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CVO's Desk:

There is a doctrine of “Contra Proferentem” in contract law. It is basically derived its essence from Insurance law and applies in situations when a position in a contract can be interpreted in more than one way. In such cases court prefers the interpretation which is more favourable to party which has NOT drafted the terms of contract. The justification being that often the parties to a contract do not have the same level while signing and usually one party dominates on the other. Contra Proferentum places the cost of losses on the party who was in best position to avoid the confusion or ambiguity .This doctrine can also be put to use in court or arbitrator when one party is excluding or absolving itself from certain responsibility or liability i.e. sometimes there is clause of taking NOC from government authority as per provisions of Acts, by the contractors else penal actions are recommended.

Government contracts are always unconditional. Therefore it becomes inevitable for bid approvers to ensure that various provisions of the tender document are clear, explicit and unambiguous. To do so a) the latent, hidden or implied meanings to contract clauses are to be avoided; b) the contract conditions need to be realistic; c) all information required for working out rates by prospective bidders needs to be given in the tender document; d) technical specifications and mode of measurements should be clear; and e) the tender document should take care of various contingent event. Often ambiguous provisions are interpreted in favour of contractors. Vigilance Organization first dispute the ambiguity itself and try to assert if such an interpretation has resulted into passing of undue benefits to the contractor or has caused loss of public money. So by carefully preparing tender documents, NIT framers, its checkers and approvers can protect their officials from unnecessary vigilance scrutiny also.

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Sharat Chandra Tiwari, ITS

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COMMON IRREGULARITIES/LAPSES OBSERVED IN AWARD OF ELECTRICAL, MECHANICAL AND OTHER ALLIED CONTRACTS AND GUIDELINES FOR IMPROVEMENT THEREOF - PART - 4

5. NOTICE INVITING TENDER

5.1 The most preferred, competitive and transparent mode of tendering is to go in for Open/Advertised tenders. However, there is a tendency in some organisations to go in for limited tenders for high value works. The reasons given for this are, either that the work has to be completed in a very short time or that the firms known for carrying out a particular work are very few in number. In the process, the competition is restricted which in turn results in cartel formation, higher rates and favouritism to select firms. At times, even in cases where advertised/global tender notices are issued, the same are published in 'local' dailies and not in any national newspaper. Surprisingly, in some cases, the notice was published only in the 'evening' newspapers. There are cases of the tender notice being published in a leading national newspaper but not on the page dedicated to the advertisements for tenders, thus partly restricting the competition and defeating the purpose of issuing advertised tenders. Some PSUs routinely follow the limited tendering system for all works and issue tender documents to contractors on their approved list. In one oil PSU, limited tenders were issued to 6/7 approved contractors but only one offer was received. Though this was almost 20% higher than the estimated rate, it was accepted and the contract awarded, without any negotiations. On further examination, it was found that the other 'approved contractors' had not even bothered to respond or to send a regret letter which established that they were either no longer interested in dealing with the organisation or had formed a cartel to divide different works of the said organisation among themselves. Ironically, the 'approved contractors' list had been formed a long time back and had not been updated for years - giving credence to the cartel theory.

In order to generate wide publicity for better competition and to avoid cartel formation and favouritism to select firms, it is imperative that the advertised/global tender notice should be published in select 'national' and 'local' dailies with a large circulation. Tender notices may also be displayed on the notice boards of other organisations. In case of global tenders, copies of the tender notices should be sent to the Indian Missions/Embassies in major trading countries. In addition to the paper advertisements, the tender notices should also be put on the website indicating all the details of the tender. In case of limited tenders to 'approved contractors', due care should be taken to generate adequate competition and reasonableness of rates should be established. The 'approved' list should be periodically updated weeding out the non performers and including fresh entrants in the field.

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5.2 The Notice Inviting Tenders (NIT) should contain all the relevant information in an explicit and categorical manner. Some organisations do not indicate the estimated value in the tender notice with the apprehension that the bidder will come to know their estimates and who may then give biased offers. Some other organisations put forth a fraction of estimates in the tenders. And at times such information as may not be relevant and rather may mislead the bidders is also indicated in the tender notice. In one case of supply and installation of a DG set by a hospital in Delhi, the tender notice indicated an initial security deposit of Rs.1,00,000/-. This amount was to be deposited by the successful bidder after award of the contract but the bidders after seeing high value as initial security deposit probably mistook this amount to be deposited with tenders in addition to the EMD. As a result some firms refrained from buying the bid documents and only one tender was sold despite repeated extensions and eventually the work was awarded on single offer basis. It has also been noticed that the tender sale and tender opening dates are not indicated in the tender notices and the tender sale is closed much in advance of tender opening date.

5.3 In some cases, the time given for submitting the bids is unrealistically short and only such firms as are acquainted with the functioning of the organisation and with prior preparations are able to participate in the bid. One such case regarding execution of a very large hydroelectric project on turnkey basis is illustrative. The large and complex, work running into thousands of crores involved a lot of spadework before submitting the bids. But the time given for submitting the bids for such a large project was only 45 days. During the pre-bid conference and through correspondence almost all the firms requested for an extension of the bid submitting date which was not granted to them. Due to abnormally short time given, only two contractors submitted the bids in time. On examination of the case, it was found that these two contractors had participated in the first round of tendering for this work but the tender had to be cancelled due to non-conclusion of the financial tie-up for the project. The re-bids for the same work were invited almost after four years and on the plea of urgency sufficient time was not granted to the bidders to quote. However, these two contractors were fully prepared as they had already done their spadework and were therefore in a position to submit their bids in such a short period. The contract was also awarded at very high rates. Thus, the purpose of floating global tenders to give wide publicity and generate sufficient competition seems to have been defeated.

In order to generate fair and adequate competition, it is important that sufficient time, depending upon the magnitude and complexity of the project should be given to the bidders to submit their bids. For big projects, extensions if asked by a majority of the bidders may be considered in the larger interest of the project. Any corrigenda issued in support of extension of dates or any other information should be individually intimated by various means and also be published in the media for wider publicity.

- As Per CTE's Organization



Inspection at Sitapatore Mine



Stores Insection at Chikla Mine



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