ADVISORY : ADMINISTRATION OF CONTRACTS

1. Detailed instructions exist in Manual on Contracts-2007 (Reprint 2012), RMES & DWP for planning, processing and execution of works in MES. In addition, several instructions have also been issued from time to time to clarify and amplify the provisions contained in the Manual of Contracts and other regulating documents. However, certain pertinent issues with respect to an important project, which have come to notice of this HQ and merit attention are given in the subsequent paragraphs.

2. **Exceeding Financial Limits.**

   (a) The project was sanctioned by Government and the architectural and structural design work were entrusted to a reputed consultant by the Accepting Officer. The consultant had prepared architectural and structural drawings and submitted bills of quantities but the tender was prepared as lump sum tender based on drawings and specifications. The basic plinth area (PA) rate for main building as per details prepared by the consultant was much higher than the sanctioned rate. Financial Concurrence (FC) was intiated after tendering since adequate amount was not available to conclude the tender. The issues as to whether the tender was prepared strictly within the ambit of Adm Approval and whether the PA rate at the time of tendering for the building kept within the sanctioned PA rate, was never checked by the Accepting Officer while initiating FC violating provisions of Para 26 (f) of DWP- 1986.

   (b) To avoid such violations, whenever a work is planned through a consultant, sanction of CFA should be obtained based on Detailed Project Report (DPR) and not on the basis of standard PA rate. Item rate contract is a better option to deal with such works than lump sum contract. To avoid cost over-run of any project, the consultancy contract should also specify the detailed scope and financial limits within which the consultant will plan and design the main project.
3. **Acceptance of Tender with Ambiguous /Conditional Letter of Extension of Validity.** Since FC case was initiated, the CE Zone had asked L1 bidder to extend the validity of their offer several times. Although, the L1 bidder in the initial stage itself brought out that in view of the rising market trend it would not be feasible for him to extend the validity period but as a special case agreed for the extension of validity up to a certain date. Since the CE Zone could not accept the tender by the extended date of validity of offer, further extension of time was asked from the L1 bidder. L1 bidder extended the validity of offer but with a request for "favorable consideration in respect of abnormal increase in the price of cement to be made in due course". The contract was concluded without addressing this request of L1 which tantamounts to involving an uncertain liability/conditional validity extension. During currency of the contract, the Contractor raised the issue and claimed reimbursement for increase in price of the cement as per their letter submitted at the time of granting extension of validity. Non entertainment of the claim by the CE Zone resulted into disputes between the two parties. The matter was, therefore, referred for interim arbitration. The Sole Arbitrator in his award concluded that the Accepting Officer has accepted the contract without any amendment to the contractor's said letter and awarded a huge sum in favour of the contractor. This was over and above the escalation amount as per Escalation clause already included in the contract. Conclusion of contract with unambiguous letter from the bidder regarding consideration of increase in the price of cement was clearly a conditional tender with uncertain liability which is a violation of Para 394 of RMES. This resulted in undue additional payment to the contractor. Such letters (from contractors) involving uncertain liability or any condition of an unusual character should not be accepted under any circumstances.

4. **Abnormal Delay in Communicating Decision and Placing DOs involving Various Changes.**

(a) The project being prestigious, users' aspirations were aimed to be catered to the maximum possible extent to provide state of the art work. Thus, the executives tried to accommodate all the requests of the users' during execution resulting in too many deviations involving radical changes/revision of drawings/star rates etc. Further delayed action in initiating necessary AIPs for regularization resulted not only in delay in payment of genuine RAR to the contractor but also abnormal delay in completion of the work. Such situation could have been avoided had deliberate planning of works both at pre and post Adm Approval stage taken place. The same has to be ensured through interaction with the users', site visits by planning teams to avoid involvement of such large number of changes at the time of execution and eventual contractual complications. Such issues, if not addressed in right earnest ab initio, leads to time & cost-over runs and & litigations. Hence, quick decision making process, if required in a collegiate manner, has to be ensured by the Accepting Officer. All these issues have already been covered under various policy instructions issued by E-in-C's Branch from time to time.
Condition 7 of IAFW-2249 (GCC) stipulates the following amongst others:

(i) No deviation shall be made (executed) by the contractor without written instructions of GE.

(ii) GE's communication for deviation shall include lump-sum assessment or the purposed basis of payment i.e. intimation of approximate financial effect/mode of pricing of the deviation.

(iii) This will enable contractors to put forward any objection to the deviation / its mode of pricing etc timely.

(b) In addition Para 19.2 of MES Manual on Contracts also contains instructions for early finalisation of Star Rates. This has also been reiterated in Para 3 of this HQ letter No 66546/Manual/24/E8 dated 05 Feb 2020.

5. **Granting Extension of Time under Condition 11 in lieu of Condition 7 and Non-Suspension of Work under Condition 9 of IAFW-2249 due to Various Changes Involved.** As a result of time & cost over-run, the contractor repeatedly asked for extensions of time under Condition 7 and suspension of work under Condition 9 of IAFW-2249, but all the extensions of time were invariably granted under Condition 11 (A) (vii) of IAFW-2249 without analyzing the issues involved. There was absolute reluctance in suspension of the work under Condition 9 of IAFW-2249 probably due to sole reason to avoid giving compensation to contractor. This became one of the main reasons for the disputes. Once reference was made, the Arbitrator awarded huge sum in favour of the contractor towards compensation and damages on account of various breaches by the Department. The detailed instructions/guidelines on dealing such cases do exist, which need to be followed in true spirit to avoid recurrence of cases in future. The requirement of resorting to suspension of works has been reiterated through various instructions issued from time to time including the following letters of E-in-C's Branch:

(a) No 13600/Arb/Gen/76/E8 dated 14 Dec 2018.

(b) No 13600/Arb/Gen/TUE/E8 dated 05 Feb 2019.

6. **Improper Handling of Arbitration Award.** Consequent to publication of award by Sole Arbitrator, there was an abnormal delay in filing of objections against the award in terms of Section 34 (3) of the Arbitration & Conciliation Act 1996. Therefore, the objection petition alongwith the condonation filed by the Government was dismissed by the Hon'ble Court and the Government had to pay the entire awarded amount to the contractor. Procedure for dealing with arbitration award has been covered in Section 31 of Manual on Contracts – 2007 (Reprint 2012) and the essence of timely processing of court cases has also recently been reiterated vide E-in-C's Branch letter No 13600/Arb/Gen/143/E8 dated 19 Aug 2019 and the same needs to be strictly adhered to avoid cases becoming barred by limitation and without being disposed on merit of the case.
7. **Lackadaisical Approach in Dealing of Arbitration Case.**

(a) Detailed instructions on measures to reduce arbitration case and on preparation and defence of arbitration cases, have been given in Chapter 27 & 29 of Manual on Contracts. Yet the cases are not being prepared and defended effectively by many CEs Zone. In the instant case, although the contractor had initially signed extension time DOs under protest but subsequently the contractor signed all the DOs for granting extension of time without protest. But this fact was never raised in Pleadings-in-Defence by the defending team in the arbitration proceedings, which resulted in award of huge amount towards compensation and damages on account of various breaches by the Department for the entire prolonged period without deducting the period where the contractor had accepted the extensions without any reservation, thereby allowing the arbitrator to award more amount in favour of the contractor.

(b) The concept of mock hearing has already been introduced to cover all such important issues at pre-hearing stage in the course of preparation for effective arguments and projection of all issues before the Arbitrator. There is a need of strict compliance of these instructions to minimize such lapses in arbitration.

8. Apart from issues highlighted above, a concerted effort needs to be made by respective CEs Zone, Dir (Contracts), CsWE & GEs to take all remedial measures to avoid recurrence of such incidents in their AOR.

9. It is reiterated that above issues need to be addressed seriously at all levels ensuring personal indulgence of the executives/contract management officers at all levels.

10. Please ensure compliance and confirm.

   (R P Singhal)
   Jt DG (Contracts)
   for E-in-C

**Internal:**

E2W(PPC), E2W(TC), E4 (U)

Automation Cell – It is requested to upload this letter on MES website