceptance against such deviation should be duly documented. The CA that approved the tender should have the final decision on deviations.

Deviations from the contract specifications or requirements not affecting price, quality, performance and other terms of the contract may be allowed at the level of the CA in consultation with the user Department on merits or nature of deviations.

In all other cases, the goods should be rejected giving all reasons by issuing a rejection inspection report. Rejections should not be made in a piecemeal manner.

9.13 Storage and Issue of Inspected Goods

After satisfactory inspection and tests, the accepted materials should be stamped, labelled, marked, or sealed and stored in a systematic manner. This is to facilitate easy retrieval at a later stage. As all goods needed or procured cannot be consumed at one point of time, storage is an inevitable process. The storage system forms the key component of any materials management system. It should be ensured that the goods are stored in such conditions that they are protected against unauthorised removal and deterioration.

9.14 Accounting and Payment of Received Materials

9.14.1 **Goods Receipt and Inspection Report**

If the received material successfully passes the quantity and quality checks, accounting of material received shall be on the basis of the Goods Receipt and Inspection Report (GRIR) (Annexure 22) prepared after inspection and acceptance of the material which will be signed by the concerned officers. This includes cases

where payment is made to the supplier on proof of dispatch, for which inspection at the suppliers' premises is conducted by an authorised officer of Procuring Entity prior to dispatch by suppliers. This excludes cases of imported materials where accounting will be done on completion of certain further formalities as per regulations and practices. While preliminary receipt is only an acknowledgement of quantity received, GRIR is an acknowledgement of receipt of the correct quantity as well as quality of goods. GRIR is a voucher which forms the basis for the supplier to claim payment as per the contract. It also is a voucher for accountal of the received material in the inventory accounts. Along with the GRIR, material is handed over to the warehouse where it is to be stored.

In case the received material fails to pass quantity and quality checks, a rejection GRIR is issued, noting the reasons for rejection. If feasible, a yellow paint mark should be put on the rejected material to prevent its resubmission by the supplier. The associated Finance/ FA should be asked to recover any advance payment or freight charges paid for the rejected quantity. The rejection GRIR contains instructions for the supplier to take back the rejected goods within a stipulated number of days (usually 21). Such removal should be permitted only after the advance payment/freight paid is recovered. Lots that are under inspection, accepted, or rejected should be properly tagged, segregated and identified.

9.14.2 **Passing of Supplier's Bills**

After the GRIR is issued, the invoice is received from the supplier, supported by relevant documents evidencing award of purchase orders/contracts and receipt of materials/services. Based on contractual terms where payments are made based on proof of dispatch against a purchase order, bills shall be passed and accounted based on the GRIR of approved materials. The invoice submitted by the supplier will be verified and signed by the indenting officer, and pay order form (Annexure 23) or any other relevant forms will be prepared by the procuring entity and signed by an officer authorised to sign pay-orders. All correspondence with the supplier will be handled by procuring entity Department.

The documents, which are needed from the supplier for release of payment, are to be clearly specified in the contract. The paying authority is also to verify the documents received from the supplier with corresponding stipulations made in the contract before releasing the payment.

While claiming the payment, the supplier must also certify on the bill that the payment being claimed is strictly in terms of the contract and all the obligations on his part for claiming this payment have been fulfilled as required under the contract. There should also be a suitable provision for verification of the authenticity of the person signing the invoice, and so on, to claim the payment.

In case of part supply, the payment will be released by deducting 10 (ten)per cent of the bill value which will be released once the entire supply is made. Deduction of applicable taxes at source from payments to suppliers will be done as per the existing law in force during the currency of the contract.

9.15 Contract Management - Risks and Mitigations	
Risk	***Mitigation***
Advance payments: This is an area of risk in public procurement with undue and unintended benefits to the contractor, which vitiates the original selection criteria.	Any mobilisation or other advance payments should be interest bearing and should be only for justifiable cases. Terms of such advances should be expressly stated in the NIT/bid documents. The advance payment may be released in not less than two stages depending upon the progress of the contract. Advance should be progressively adjusted against bills cleared for payment. Interest should be charged on delayed recoveries irrespective of the reason stated.
Contract changes and renegotiations: This is also a risk area, where the procuring entity may not get what it contracted and paid for or may pay for what it has not received. On the other hand, the contractor may not get timely or proper amendments due to changes asked by the procuring entities.	Contract modifications and renegotiations should not substantially alter the nature of the contract. It should not vitiate the basis of the selection of the contractor. It should not give undue or unintended benefits to the contractor. However, for any changes caused by the procuring entity, the contractor should be adequately and timely compensated within the contractual terms.
Supervising agencies/individuals are unduly influenced to alter the contents of their reports so changes in quality, performance, equipment and characteristics go unnoticed.	A contract management manual or operating procedure should be prepared for large value contracts. There should be inbuilt systems of checks and balances.
Contractor's claims are false or inaccurate and are protected by that in-charge of revising them.	All large contracts should be formally reconciled for closure to ensure that the scope of the work and warranty/defect

9.15 Contract Management - Risks and Mitigations	
Risk	***Mitigation***
Payment to the contractor is delayed intentionally or otherwise.	liability period is completed. This should include the dispute resolution forum for resolving disputes in a fixed timeframe with provision of escalation level. All payments/recoveries should also be reconciled. It should also be ensured that material/assets loaned to him including security passes are accounted for.
Contractor gets final payment, but contract closure has not been formally done. As a result material/assets loaned to him are not accounted for.	
Every dispute lands up in arbitration or court cases, since the procuring entity is reluctant to grant compensation for its own lapses to the contractor.	
Agents/ Sub-contractors and partners, chosen in a non-transparent way, are unaccountable or are used to channel bribes.	Agents should only be as per the terms of the contract. Sub- contracting of the contract should normally not be allowed in procurement of goods.