

Petr Lex



19th & 20th June, 2023

Ramada, Kochi



Knowledge Partner



TABLE OF CONTENTS

S.NO.	TOPICS	PAGE
A.	Day-1 (19.06.2023) SESSION-1: (0900 Hrs. to 1400 Hrs.) REGISTRATION & OPENING SESSION (Welcome Address, Inaugural & Keynote Address)	3
1.	Interest Prohibition Clause- Strategy, Implications & Way Forward	3
2.	LD vs Price Discount vs Penalty - Regime, practical issues and recent legal development	8
	Annexure A1: Relevant contract terms of IOCL	14
	Annexure A2: Relevant contract terms of HPCL	16
	Annexure A3: Relevant contract terms of BPCL.....	17
3.	Right of Risk and Cost vis-à-vis Ultimate recovery of amount: Strategy, Implications & Way Forward	18
	Annexure B1: Risk and Cost clause of IOCL.....	22
	Annexure B2: Risk and Cost clause of BPCL	22
	Annexure B3: Risk and Cost clause of HPCL.....	22
B.	Day-1 (19.6.2023) SESSION-2: (1500 Hrs. to 1800 Hrs.) THEME BASED PRESENTATION BY OMC	23
4.	Nomination of Officer under LM Act- Amendment to Rules & Way Forward	23
5.	Implications of Section 18 & 19 of MSME Act including recent judicial pronouncements	27
6.	How to determine/compute Mesne Profit: Strategy to minimize to Liability	32
C.	Day-2 (20.06.2023) SESSION-1: (930 Hrs. to 1430 Hrs.) OPEN SESSION.....	36
7.	Vivad se Vishwas II (Contractual Disputes) Likely regime & Advance actions	36
	Annexure C: Office Memorandum dated 29.05.2023.....	43

8.	AMRCD – Recent Circular - Way forward - inclusion of railway claims and thresholds.....	55
	Annexure D1: Office Memorandum dated 22.05.2018	63
	Annexure D2: Office Memorandum dated 20.02.2020	68
	Annexure D3: Office Memorandum dated 14.12.2022	70
	Annexure D4: DO dated 06.02.2023	74A
9.	Stamping of Agreement in view of recent Supreme Court Judgment - Way forward	75
10.	Holiday listing aspects such as Suspension; termination of contract before holiday listing, whether mandatory	81
	Annexure E1: Holiday Listing Guidelines of IOCL	85
	Annexure E2: Holiday Listing Guidelines of HPCL	94
	Annexure E3: Holiday Listing Guidelines of BPCL	105
	Annexure E4: Oil Industry Transport Discipline Guidelines of MOP&NG	120
11.	Notified Claims	135
	Annexure F: IOCL GCC Clause 9.....	138
12.	Qualification Criteria for Various Tenders	141



About MCO Legals

Founded in the year 1968 by Mr. Mohan Prasad Meharia, MCO Legals thrives on the pillar of strong work ethics and transparency.

With its 1st office in Kolkata, today, the MCO Team consists of 100 + professionals having their presence in New Delhi, Mumbai and Kolkata and associate offices in Ahmedabad, Chandigarh, Kuala Lumpur, London and Singapore, all dedicated to provide creative and comprehensive solutions to its clientele.

The MCO team is dynamic, innovative, solution oriented and relentlessly strives to provide pragmatic advice and legal expertise to its clients. We believe that quality in content and timely delivery of services is what brings a sustained growth and helps build relations with clients.



www.mcolegals.in



**A. Day-1 (19.06.2023) SESSION-1: (0900 Hrs. to 1400 Hrs.)
REGISTRATION & OPENING SESSION (Welcome Address,
Inaugural & Keynote Address)**

1. Interest Prohibition Clause- Strategy, Implications & Way Forward

1.1 Introduction

- 1.1.1 In general, interest is the return or consideration or reimbursement for the use or retention by one person of a sum of money belonging to, or owed to, another.
- 1.1.2 The key legal provisions pertaining to Interest are the Interest Act 1978 (for short '1978 Act'), Section 34 of the Code of Civil Procedure 1908 (for short 'CPC'), and Section 31(7) of the Arbitration and Conciliation Act, 1996 (for short '1996 Act').
- 1.1.3 Section 34 of CPC authorizes the Court to grant interest during pre-litigation stage, *pendent lite*, and post-litigation stage in the decree.
- 1.1.4 The 1978 Act deals with payment of interest up to the date of Suit/ claim. This Act was enacted to amend the law relating to the allowance of interest in specific cases. Section 3 of the 1978 Act grants power to the Courts to allow interest upon debt or damages.
- 1.1.5 Except in the case of a debt payable by a written instrument at a specific time, the notice of written demand for interest should be decisive to determine the starting point to ascertain the interest. The notice of demand primarily serves two purposes;
 - (a) Re-asserting the claim for the principal, and
 - (b) Notifying the desire of the claimant for interest.

It prevents disagreements as to the date of the breach of contract or tort commission where the claim for the actual amount is related to the breach of contract or tort.

1.2 Grant of Interest Upon Equity

- 1.2.1 In addition to Section 3 of the 1978 Act, interest may also be payable by virtue of 'any enactment other rule of law or usage having the force of law' as enunciated under Section 4 of the 1978 Act.
- 1.2.2 The case of *Life Insurance Corporation of India -v/s- S. Sindhu*, AIR 2006 SC 2366 enumerated three conditions when interest at a pre-litigation stage can be granted;
 - i. When the contract explicitly provides for the same; or
 - ii. Where the statute applicable to the transaction and/or liability, provides for payment of interest; or
 - iii. When interest is payable as per the provisions of the 1978 Act.
- 1.2.3 However, alternatively the Bombay High Court in the matter titled as *Prabhavati Ramgarib B. -v/s- Divisional Railway Manager*, (2010) 4 Mah LJ 691 clarified that as Interest Act 1839 recognized interest being payable in all cases where it is payable *de jure*, this position is no different in the 1978 Act. The Hon'ble Court held that upon proper interpretation of Section 4(1) of the 1978 Act it is found that the words 'other rule of law' include interest payable on grounds of equity.
- 1.2.4 The Supreme Court in *Dushyant N. Dalal -v/s- Securities and Exchange Board of India*, (2017) 9 SCC 660 reaffirmed the above said principle and laid down that Courts and Tribunals can draw power from the 1978 Act while granting interest in equity, with valid reasoning, since the cause of action till the date of commencement of proceedings for recovery of such interest.

1.3 Interest Barring Clauses

- 1.3.1 Parties to a contract can mutually imbibe interest-prohibiting clauses as long as they are not leading to an unlawful object or being prejudicial to either of the parties to the contract. The said provision of barring payment of interest should not be a result of any coercion or undue influence of a party upon the other party.
- 1.3.2 During judicious adjudication of such transactions, the courts have given paramount importance to the terms & conditions of the contract between parties. Section 3(3) of the 1978 Act and Section 31(7)(a) of the 1996 Act

allow the parties to waive their right to claim interest by virtue of an explicit agreement.

1.4 Interest Barring Clause And Arbitration

- 1.4.1 **As per Section 2(a)** of the 1978 Act – Court includes ‘Tribunal’ and an arbitrator. Consequently, in lieu of Section 2(a) of the 1978 Act, an arbitrator acquired powers in equal footing as the Courts to award interest up to the date of institution of the proceedings.
- 1.4.2 Section 31(7)(a) of the 1996 Act grants authority to the arbitrator to award interest, unless otherwise agreed among the parties, upon the sum payable from the date of cause of action till the date of Award.
- 1.4.3 In *Union of India -v/s- Manraj Enterprises* 2021 SCC OnLine SC 1081, the Hon’ble Supreme Court overturned the decision of an Arbitrator to grant *pendente lite* and future interest as per Section 31(7) of the 1996 Act, although the payment of interest was specifically barred qua the contract between the parties. While setting aside the Award the Supreme Court reiterated that an arbitrator being a product of the contract shall be bound by the ambit of the amicably settled terms of the contract.
- 1.4.4 The Hon’ble High Court of Madras in *The Union of India -v/s- R.K. Constructions* (Arb. O.P. (Com Div) No. 148 of 2022) also held that if the clause prohibiting such interest is not specifically pleaded or adduced as evidence by the aggrieved party, the arbitral tribunal may award interest on the security deposit.
- 1.4.5 In *Bawana Infra Development Pvt. Ltd -v/s- Delhi State Industrial & Infrastructure Development Corporation Ltd.*, 2023 SCC Online Del 1569, the Hon’ble High Court of Delhi partly set aside an Arbitral Award by declaring patent illegality on the grounds that the Arbitrator granted post-award interest as per Section 31(7)(b) of the 1996 Act and failed to consider the rate of interest explicitly provided in the contract executed between the parties.
- 1.4.6 In case of *Oriental Structural Engineers Pvt. Ltd. v. State of Kerala*, 2021 SCC OnLine SC 337, it was held that Tribunal had the authority to award interest even when the Contract is silent upon the same.

1.5 Interest On Pre-Award Interest

- 1.5.1 The Hon'ble Supreme Court in *Morgan Securities & Credits (P) Ltd. - v/s- Videocon Industries Ltd.*, (2023) 1 SCC 602 clarified the existing lacuna upon the principle of grant of interest, during post-award stage, upon pre-award interest and also expanded the discretionary powers of the Arbitrator under Section 31(7) of the 1996 Act. The Court held that it is the discretionary power of the Arbitrator to award post-award interest upon the 'sum' as mentioned in Section 31(7)(b) and the 'sum' might include pre-award interest along with the principal amount.

1.6 Way Forward

- 1.6.1 In light of the judicial pronouncements and the existing framework of law, the draftsmen of contracts need to take due care upon the Interest prohibiting clauses. Specific attention is required in order to lay down such clauses as per the needs of the contractual parties.
- 1.6.2 The Courts have adopted a strict interpretation upon the terminology used in the contracts while adjudicating such interest claims, and in lieu of the trends of the pronouncements the position does not seem to alter in the near future.
- 1.6.3 Further while granting interest in decrees, the Courts have implemented the condition of reasonability and equity, apropos to Section 34 of CPC.
- 1.6.4 In case it is the intention of the parties that no interest is to be charged upon default or upon delay in payments, it shall be explicitly enumerated in the contract rather than leaving it for the interpretation of the Tribunals or Courts, for the best interest of the parties.
- 1.6.5 Further, it is to be borne in mind that such interest prohibitory clauses shall be pleaded and brought on record before the Tribunal and/or Courts for the clauses to be applicable during the adjudication of grant of interest. In a considerably recent judgment passed on dated 25.05.2023 in *M/s Mahesh Construction -v/s- Municipal Corporation of Delhi & Anr.* (2023 SCC OnLine Del 3192), the Hon'ble High Court of Delhi had held that explicit clauses barring payment of interest by parties upon delayed payment cannot in any way curtail the powers of the Arbitrator to grant interest under Section 31(7) of the 1996 Act. It is based upon the finding

that the clause is not debarring the Arbitrator to grant interest rather it is a restrictive component upon the contractual parties to claim interest.

1.7 Conclusion

- 1.7.1 The parties executing a contract must ensure that there are express provisions in the contract barring interest. Particular interest prohibiting clauses for specific situations can be incorporated, however the same shall be reasonable and concurring to the principles of natural justice.
- 1.7.2 *Pendente Lite* interest can be barred if mutually agreed between the parties provided the same is rational *de jure*, otherwise Courts have discretionary powers to deem the barring clauses as arbitrary and may proceed to grant interest.
- 1.7.3 According to Section 31(7) of the 1996 Act, an Arbitrator is competent to grant pre-award and post-award interest, unless otherwise explicitly agreed by the contracting parties. Unlike Courts, an Arbitrator is bound by the terms of the contract, hence the explicit provisions in a contract shall have paramount primacy in cases of Arbitration.

2. LD vs Price Discount vs Penalty - Regime, practical issues and recent legal development

2.1 Introduction

2.1.1 When it comes to contractual agreements, parties often include provisions that outline the consequences of a breach. Three common approaches in this regard are liquidated damages, price discounts, and penalties.

2.1.2 These remedies play crucial roles in commercial contracts since as per law, when there is a breach of contract, the injured party is entitled to recover reasonable monetary compensation from the breaching party.

2.1.3 Indian jurisprudence recognizes and differentiates between these remedies, as they have varying legal implications. In this article, we will explore and compare these three approaches to understand their purposes, implications, and considerations in contractual agreements.

2.2 Understanding The Remedy

2.2.1 Liquidated Damages:

- a. Section 74 of the Indian Contract Act, 1872 ("**Contract Act**") has two legs, wherein the first leg, pertaining to the remedy of damages allows contracting parties to predetermine a fair and reasonable sum, being the maximum sum, that the party at fault must pay to the affected party for any contractual breach.
- b. It is pertinent to note that Section 74 does not employ the term liquidated damages but only damages. However, Indian jurisprudence in this regard has incorporated the remedy of liquidated damages in the scope of Section 74 due to their similar underlying principle.
- c. Section 74 is read conjointly with Section 73 of the Contract Act, which prescribes the general principles for awarding reasonable damages, whereby the loss or damage caused to the injured party should arise in the usual course of things and that such loss or

damage was contemplated by the parties to be likely to result from such breach.

- d. In *SAIL v. Gupta Brother Steel Tubes Limited* [(2009) 10 SCC 63], the Hon'ble Supreme Court observed that where the specific breaches alleged by the injured party did not fall within the agreement specifying damages for certain types of contractual breaches then Section 74 will not be attracted, establishing the requirement to read both sections *in tandem*.
- e. In *Maula Bux v. Union of India* [1969 (2) SCC 554], the Apex Court observed that the expression "whether or not actual damage or loss is proved to have been caused" covered different classes of contracts where compensation assessment can be impossible for the courts.
- f. Similarly, in *Kailash Nath Associates v. DDA* [(2015) 4 SCC 136], it was propounded that the proof of loss or damage is *sine qua non* for payment of compensation under Section 74.
- g. In *ONGC v. Saw Pipes Ltd.* [(2003) 5 SCC 705], the Hon'ble Supreme Court held that the party claiming liquidated damages discharges the burden of proving that the stipulated pre-determined sum was not a reasonable assessment.
- h. In *BSNL v. Motorola India (P) Ltd.* [(2009) 2 SCC 337], the Hon'ble Supreme Court has upheld the jurisdiction of the arbitrator to ascertain the responsibility for the delay caused in order to quantify the liquidated damages actually payable.
- i. In *Mitra Guha Builders (India) Company v. ONGC* [(2020) 3 SCC 222], the Hon'ble Supreme Court upheld the Division Bench's judgment stating that the liquidated damages clause in the contract was not in the nature of penalty and the same could be adjusted in the final bill payable to the contractor.
- j. Liquidated damages is one of the most important aspects in contracts, especially in an era where the emphasis is on quick and efficient dispute resolution. It serves several practical purposes such as, *inter alia*, avoiding litigation where possible; allows

predetermining liabilities since proving actual loss can be tedious and expensive in itself; avoids the risk of under-compensation; and simultaneously being reasonable in nature.

2.2.2 Penalty:

- a. The second leg of Section 74 of the Contract Act provides the remedy of “penalty”. In *K.K. Subbarama Sastri v. K.S. Raghavan* [(1987) 2 SCC 424] the Hon’ble Supreme Court noted that the stipulation, being in the nature of penalty, acts *in terrorem*, i.e., to punish the breaching party or to deter them from breaching any contract term.
- b. In *Punj Lloyd Ltd. v. IOT Infrastructure and Energy Services Ltd.* [2018 SCC OnLine Bom 19741], the Hon’ble Bombay High Court noted that Indian law in regard to penalty takes a departure from the English common law doctrine, which follows that parties cannot be penalized for contractual breaches but can only be awarded the genuine pre-estimated sum, i.e., liquidated damages.
- c. The Hon’ble Allahabad High Court in the old case of *Nait Ram v. Shib Dat* [1882 (Vol. V) ILR 238] propounded that the wording of Section 74 is wide enough to include both damages and penalty, regardless of the distinction between the two.
- d. In *Fateh Chand v. Balkishan Dass* [AIR 1963 SC 1405], the Hon’ble Supreme Court has observed that the Indian legislature has done away with the English common law and introduced a uniform provision in regard to both liquidated damages and penalty. It would be useful to reiterate here that Section 74 only uses the term damages.
- e. Indian courts while assessing damages, whether as liquidated damages or penalty, only have to pay heed to the principle that the amount so payable to the affected party cannot exceed the sum stipulated in the contract.
- f. In *3i Infotech Limited v. Tamil Nadu e-Government Agency & Anr.* [2019 SCC OnLine Mad 33295], the Hon’ble Madras High Court highlighted the distinguishing factor between liquidated damages

and penalty, wherein if the stipulated pre-determined sum resembles a fair assessment of loss, then the same is to be construed as liquidated damages, otherwise, as penalty.

- g. In other words, liquidated damages is a fair and proportionate assessment of the anticipated loss pre-estimated at the time of contract formation, whereas penalty does not bear any such adjectives and is a uniform, and often disproportionate, stipulation regardless of the gravity of breach.

2.2.3 Price Discount:

- a. Real world instances suggest that in commercial contracts, most breaches occur in respect of compliance with the contract delivery dates by the contractors or suppliers. The foregoing premise is better encapsulated by the phrase – “time is the essence of the contract”, the same forming a ground for compensation.
- b. However, to remedy the situation, the affected party, i.e., Owner or Buyer, may accept delivery of work beyond the contractual delivery date with imposition of the stipulation prescribing predetermined price reduction (or liquidated damages).
- c. Similar, but not identical, to the principle of damages is the remedy of Price Discount or Price Reduction. Price Discount is traditionally a civil law remedy, wherein the Owner is entitled to reduce the contractual price payable to contractor, as per the stipulated calculation mechanism, in the case the project completion is not achieved by the contractual delivery date.
- d. The underlying principle is that the Owner may keep the delayed work and the same results in the contract being adjusted to adapt to the changed circumstance. When compared with liquidated damages, the major difference lies in the fact that the remedy of Price Discount especially applies in cases where payment liability is to be effected on a later date. It allows the Owner to reduce the contract price before the payment has been made to the contractor party, otherwise, the Owner claims the differential amount from the contractor.

- e. The remedy of Price Discount is effectuated solely at the discretion of the Owner without having to first satisfy any need with regard to contractor's consent for reduction in price or securing a mandate from any court or tribunal. In case of liquidated damages, often the injured party claims the damages but such claim is not liquidated until the breaching party has consented or the court grants a decree to that effect.
- f. It is also worth noting the difference in calculation methodologies between liquidated damages and price discount, wherein the focal point for the latter is the conclusion date of the contract. For practical purposes, the contractor instead of being granted "extension of time" is only granted permission to work beyond the scheduled contract date. The same allows Owner to accept the delayed work and to impose Price Discount starting from the end of the original contract delivery date.
- g. However, similarity with liquidated damages lies in the fact, *inter alia*, that both remedies are proportional in nature. Both remedies represent what is a fair and genuine pre-estimate of the loss that would be incurred by the Owner due to the delay by contractor.
- h. For practical reasons, Indian courts tend to apply the principles of damages also to price discount. In *Indian Oil Corporation Ltd. v. Fabtech Works and Constructions and Another* [2019 SCC OnLine Mad 38764], the hon'ble Court held that the injured party cannot arbitrarily dispense with the requirement to prove damage or loss (re: *Kailash Nath*) and circumvent the laws of liquidated damages merely by using the term, price adjustment.

2.3 Adoption by Oil Manufacturing Companies

- 2.3.1 The remedy of Price Discount has been adopted by Indian Oil Corporation Limited ("IOCL"). In general, Clause 4.4.0.0 of the General Conditions of Contract ("GCC") contains the provisions regarding levy of Price Discount, wherein the same imposes discount having a certain percentage for every week the contract delivery is delayed by. The price discount also comes with a stipulated ceiling value, limiting the contractor's liability. In

addition, Clause 4.4.2.2 of GCC expressly differentiates price discount from the remedies contemplated in Section 74 of the Contract Act.

- 2.3.2 In a similar fashion, Hindustan Petroleum Corporation Limited (“**HPCL**”) also levies Price Discount for delay in contract completion, wherein the provisions in this regard find their way in Clause 10 of the General Terms and Conditions of Works Contract. Sub-clause (v) explicitly states that the Price Discount represents a genuine pre-estimate of damages, highlighting the overlap with liquidated damages.
- 2.3.3 In the case of Bharat Petroleum Corporation Limited (“**BPCL**”), its Clause 22 of the GCC contains the provisions on liquidated damages, although having uncanny similarity with the provisions on Price Discount. The same again presents an interesting illustration of the overlaps between the two regimes.
- 2.3.4 For ease of reference, we have annexed the relevant contract terms of the abovementioned OMCs and the same is marked as **Annexure “A1” at Page No 14 (IOCL), Annexure “A2” at Page No 15 (HPCL) and Annexure “A3” at Page No 16 (BPCL).**
- 2.3.5 As such, due to the nature of Price Discount and its resulting implications, the OMCs have also incorporated stipulations that easily allow them to deduct the contractors’ liabilities in respect of Price Discount from the bills of the contractor as well as from the amounts under hold by the OMCs such as Security Deposit and/or Bank Guarantees.

2.4 Conclusion

- 2.4.1 In contractual disputes, liquidated damages, price discount, and penalties serve as remedies to address breaches and compensate the injured party. Each remedy has its advantages and considerations, emphasizing the importance of careful drafting and tailored application. By understanding the purposes and implications of these remedies, parties can navigate contractual disputes effectively, preserve the integrity of their agreements as well as safeguard their own interests.

Annexure A1: Relevant contract terms of IOCL

35

.....

.....

.....

.....

.....

.....

.....

.....

4.4.0.0 PRICE ADJUSTMENT FOR DELAY IN COMPLETION

4.4.1.0 The contractual price payable shall be subject to adjustment by way of discount as hereinafter specified, if the Unit(s) is/are mechanically completed or the contractual works are finally completed, subsequent to the date of Mechanical Completion/final completion specified in the Progress Schedule.

4.4.2.0 If Mechanical Completion of the Unit(s)/final completion of the works is not achieved by the last date of Mechanical Completion of the Unit(s)/final completion of the works specified in the Progress Schedule (hereinafter referred to as the "starting date for discount calculation"), the OWNER shall be entitled to adjustment by way of discount in the price of the works and services in a sum equivalent to the percent of the total contract value as specified below namely:

- (i) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 1 (one) week of the starting date for discount calculation - 1/8 % of the total contract value.
- (ii) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 2 (two) weeks of the starting date for discount calculation - 1/4 % of the Total Contract Value.
- (iii) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 3 (three) weeks of the starting date for discount calculation - 1/2 % of the Total Contract Value.
- (iv) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 4 (four) weeks of the starting date for discount calculation - 3/4 % of the Total Contract Value.

- (v) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 5 (five) weeks of the starting date for discount calculation - 1 % of the Total Contract Value.
- (vi) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 6 (six) weeks of the starting date for discount calculation - 1½ % of the Total Contract Value.
- (vii) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 7 (seven) weeks of the starting date for discount calculation - 2 % of the Total Contract Value.
- (viii) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 8 (eight) weeks of the starting date for discount calculation - 2½% of the Total Contract Value.
- (ix) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 9 (nine) weeks of the starting date for discount calculation - 3 % of the Total Contract Value.
- (x) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 10 (ten) weeks of the starting date for discount calculation - 3½ % of the Total Contract Value.
- (xi) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 11 (eleven) weeks of the starting date for discount calculation - 4 % of the Total Contract Value.
- (xii) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 12 (twelve) weeks of the starting date for discount calculation - 4½ % of the Total Contract Value.
- (xiii) For Mechanical Completion of the Unit(s)/final completion of the works achieved within 13 (thirteen) weeks of the starting date for discount calculation - 5% of the Total Contract Value.
- (xiv) The reduction in the contract price hereunder by way of price discount shall in no event exceed 5% (five percent) of the Total Contract Value.

4.4.2.1 The starting date for discount calculation shall be subject to variation upon extension of the date for Mechanical Completion of the Unit(s)/final completion of the works with a view that upon any such extension there shall be an equivalent extension in the starting date for discount calculation under Clause 4.4.2.0 hereof.

4.4.2.2 It is specifically acknowledged that the provisions of Clause 4.4.2.0 constitute purely a provision for price adjustment and/or fixation and are not to be understood or construed as a provision for liquidated damages or penalty under Section 74 of the Indian Contract Act or otherwise.

4.4.3.0 Application of price adjustment under clause 4.4.2.0 above shall be without prejudice to any other right of the OWNER, including the right of termination under Clause 7.0.1.0 and associated clauses there under.

4.4.4.0 Nothing in Clause 4.4.2.0 above shall prevent the OWNER from exercising its right of termination of Contract under Clause 7.0.1.0 hereof and associated clauses there under, and OWNER shall be entitled, in the event of exercising its said right of termination after the last date for Mechanical Completion of the Unit(s) and/or final completion of the works as stipulated in the relative Progress Schedule without prejudice to any other right or remedy available to the OWNER, to discount as aforesaid in the contractual price of services in addition to any amount as may be due consequent to a termination under Clause 7.0.1.0 hereof and associated clauses there under.

10. Price reduction

- i) In case of any delay in completion of the work beyond the CDD, the Owner shall be entitled to be paid Price Reduction by the Contractor. The price reduction shall be initially at the rate of 0.5% (half percent) of the total contract value for every week of the delay subject to a maximum of 5% of the total contract value. The price reduction shall be recovered by the Owner out of the amounts payable to the Contractor or from any Bank Guarantees or Deposits furnished by the Contractor or the Retention Money retained from the Bills of the Contractor, either under this contract or any other contract.
- ii) The Contractor shall be entitled to give an acceptable unconditional Bank Guarantee in lieu of such a deduction if Contractor desires any decision on a request for time extension.
- iii) Once a final decision is taken on the request of the Contractor or otherwise, the price reduction shall be applicable only on the basic cost of the contract and on each full completed week(s) of delay (and for part of the week, a pro-rata price reduction amount shall be applicable).
- iv) This final calculation of price reduction shall be only on the value of the unexecuted portion/quantity of work as on the CDD.
- v) Contractor agrees with the Owner, that the above represents a genuine pre- estimate of the damages which the Owner will suffer on account of delay in the performance of the work by Contractor. The Contractor further agrees that the price reduction amount is over and above any right which owner has to risk purchase under Clause 12.4 and any right to get the defects in the work rectified at the cost of the contractor.

Annexure A3: Relevant contract terms of BPCL

22. LIQUIDATED DAMAGES FOR DELAY:

- 22.1 Time is the essence of the contract. In case the contractor fails to complete the whole work within the stipulated period, he shall be liable to pay liquidated damages of 0.5% of the basic value of contract per week and or part thereof of the delay subject to a maximum of 5% of the value of the contract. The parties agree that this is a genuine pre- estimate of the loss/damage which will be suffered by the owner on account of delay on the part of the contractor and the said amount will be payable on demand without there being any proof of the actual loss or damages having been caused by such delay/breach. The owner shall be at liberty to adjust or deduct the said amount of liquidated damages from any amount due to the contractor including Security Deposit. In case where the concluded contract value is different from the original contract value due to the change orders/variation in executed quantities/extension of time, etc., the concluded contract value should be considered for recovery of Liquidated Damages for late delivery/delayed completion.
- 22.2 The owner shall be at liberty to deduct or retain from any amount payable to the contractor periodically, the proportionate or full amount of liquidated damages as the case may be for the delay periodically caused by the contractor.

3. Right of Risk and Cost vis-à-vis Ultimate recovery of amount: Strategy, Implications & Way Forward

3.1 Meaning

- 3.1.1 Risk and cost clause is usually entered into between the parties in advance which contemplates payment of damages against the risk undertaken by a party.
- 3.1.2 Another category is the Risk Purchase Clause which clause ensures that in the event of delay beyond the stipulated period the sale will be completed at the risk and cost of the seller.
- 3.1.3 Alternatively, Risk purchase costs are in the nature of reimbursements claimed by the principal towards costs and expenses incurred for engaging third parties/purchasing materials from third parties and includes additional costs incurred to avoid delay in completion and/ or mitigate further delay.
- 3.1.4 The Bangalore District Court in *M/s Bharat Heavy Electricals Limited vs. Tecpro Systems Limited* (Com.AS.No.160/2017& Com.AS.No.190/2017) confirmed the legal principle that liquidated damages and risk purchase costs may be claimed simultaneously.

3.2 When does risk and cost crystallize

- 3.2.1 A risk and cost claim only arises in the event of a breach or delay in performance of a contract or failure to perform obligations.
- 3.2.2 In *Rlj Ferro Alloys Pvt. Ltd. vs. Steel Authority of India* (2009 SCC OnLine Cal 2488), the Calcutta High Court held that risk purchase clause would have become operative only if the contract would have been terminated which was not done.
- 3.2.3 In *Indian Oil Corporation Ltd v. SPS Engineering Ltd.* (2011) 3 SCC 507 the Bench of J. Raveendran held that once a risk and cost tender is issued, then, the amount which is to be claimed becomes crystallized when the risk and cost tender at a higher cost is awarded. Once a higher cost of work is known as compared to the cost of the work for the earlier work with respect to which the earlier contractor was in breach, then not only the amount becomes crystallized but limitation also commences for filing

of the legal proceedings against the person in breach of obligations under the earlier contract.

- 3.2.4 In this case, the contract also specifically mentioned that only the excess cost incurred in final completion of the work as compared to what would have been paid to the original contractor, can be claimed under the risk and cost clause.
- 3.2.5 The Madhya Pradesh High Court in *CMI Limited vs. Union of India (Arbitration Appeal No.13 Of 2017, 9.12.2022)* dealt with an issue of whether the liability of risk purchase tender could be fastened to the defaulting party although the subsequent tenderer also failed to supply in terms of the tender. The Court held that when cost was not actually incurred under the risk and cost tender, the party could not have claimed risk and cost from the previous tenderer.

3.3 Elements of risk and cost

- 3.3.1 *Anil Kumar and Company v. State of MP; (2017) SCC OnLine MP 1969*: As the petitioner failed to complete the work within the extended time, the contract was terminated and the work was given to another agency at the risk and cost of the petitioner. Since the petitioner did not challenge the termination of contract, held that it does not lie with the petitioner to question the recovery of the amount incurred by the respondent to complete the incomplete work.
- 3.3.2 Under similar facts in *Chandragiri Construction vs. State of Kerala [(WP(C).No. 8421 of 2011 (C), 9.08.2012]*, the Court held that although the termination of contract was not challenged, the automatic imposition of the risk and cost clause was abrupt and not clear from the terms. The respondent was directed to consider the contentions of the petitioner before the imposition of the risk and cost as to whether the delay could be attributed to the fault of the petitioner.
- 3.3.3 In *Union of India vs. Modi Industries Limited*, the Delhi High Court held that the party claiming risk purchase cost would be under the obligation to prove their claim of risk purchase loss and that the same is valid and in accordance with law.
- 3.3.4 In *Vishnu Aggarwal vs. Hindustan Petroleum Corporation 2019 SCC OnLine Del 9300*, the Court observed that the Arbitrator had allowed the risk and cost claims of HPCL on the ground that contractor was given ample

opportunity but failed to perform the contract and the purchase order provided for a risk and cost clause. HPCL got the job completed through third party at risk and cost of the Claimant. The Court however remanded the matter back to the Arbitrator on the ground of vagueness of the amounts to be adjusted between the parties but did not question the radical behind allowing the risk and cost claims.

3.4 Documents in support of risk and cost

- 3.4.1 The case laws relied upon point to the requirement of documents evidencing the delay on the part of the contractor or seller and a corresponding clause under the terms of the contract contemplating that the work undertaken beyond the delayed period would be at the risk and cost of the contractor.
- 3.4.2 In *N.M. Narayan Nair vs. Divisional Forest 2013 SCC OnLine Ker 18625*, the Court allowed the imposition of risk and cost and recovery of the balance amount on the ground that the terms of the agreement clearly provided for the same.
- 3.4.3 In *Vale Australia Pty Limited vs. Steel Authority of India Limited (O.M.P. 414/2011, 30.03.2012)*, the petitioners contended that the respondent had failed to document that any risk cost at all was incurred in making the risk purchases beyond the period of delay. The Delhi High Court held that since the contract clearly contemplated payment of risk purchase costs, the respondent cannot be said to have waived such claim simply because it was asking the petitioner to comply with its obligations while making the risk purchase. Further, the risk purchase cost was not in the nature of general damages or liquidated damages, it was a clear claim arising out of the terms of the contract.
- 3.4.4 The Court also relied on the legal principle that a party suffering a breach of contract must be resituated to the same position had the breach not occurred and held that risk purchase is in a way a species of the same principle.

3.5 Steps / pre-requisite for claiming risk and cost

- 3.5.1 In the facts of *Gargson Builders vs. Union of India (2009 SCC OnLine P&H 9238)*, the claims against dispute were to be referred to arbitration within the period of 180 days. The Court held that the dispute in respect of execution of work at the risk and cost of the petitioner had arisen after

the payment of the final bill and hence it would not be bound by the 180 days limit. The arbitrator was directed to consider the risk and cost claim.

- 3.5.2 The parties must be well informed on the claim management issues and be aware of the probability of happening of unforeseen circumstances that may affect the performance of the contract. This would ensure ease in materializing the claims at initial stages. Risk purchase or risk and cost clauses in a contract are imperative for a party to be able to claim the same. The party must also be well informed on whether they seek a risk and cost clause or a performance guarantee clause.
- 3.5.3 Where such clause is present, the parties must be cautious in following the procedure there under such that the clause is invoked in the correct manner and within the limitation period.
- 3.5.4 A post-contract management vertical of the Ministry of Defence has defined such exercise in simplified form as: “While initiating risk purchase at the cost and expense of the Seller, the Buyer must satisfy himself that the Seller has failed to deliver and has been given adequate and proper notice to discharge his obligations. Whenever risk purchase is resorted to, the Seller is liable to pay the additional amount spent by the Government, if any, in procuring the said contracted goods/ services through a fresh contract, i.e. the defaulting Seller has to bear the excess cost incurred as compared with the amount contracted with him. Factors like method of recovering such amount should also be considered while taking a decision to invoke the provision for risk purchase. The seller defaulting in supply should not be allowed to participate in such tender.”
- 3.5.5 Copy of the risk and cost clause of IOCL, BPCL and HPCL is annexed herewith and marked as **Annexure “B” at Page No. 22.**

Annexure B1: Risk and Cost clause of IOCL

IOCL GPC Clause 12.4

- 12.4 Without prejudice to its rights under Clause 12.3 hereof and to entitlement to discount(s) accrued in terms thereof and in addition thereto, IOCL may at any time after the expiry of the stipulated date(s) of Delivery in respect of any Material(s), at its discretion terminate in whole or part the Contract in respect of the undelivered Material(s) or any of them and either purchase such Material(s) from any other available source at the risks and costs of the Vendor and recover from the Vendor any additional cost incurred by it on such purchase or recover from the Vendor without such purchase the difference between the market and contract price of such Material(s) on the date of termination of Contract relative thereto.

IOCL GCC Clause 7.0.9.0

- 7.0.9.0 Upon termination of the Contract, the OWNER shall be entitled at the risk and expense of the CONTRACTOR by itself or through any independent CONTRACTOR(s) or partly by itself and/or partly through independent CONTRACTOR(s) to complete and/or get completed to its entirety the work as contemplated in the scope of work and to recover from the CONTRACTOR in addition to any discounts, compensations or damages that the OWNER may in terms hereof or otherwise be entitled (including price discount within the provisions of Clause 4.4.0.0 and liquidated damages under Clause 7.0.7.0 hereof) to the difference between the amounts as would have been payable to the CONTRACTOR in respect of the work(s) (calculated as provided for in Clause 6.2.1.0 hereof read with the associated provisions there under and Clause 6.3.1.0 hereof) and the amount actually expended by the OWNER for completion of the entire work(s) as aforesaid together with 5% (five per cent) of the said amount expended by the OWNER for completion of the entire work(s) to cover OWNER's additional administrative and supervision charges, and in the event of the latter being in the excess of the former, the OWNER shall be entitled (without prejudice to any other mode of recovery available to the OWNER) to recover the excess from the Security Deposit or any monies due or becoming due to the CONTRACTOR.

Annexure B2: Risk and Cost clause of BPCL

BPCL GPC Clause 21

21. **RISK PURCHASE CLAUSE:**
BPCL reserves the right to curtail or cancel the order either in full or part thereof if the vendor fails to comply with the delivery schedule and other terms & conditions of the order. BPCL also reserves the right to procure the same or similar materials/equipment through other sources at vendor's entire risk, cost and consequences. Further, the vendor agrees that in case of procurement by the owner from other sources the differential amount paid by the owner shall be on account of the vendor together with any interest and other costs accrued thereon for such procurement.

BPCL GCC Clause 24.2

- 24.2 In case a situation is brought about by the contractor warranting termination/off-loading of the whole or any part of the work for any reason whatsoever, the Company/owner shall have the liberty and right to entrust/engage/award the work so terminated/off loaded at the risk and cost of the contractor to any other agency/contractor by adopting any mode of inviting tenders, i.e. open/limited/single party/negotiation basis etc. in order to ensure completion of the work as per the schedule or at the quickest possible time.

Annexure B3: Risk and Cost clause of HPCL

- 12.4 In case of Termination of the contract, Owner shall have the right to carry out the unexecuted portion of the work either by themselves or through any other contractor(s) at the risk and cost of the Contractor. In view of paucity of time, Owner shall have the right to place such unexecuted portion of the work on any nominated contractor(s). However, the overall liability of the Contractor shall be restricted to 100 % of the total contract value.



Technology brings Transparency

About MCOAPP

MCO Legals functions with a well-developed infrastructure and advanced technology. Our own ERP software, 'MCOAPP', enables us to be "paperless" with all records digitalised since 1968. It enables our team to be a part of the "office" from anywhere in the globe thereby ensuring continuous flawless service to our clients - with just a click away!

MCOAPP also gives access to clients to come to the same platform. It makes information about every case accessible to the clients, anywhere, anytime ensuring unblemished and transparent services. MCOAPP has a dedicated module called 'Client Care', which can only be accessed by a client, and all details regarding his cases e.g. documents, status, bills paid and unpaid, outstanding statement etc. can be obtained therefrom. Every detailed update or progress about a case is informed to the clients via sms/mail services through MCOAPP.

Download from



MCOAPP is mobile friendly too (only Android).



B. Day-1 (19.6.2023) SESSION-2: (1500 Hrs. to 1800 Hrs.) THEME BASED PRESENTATION BY OMC

4. Nomination of Officer under LM Act- Amendment to Rules & Way Forward

4.1 Background and Introduction

4.1.1 On 4th October 2022, in exercise of the powers conferred by sub-section (1), read with clauses (c), (f), (h), (i) and (s) of sub-section (2) of section 52 of the Legal Metrology Act, 2009 ("the Act"), the Department of Consumer Affairs, Government of India *via* the Legal Metrology (General) Amendment Rules, 2022 ("Amendment Rules") amended the Legal Metrology (General) Rules, 2011 ("Rules").

4.1.2 The press release issued by the Government stated that the said amendment was introduced for ease of doing business and reducing the compliance burden for the industries.

4.2 The Act: In brief

4.2.1 The Act was preceded by the Standards of Weights and Measures Act, 1976 (60 of 1976) and the Standards of Weights and Measures (Enforcement) Act, 1985 (54 of 1985) which are now repealed with the coming into force of the Legal Metrology Act on 13th January 2010.

- The Object of the Act is:
 - To establish and enforce standards of weights and measures, and
 - To regulate trade and commerce in weights, measures and other goods which are sold or distributed by weight, measure or number.

4.2.2 As per section 2(g) of the Act, "Legal Metrology" means *that part of metrology which treats units of weighment and measurement, methods of weighment and measurement and weighing and measuring instruments, in relation to the mandatory technical and legal requirements which have the object of ensuring public guarantee from the point of view of security and accuracy of the weighments and measurements.*

4.3 Nomination of a Responsible Person: Pre-Amendment

- 4.3.1 Under sub-section (2) of section 49, *any company may, by order in writing, authorise any of its directors to exercise all such powers and take all such steps as may be necessary or expedient to prevent the commission by the company of any offence under the Act.*
- 4.3.2 Explanation to section 49(2) provide that *where a company has different establishments or branches or different units in any establishment or branch, different persons may be nominated under this sub-section in relation to different establishments or branches or units and the person nominated in relation to any establishment, branch or unit shall be deemed to be the person responsible in respect of such establishment, branch or unit.*
- 4.3.3 In pursuance of section 49(2), the Government has formulated Rule 29 of the Rules to prescribe the manner of nomination of a director. It requires a company to intimate the authorized officer, the name and address of the “director” nominated under section 49(2) in the format specified in the Thirteenth Schedule. The aforesaid format also refers to nomination of the “director” by the company.

4.4 Nomination of a Responsible Person: Post-Amendment

- 4.4.1 Via the Amendment Rules, a proviso was inserted in Rule 29 which provides as under:

“Provided that where a company has different establishment or branch or different unit in any establishment or branch, an officer who has the authority and responsibility for planning, directing and controlling the activities of the establishment or branch or different unit may be nominated under sub-section (2) of section 49 to be in-charge of and be responsible for the conduct of business of the establishment, branch or unit thereof.”

- 4.4.2 Simultaneously, the phrase “(name and designation of the officer nominated under rule 29)” have been substituted in place of the word “director” in the format prescribed under the Thirteenth Schedule.

- 4.4.3 On a primary reading of the above proviso, it is discernible that any officer other than a director can also be nominated by a company under Section 49(2) provided such officer has the authority for planning, directing and controlling the activities of the business.

4.5 Issues

- 4.5.1 **Reading the Act and Rules together:** On reading section 49(2) and the explanation appended to it, it is clear that the Parent Act already provided for the casting of the responsibility on the person other than the director in case of a company having different establishments, branches or units. It was just the General Rule which restricted its applicability to the Directors only, as clear from ream reading Rule 29 and para 1 of the 13th Schedule. Therefore, the amendment of the relevant rules has made the provision of the Act and the Rules in synchronization as far as the nomination of the person is concerned.
- 4.5.2 **Company having only 1 establishment, branch or unit:** It is unclear if the provisions are applicable to a company having only one establishment, branch or unit.
- 4.5.3 **Nomination of a person for 2 or more establishments, branches or units:** It is also required to be clarified if the company having different establishments, branches, or units can nominate a person for 2 or more such establishments, branches or units.
- 4.5.4 **Whether an additional requirement of Nomination:** Another concern that has been raised is that - whether the person who is nominated for an establishment, branch or unit is responsible for such establishment, branch or unit in addition to the Director who is responsible for the overall functioning of the company. On reading the press release by the Government makes it clear that the amendment is meant to facilitate the companies to nominate a person who is actually responsible for the activities of an establishment or branch of the company in place of Director of the Company, who is not directly involved in day-to-day activity of that establishment or branch thereof.

4.6 Conclusion

4.6.1 Barring certain issues as mentioned above, the purpose of the Amendment seems to be noble, pro-business and industry-friendly. Rightly, the amendment has been introduced keeping in mind the ease of doing business and reducing the compliance burden for the industries. The only factor that has to be kept in mind by the companies is to make an informed nomination of the director for the company or any other person for the establishment, branch or unit considering the grave repercussions that may arise in case an offence is committed.

5. Implications of Section 18 & 19 of MSME Act including recent judicial pronouncements

5.1 Introduction

- 5.1.1 The Micro, Small and Medium Enterprises Development Act, 2006 (MSME Act) aims to protect the interests of micro, small and medium enterprises.
- 5.1.2 The MSME Act provides for measures for promotion and development and grant of credit facilities to the micro, small and medium enterprises.
- 5.1.3 The Act also creates an obligation of interest on delayed payments to micro, small and medium enterprises (msme/supplier), i.e., whenever a buyer fails to make payments to the seller, he is liable to pay compound interest on the amount due for the delayed period (Section 16 of the MSME Act).

5.2 Sections 18 & 19

- 5.2.1 When any dispute arises between parties with regard to an amount due for goods supplied or services rendered and the party to whom the amount is due is an MSME then a reference of such dispute may be made to the Micro and Small Enterprises Facilitation Council (Council) under Section 18 of the MSME Act.
- 5.2.2 The Council is to first conduct conciliation between the parties to the dispute, either by itself or in assistance of an alternative dispute resolution institution.
- 5.2.3 The conciliation is to be conducted as if a reference for the same has been made under the Arbitration and Conciliation Act, 1996 (A&C Act). Thus, sections 65 to 81 of the A&C Act shall be applicable to the conciliation conducted under this section.
- 5.2.4 If the conciliation fails and the parties do not reach any settlement then the dispute shall be referred to arbitration. The arbitral tribunal may either be the Council itself or it may be referred to any dispute resolution Centre.

- 5.2.5 In this case, the provisions of A&C Act would be applicable and the arbitration would be conducted as if it was in pursuance of an arbitration agreement between the parties under section 7(1) of the A&C Act.
- 5.2.6 The applicability of the A&C Act is strengthened by the express language of the MSME Act.
- 5.2.7 Section 19 states that any court shall not entertain an application for setting aside of an award, decree or order made in relation to the dispute between the buyer and supplier in case where a buyer has made such application unless 75% of the decretal amount is deposited with the court.
- 5.2.8 The court may also decide such percentage of the deposited amount to be paid to the supplier during the pendency of the application as it considers reasonable.
- 5.2.9 The conditional payment under Section 19 does not apply when the application for setting aside is filed by the supplier, i.e. the MSME.

5.3 Judicial pronouncements

- 5.3.1 There have been differing views of courts on the issue of whether an arbitration agreement between the parties would stand nullified by reason of Section 18 of the MSME Act or would the agreement survive.
- 5.3.2 In *Steel Authority of India Ltd. vs. Micro, Small and Medium Enterprises Facilitation Council* AIR 2012 Bom 178 the Court held that the provisions of the MSME Act do not render the arbitration agreement ineffective. *Porwal Sales vs. Flame Control Industries* 2019 SCC OnLine Bom 1628 also held that had the intention of the legislature been to not give any effect to the arbitration agreement between the parties, it would have so expressly provided.
- 5.3.3 Diametrically opposite view was taken in *National Projects Construction Corporation Limited vs. West Bengal State Micro Small Enterprises Facilitation Council* 2017 SCC OnLine Cal 263 which held that arbitration agreement between the parties stands superseded by reason of the statutory provisions and authority provided under the MSME Act. This

position was confirmed in *M/s. Silpi Industries vs. Kerala State Road Transport Corporation 2021 SCC OnLine SC 439*.

- 5.3.4 It was clarified in *Jharkhand Urja Vikas Nigam* that the procedure of dispute resolution provided under Section 18 of the MSME Act was to be strictly followed. It was held by the Supreme Court that it was mandatory for the Council to conduct conciliation first and only when the conciliation fails then the Council may undertake the dispute for arbitration. The Council cannot go on to pass an order of payment directly where the buyer did not appear in the conciliation process since conciliation is a settlement process.
- 5.3.5 In *Gujarat State Civil Supplies Corporation Ltd. vs. Mahakali Foods Pvt. Ltd 2022 SCC OnLine SC 1492* the Court held that the Council would be competent to act both as a conciliator as well as an arbitrator because the bar under Section 80 the A&C Act stands superseded by the provisions of the MSME Act since the latter is a specialized legislature.
- 5.3.6 In *Tirupati Steels vs. Shubh Industrial Component (2022) 7 SCC 429*, the Supreme Court relying on *Goodyear India Limited vs. Norton Intech Rubbers (P) Ltd.*, held that the condition of depositing 75% of the awarded amount for consideration of the setting aside application was mandatory requirement and not merely directory in nature. The Court allowed the buyer to make the deposit in instalments since it was a huge amount and could create financial burden on the buyer.
- 5.3.7 The limitations of the MSME Act, however cannot be ignored. Section 18 only applies to disputes that relate to the amount due and hence MSME cannot approach the Council in relation to other grievances.

5.4 Conclusion

- 5.4.1 The purpose of arbitration is speedy resolution of disputes. The legislative intent for referring the dispute in relation to a MSME to arbitration thus must be to ensure that payments to MSME are not delayed.
- 5.4.2 Delayed payments hamper the smooth functioning of business as MSME run on limited amount of capital unlike large businesses.

- 5.4.3 The provision for deposit of money under Section 19 of the MSME Act also gives wings to this view. To avoid continuation of litigation and further delays in payments even after having an award in its favour, the msme have been provided with an additional level of protection of deposit of 75% of the decretal amount where a challenge to the decree is made by the buyer.
- 5.4.4 This has been inserted as a mandatory condition in the enactment.
- 5.4.5 Section 18 (5) of the MSME Act provides that a reference of the dispute must be decided within a period of ninety days from the date of making such reference.
- 5.4.6 Thus, the clear implication of Sections 18 and 19 of the MSME Act is to ensure speedy recovery of dues to the msme and aid maintenance of liquidity in its business to promote the overall development of such enterprises which contribute hugely to the economic state of the country.
- 5.4.7 It also gives a sense of importance to the issues of such enterprises which were earlier an unregulated sector and struggled with financial resources by reason of the very nature of the business. Huge amounts of dues used to cause further hindrance to the owners of the msme. This is in sync with the object and purpose of the MSME Act to facilitate promotion and development of msme.
- 5.4.8 Constitution of a dedicated Council for adjudicating the disputes of msme also promotes the clear intention and implication of Sections 18 and 19 of the MSME Act.
- 5.4.9 It must also be noted that the members of the Council are technical members and not judicial members. In light of *Gujarat State Civil Supplies*, the Council acting both as the conciliator and arbitrator creates an impediment in the entire process. While conciliation is not as technical, arbitration does contemplate following of procedures as provided under the A&C Act. In that sense, the practical application of the decision does not seem feasible. The Council mostly fails to appreciate evidence before it and strictly follows the literature of the MSME Act, the provisions whereof tilt in favour of the supplier/msme alone.

5.4.10 The remedy of challenge also does not seem to be fruitful as the courts merely set aside the award on finding lacunas therein or remit the award back to the Council which merely leads to duplication of the entire process and costs.

5.4.11 Thus, the interpretation of the court may seem to be in line with the statute but does not entail the issues that arise in implementation/execution.

5.4.12 Further, numerous litigations before courts seeking interpretation of the provisions of the MSME Act and distinct views of the courts has in many ways frustrated the implications of Sections 18 & 19 and thus there is a need for legislative clarification on these provisions.

6. How to determine/compute Mesne Profit: Strategy to minimize to Liability

6.1 Introduction

- 6.1.1 Mesne profit is a category of damages or compensation that is awarded in cases of infringement of a legal right. It is a remedy against illegal possession of a property.
- 6.1.2 A lawful owner of a property is entitled to a compensation or a sum for the period during which an unlawful owner was in possession of such property. This compensation or sum is termed as mesne profits.
- 6.1.3 Mesne profits include the rent or any other profits the unlawful owner may have gained during the period of unauthorized occupation either by creating a tenancy on such property or by being in possession of such property or even by merely occupying the said property.

6.2 Code of Civil Procedure on Mesne Profits

- 6.2.1 Section 2(12) of the CPC, 1908 defines mesne profits as *“those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession”*.
- 6.2.2 A claim for mesne profits is ordinarily made in a suit for recovery of immovable property or suit for eviction from an immovable property.
- 6.2.3 Under Order VII Rule 2, a suit claiming an amount must mention the precise amount. However, in cases where the suit is for claiming mesne profits or other amounts which cannot be fairly estimated then the plaintiff may mention an approximate amount or call upon the court to measure the amount after taking all unsettled accounts between the parties into consideration.
- 6.2.4 Under Order XX Rule 12, the Court may also direct an inquiry for ascertainment of the amount of mesne profits payable.

- 6.2.5 The burden of proof in cases where mesne profits are claimed, is upon the claimant, i.e., the claimant is to show that the other party is in illegal possession of the property of which the claimant is the rightful owner.

6.3 How to determine/compute mesne profits

- 6.3.1 The calculation of mesne profits has arisen as an issue in cases when the advantage gained by the unlawful owner during the period of unauthorized occupation is not monetary or capable of being calculated in figures.
- 6.3.2 This is also because the Code of Civil Procedure or any other law which governs property rights is silent on the issue of basis of calculation of mesne profits.
- 6.3.3 In *Laljee Shahay Singh vs. F.C. Walker* 1902 SCC OnLine Cal 109, the benefit during the period of illegal occupation accrued both to the original owner as well as the trespasser. The Court hence held that mesne profits should be calculated on the basis of fair rent and not on the basis of value of production made on the land.
- 6.3.4 In *Rai Kiran Chandra Roy Bahadur v. Erfan Karikar* 1933 SCC OnLine Cal 310 the Court directed that the mesne profits be calculated on the basis of definition under section 2(12) of the CPC. The Subordinate Judge had directed the mesne profits to be paid on the basis of fair rent. The Court disagreed with this view.
- 6.3.5 It was held that mesne profits are to be ascertained on the basis of the profits actually received or might have been received in ordinary diligence according to the value of property in that area together with the interest on such profits. In this case, the Court observed that the profits would be the actual amount received after deduction of cost of cultivation on the land, rent paid and the cost of maintenance.
- 6.3.6 In *Rattan Lal v. Girdhari Lal* 1971 SCC OnLine Del 74 the Court clarified that the principle of mesne profits is not to compensate the lawful owner in case he has suffered the loss but to see whether the party in possession made profits or could have made profits with reasonable diligence during the period of occupation of the property. The Court held that the rent paid

for such property could be the first basis of calculation of mesne profits, then the profits made by the trespasser if they are higher than the rent paid. [Also, *Phiraya Lal alias Piara Lal vs. Jia Rani* AIR 1973 Del 186]

- 6.3.7 In the calculation of mesne profits, the Supreme Court also included losses incurred as a result of delay in court proceedings. [*Marshall Sons & Co. (I) Ltd. vs. Sahi Oretans (P) Ltd.* (1999) 2 SCC 325]
- 6.3.8 The calculation on the basis of rent payable taking into account the rate of rent that was applicable on such property or other property located in the same area was also approved in *New India Assurance Co. Ltd. vs. M/s. M. Gulab Singh & Sons P. Ltd.* 2018 SCC OnLine Del 6787.
- 6.3.9 In *Hindustan Petroleum Corporation Ltd. vs. Mohanjit Singh* 2019 SCC OnLine Del 9419, the Court held that the computation of mesne profits was rightly made after taking into account the location of the suit premises and other circumstances.
- 6.3.10 The Court also observed that sine the lease deed in this case was 55 years old, an increase of almost 300% on the contractual rate of rent was justified since the area had undergone a tremendous transformation.
- 6.3.11 In *State of W.B. vs. Bireswar Dutta Estate (P) Ltd.* (2020) 20 SCC 558 the Court undertook the exercise of calculating the mesne profits itself.
- 6.3.12 In *Anar Devi vs. Vasudev Mangal* (2022) 7 SCC 504 the mesne profits on the residential property was calculated by reducing the value of a commercial property to 50%. The Court held that the same could not be done and thereafter went on to increase the mesne profits payable to the lawful owner.

6.4 Strategy to minimize liability

- 6.4.1 The primary observation that can be made in this regard from the decisions cited above is that the courts have not focused on the interest component in the calculation of mesne profits and thus liability of interest on mesne profits may be minimized under this argument.

- 6.4.2 It may also be argued that the unlawful owner could not have earned profits with ordinary diligence during the period of possession keeping in mind the nature of the property in question.
- 6.4.3 In *M.C. Agarwal (HUF) vs. Sahara India 183 (2011) DLT 105*, the Court only directed payment of mesne profits at the rate of 15% over and above the contractual rate of rent.
- 6.4.4 Further, mesne profits can only be granted by an order or decree of a court. [*Ramakka vs. V. Negasam AIR 1925 Mad 145*]
- 6.4.5 However, the general precedential observations of the courts in matters of granting mesne profits have always tilted in favour of the lawful owner implying that the liability of mesne profits cannot be ignored by a trespasser in general circumstances. [*Hindustan Motors Ltd. vs. Seven Seas Leasing Ltd. 2018 SCC OnLine Del 11391*]

KNOWLEDGE BANKTM

Always stay curious

About Knowledge Bank

MCO Legals believe and gives utmost importance to knowledge dissemination for which we have a dedicated team of researchers & paralegals under able guidance, carrying out in-depth research in legal field and spreading awareness through its publication - "Knowledge Bank".

MCO's research division works extensively to keep its clients and all subscribers in the loop of all the latest know-how's, events and developments happening in the field of law.



www.mcolegals.in/knowledge-bank



C. Day-2 (20.06.2023) SESSION-1: (930 Hrs. to 1430 Hrs.) OPEN SESSION

7. Vivad se Vishwas II (Contractual Disputes) Likely regime & Advance actions

7.1 Background & Introduction

- 7.1.1 The Procurement Policy Division of the Department of Expenditure (**DoE**), Ministry of Finance, Government of India through its Office Memorandum (**OM**) dated 29.05.2023 has introduced a one-time settlement Scheme called “*Vivad se Vishwas II (Contractual Disputes)*” to effectively settle pending disputes. Copy of the OM dated 29.05.2023 is annexed herewith as **Annexure “C” at Page No. 43**.
- 7.1.2 The Scheme has been introduced in the backdrop of Rule 227A of General Financial Rules, 2017, para 16.4 DoE’s General Instructions on Procurement and Project Management and NITI Aayog’s – “Task Force on Conciliation Mechanism” about the importance of public procurement contracts in the Indian economy and the necessity of Government actions by assisting and supporting the Micro, Small and Medium Enterprises (**MSMEs**) sector.
- 7.1.3 The new-fangled settlement mechanism is brought under the series of ‘*Vivad se Vishwas*’ Scheme, formally announced in the Union Budget 2023-24. The date of commencement of the Scheme shall be 15.07.2023 and the claims under it can be submitted by 31.10.2023.

7.2 Applicability of the Scheme

7.2.1 Parties to the dispute

- a. The Scheme will be applicable in relation to contractual disputes where one of the parties is either Government of India (referred to as “***procuring entities***” in the OM) and the other party is the “***contractor(s)***”, supplying that entity or the government.
- b. In addition to the aforesaid, the Scheme can also be availed by– all autonomous bodies of the Government of India, public sector banks

and public sector financial institutions, Central Public Sector Enterprises, to Union Territories without legislature and all its agencies/undertakings. It is also available to all organisations having 50% shareholding with the government, like Metro Rail Corporations subject to their reservation to opt out of the Scheme with approval of the Board of Directors.

- c. The Scheme will be applicable only to those contractor(s) who wish to participate in the Scheme.

7.2.2 Inclusions And Exclusions in the scheme

- a. The Scheme is applicable to all kinds of procurements including that of goods, services and works, earning contracts wherein government receives money in exchange of goods, services, rights etc. as well as contracts under Public Private Partnership arrangements.
- b. Disputes where Award is by Arbitral Tribunal or Court which is of monetary value will be eligible for settlement. No relief based on specific performance of contract are eligible under the same.
- c. The cases eligible for settlement under the Scheme are only when the Arbitral Award is passed on or before 31.01.2023 or a Court Award is passed on or before 30.04.2023. Furthermore, only applicable to cases involving domestic arbitration, and not international arbitration.
- d. There may be more than one dispute under one contract and each dispute can be claimed separately.

7.3 Payment for settlement under the scheme:

- 7.3.1 When a Court Award has been passed on or before 30.04.2023 – 85% of either the net amount awarded or upheld by the Court or 85% of the amount claimed by the contractor, whichever is less, irrespective of appeal being preferred. A Court Award includes those cases where the parties have approached the Court subject to Arbitral Award. However, interim orders under section 9 of the Indian Arbitration and Conciliation

Act, 1996 shall not be considered as an Award eligible for settlement under the Scheme.

- 7.3.2 When an Arbitral Award has been passed on or before 31.01.2023 – 65% of either the net amount awarded or upheld by the Court or 65% of the amount claimed by the contractor, whichever is less, irrespective of appeal being preferred. An Arbitral Award, for this purpose, will also include an Award passed by the Micro and Small Enterprise Facilitation Council or by a Tribunal appointed on its reference. However, interim orders under section 9 of the Indian Arbitration and Conciliation Act, 1996 shall not be considered as an Award eligible for settlement under the Scheme.
- 7.3.3 In case of counter-claim - The Scheme provides that in case there is a counterclaim (Y) in a dispute, and the same is successful along with the claim (X), then the calculation of the settlement amount would be the net amount awarded (X-Y) and similarly the amount payable under the Scheme would be 85% or 65% of (X-Y).
- 7.3.4 In case of Post- Award Interest - If the Award is not paid or is partially paid within the time stipulated under it (if no time period provided under the Award, the default time period which is interest free shall be 30 days), a simple interest of 9% per annum would be payable on the settlement amount, subtracting the partially paid amount. The interest would be payable for the period beyond the stipulated date in the Award till the date of acknowledgement email (discussed later).
- 7.3.5 The Scheme also restricts the post award rate of interest at 9%, notwithstanding the rate mentioned in the Award. It is to be noted that the Scheme does not interfere with the pre-reference and pendente lite interest and the same would be as mentioned in the Award.
- 7.3.6 In case of Court deposit by procuring entity before filing appeal/challenge, interest payment on amount due, shall be on the amount payable under the Scheme, i.e. on 85% or 65% of Awarded amount. Obligation is casted on the procuring entity to ensure release of Court deposit upon settlement under the Scheme.

- 7.3.7 In case the procuring entities challenge an arbitral Award, 75% of the Award amount has to be paid to the contractor against a Bank Guarantee of equivalent amount before filing of the challenge in Court. Amount paid to the contractor shall be adjusted with the amount due under the Scheme. The reimbursement of Bank Guarantee charges, however, cannot be made to the contractor.

7.4 Procedure for Availing the Scheme

- 7.4.1 The contractors, intending to avail benefits under the Scheme, are to submit their claims through the Government e-Marketplace (**GeM**) website only and for non- GeM contracts of Ministry of Railways, through IREPS.
- 7.4.2 The registered contractor are to list all the eligible disputes which it is intending to settle under Scheme and the procuring entity with whom there is a dispute. The details of dispute to contain information in the manner: contract number, procuring entity/contracting authority, paying authority, net Award amount as per 3.1 or 3.2, claim amount, status of dispute, etc.
- 7.4.3 The procuring entity will be notified in the dashboard of its GeM portal, which shall verify the claims and update.
- 7.4.4 The procuring entity, shall make an offer, within two weeks of receipt of claims, to the contractor for acceptance as per the amount calculated under the Scheme. The offer sent by the procuring entity shall be accepted within 30 calendar days, if the contractor wishes to, or otherwise it can deny, thereafter, the ongoing litigation may continue. The time period for acceptance of the offer is rigid and provides no option for relaxation.
- 7.4.5 The procuring entity would be entitled to amend/ withdraw the offer before it is accepted by the contractor. No discretion is granted to the procuring entity to outright reject an offer of a contractor. Once the offer is accepted, an acknowledgement email shall be sent to both the parties by GeM.
- 7.4.6 After accepting the offer for settlement, the contractor shall within 45 days from the date of the acknowledge, file an application for withdrawal

of case from the Court. Execution of the settlement agreement based on format annexed with the Scheme ("Settlement Agreement") and payments pursuant thereto are required to be done only after the permission to withdraw the case from the Court has been obtained by the contractor and the same has been uploaded on the GeM portal.

- 7.4.7 It is pertinent to note that, when the contractor has instituted the suit in the Court then, only when a document, indicating that the Court has permitted to withdraw the case, is presented by the contractor, then only the settle agreement can be executed between the parties. On the other side, when the procuring entity has instituted the suit, the settlement agreement can be executed within 30 days of submission of withdrawal application, without waiting for any formal permission of the Court.
- 7.4.8 Parties are free to modify the sample Settlement Agreement without changing the core terms. The Settlement Agreement would have the same effect as the settlement agreement drawn after a successful conciliation under the Arbitration Act. Stamp duty of the Settlement Agreement, in all cases under his Scheme, shall be paid by the contractor. The Settlement Agreement shall clearly state that even though the dispute is finally settled, the settlement does not decide on any issue, either of law or of fact, under dispute.

7.5 Other Residuary Provisions

- 7.5.1 Any Court order passed after the cut-off date, i.e. 30.04.2023, and before the settlement under the Scheme would not affect the status of the dispute under the Scheme.
- 7.5.2 The only exception will be if the Court passes such a post cut-off date Award in favour of the procuring entity. In that case, the procuring entity must send a revised offer as per the Court Award.
- 7.5.3 The timelines for the offer and acceptance of the offer shall be followed again for the revised offer sent by the procuring entity. However, the procuring entity's revised offer can only be sent before an acknowledgement email is generated by GeM (which is generated after the acceptance of offer by the contractor) as once an acknowledgment email is generated, it must be honoured and any Court order issued after

such acknowledgement email ought to be ignored for the purposes of this Scheme.

- 7.5.4 In case, the amount of claim availed by the contractor, under the Scheme exceeds Rs. 500 crores, then the procuring entity from its discretion decide not to accept the request for settlement made by the contractor; however, the reasons for denying the same shall be recorded along with an approval of the Secretary concerned or Chief Executive Officer of the procuring entity. Further, the option to deny shall be exercised by the procuring entity in very rare circumstances, only when the case on merits must be dealt with in the appeal and there is high probability of winning in the Court.
- 7.5.5 Further, as per the Scheme the monetary amount liable under the Scheme and any reduction or alteration thereof, shall not be brought in any further litigation. This Scheme is further not available in those cases wherein a settlement by conciliation agreement has already been reached.

7.6 Conclusion

- 7.6.1 In conclusion, the introduction of the new dispute settlement Scheme by the Procurement Policy Division is a significant step towards easing resolution in contractual dispute cases in public procurement matters.
- 7.6.2 The Scheme provides a framework to settle contractual disputes and reduce pendency of such cases in Courts and Tribunal and is a welcome step in the right direction. However, the success of the Scheme would depend on timely consideration and acceptance of settlement proposals made under the Scheme.
- 7.6.3 The exclusion of arbitral Awards/Court orders in International Arbitration matters from the Scheme is surprising since the inclusion of the same would have been in line with the Government's ease of doing business in India initiative.
- 7.6.4 Although the Scheme is promising in as much as it aims to free up financial resources locked up in dispute, it is also seen that the Scheme does not provide a discretion to the procuring entity to outright reject an offer once made by the contractor. The only leeway granted to a procuring entity is

to amend or withdraw the offer made by it after evaluation of the settlement dues under the Scheme, once availed of by the contractor. Moreover, the circumstances leading to a possible withdrawal by the procuring entity or whether a withdrawal would be deemed to mean a discretion to reject offer, is left unclear.

Annexure C: Office Memorandum dated 29.05.2023

No.F.1/7/2022-PPD
Government of India
Ministry of Finance
Department of Expenditure
Procurement Policy Division

264-C, North Block, New Delhi.

29.05.2023.

Office Memorandum

Subject: Vivad se Vishwas II (Contractual Disputes).

The undersigned is directed to refer to Rule 227A of the General Financial Rules (GFRs), 2017 and Department of Expenditure's (DoE's) "General Instructions on Procurement and Project Management" containing instructions to deal with dispute cases. Para 16.4 of the "General Instructions" is reproduced below:

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 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.

2. NITI Aayog had also established a Task Force on Conciliation Mechanism, and had circulated the final report of the Task Force. Following excerpt from the final report is highlighted:

A consideration of even more importance with respect to contracts between Government and Private entities. The same being critical not only to facilitate an overall pro-business environment but also to attract private investment in the country, to encourage private investors to establish and continue short-term and long-term contractual association with the Government, and not be wary of it.

3. It is understood, however, that more efforts are required to clear the backlog of old litigation cases. Such cases are holding back fresh investment, reducing the ease of doing business with the Government, tying up scarce working capital and indirectly reducing competition for newly floated tenders. In this context, after due study of the experience in past cases, Government has decided to implement a one time settlement scheme called "**Vivad se Vishwas II (Contractual Disputes)**" to effectively settle pending disputes.

Applicability:

4. The scheme will apply to contractual disputes where one of the parties is either the Government of India and/ or an organisation detailed below. Apart from Ministries/ Departments, attached and subordinate bodies, notwithstanding anything contained in Rule 1 of the GFRs 2017, the scheme shall also be applicable

- a) to all Autonomous Bodies of the Government of India;
- b) to public sector banks and public sector financial institutions;
- c) to all Central Public Sector Enterprises;
- d) to Union Territories without legislature and all agencies/ undertakings thereof; and
- e) to all organisations, like Metro Rail Corporations, where Government of India has shareholding of 50%; however, these organisations can opt out of the scheme at their discretion, with approval of the Board of Directors.

The above mentioned organisations shall hereinafter be referred to as "procuring entities." The other party in dispute with the procuring entity shall be referred to as contractor(s) hereinafter.

5. Disputes where the award by court/ Arbitral Tribunal (AT) is only for monetary value will be eligible for settlement under this scheme. In case the award stipulates specific performance of contract (either fully or partially); such awards will not be eligible for settlement through this scheme.

6. Cases shall satisfy following criteria to be eligible for settlement under this scheme:

Status of dispute	The award shall have been issued upto the following date
Arbitral Award passed	31.01.2023.
Court Award passed	30.04.2023.

7. The scheme will be applicable only to those contractors who wish to participate in the scheme. Central Public Sector Enterprises (CPSEs) etc., who are contractors to the procuring entities as listed above, are also eligible to submit their claims under this scheme.

8. The scheme shall apply only for cases involving domestic arbitration and cases under international arbitration are not eligible to be settled under this scheme.

9. The scheme shall be applicable to all kinds of procurement including procurement of goods, services and works. The scheme is also applicable to all "earning contracts" (i.e. contracts where government receives money in exchange for goods, services, rights, etc.) as well as contracts under Public Private Partnership (PPP) arrangements.

Amount payable under the scheme

10. The settlement amount that shall be offered to Contractors for various categories of disputes is as under:

Sl. No.	Status of dispute	Settlement Amount
(a)	Court Award passed on or before 30.04.2023. Notes:	85% of the net amount

	<p>i. Case may or may not be under further appeal.</p> <p>ii. Court award will include the cases where the parties have approached the courts directly or approached the court subsequent to arbitral award (under any provision of the Indian Arbitration and Conciliation Act, 1996). However, Interim Orders under Section 9 of the Indian Arbitration and Conciliation Act, 1996, shall not be considered as an award eligible for settlement under this scheme.</p>	<p>awarded/ upheld by the court or 85% of the claim amount lodged by the contractor under this scheme, whichever is lower.</p>
(b)	<p>Arbitral Award passed on or before 31.01.2023.</p> <p>Notes:</p> <p>i. Case may or may not be under challenge/ appeal before a Court.</p> <p>ii. Arbitral Award passed by the Micro and Small Enterprises Facilitation Council (MSEFC) or Arbitral Tribunal appointed on reference by MSEFC under the provisions of the Micro, Small and Medium Enterprises Development Act, 2006, shall also be included under this scheme.</p> <p>iii. However, Interim Orders of the Arbitral Tribunal under any provision of the Indian Arbitration and Conciliation Act, 1996, shall not be considered as an award eligible for settlement under this scheme.</p>	<p>65% of the net amount awarded/ upheld by the court or 65% of the claim amount lodged by the contractor under this scheme, whichever is lower.</p>
Notes for both (a) and (b) as above	<p>1. In case, the award directs 'X' to be paid to contractor and 'Y' to be paid to procuring entity by the contractor, then the net amount awarded shall be (X-Y) and the amount payable under this scheme will be 85% or 65%, as the case may be, of (X-Y).</p> <p>2. In case no payment or only partial payment has been made as per the award within the stipulated time given in the award itself (time should be taken as 30 days in case there is no time stipulated in the award for making payments), simple interest at the rate of 9% per annum will be payable on 85%/ 65% of the net amount awarded, as the case may be, minus the amount already paid, if any, for time period beyond such stipulated period till date of acknowledgement email, as specified in Step 3 of para 14, by the procuring entity.</p> <p>3. It is further clarified that such 9% interest will be paid only on the net amount payable under this scheme after deducting the payments already made.</p> <p>4. Even if award mentions any rate of interest (may be</p>	

below or above 9%) for payments made after the stipulated period for making such payments, still interest payable under this scheme shall only be 9% simple interest per annum.

Illustration 1:

<i>Award</i>	<i>Rs. 1,00,000/- in favour of contractor plus interest as indicated below.</i>
<i>Interest</i>	<p><i>Payable as per award:</i></p> <ul style="list-style-type: none"> <i>i. 10% till date of award, from a date mentioned in the award.</i> <i>ii. Payment to be made within 60 days of the award (stipulated period = 60 days from the date of award).</i> <i>iii. 12% for the period for which payment is delayed beyond the stipulated period.</i> <p><i>Payments including modalities under this scheme will be as under:</i></p> <ul style="list-style-type: none"> <i>i. 10% till date of award, from a date mentioned in the award. (i.e. till the date of award calculation of amount payable, including interest, shall be as per the award).</i> <i>ii. No interest is to be paid for the period stipulated for making payments in the award (60 days in the current case).</i> <i>iii. 9% for the period beyond 60 days in case of delayed payments on 85% of court award i.e. Rs. 85,000/-.</i>

11. In case the award directs payment of amount to the procuring entity, such awards shall also be eligible to be considered under the scheme, if opted by contractor. To clarify, in such cases, the contractor in order to bring finality to the case, may voluntarily offer to close the dispute on same terms and conditions as laid down in this scheme by paying the amount to the procuring entity, 85% or 65%, of the net award amount, as due under para 10(a) or 10(b) above and notes there-under, whichever may be applicable in the case.

12. Wherever the procuring entity has deposited some amount with a court before filing an appeal/ challenge, the interest payable on the amount due, as per para 10(a) or 10(b), shall be on the amount, payable under this scheme, without any reduction for the amount deposited with the court.

It shall be the obligation of the procuring entity to take prompt action to ensure release of such deposited amount at the earliest after the settlement under the scheme is accepted.

13. As per Rule 227A of the General Financial Rules (GFRs), 2017, and earlier guidelines, in case the procuring entities challenge an arbitral award, 75% of the award amount has to be paid to the contractor, against a Bank guarantee (BG) of equivalent amount, before filing of the challenge in the court. Such amounts paid to the contractor shall be adjusted with the amounts due under the present scheme. However, no reimbursement of BG charges will be made to the contractor.

Illustration 2:

Assuming Rs. 10,000 is to be paid to the contractor by the procuring entity as per para 10(a) or 10(b) above, as the case may be.

The BG available with the procuring entity under Rule 227A (equivalent to the value already paid by the procuring entity to the contractor) could be of a value either more or less than Rs. 10,000.

Such cases will be dealt as below:

- (a) In case BG available is less than Rs. 10,000/- (say Rs. 6,000/-). In such a case, procuring entity will pay Rs. 10,000 – Rs. 6,000 = Rs. 4,000 to the contractor and BG will be returned to the contractor. It may be noted that 9% interest, as per para 10, will be paid only on Rs. 4,000/-. No reimbursement of BG charges will be paid to the contractor.*
- (b) In case BG available is more than Rs. 10,000/- (say Rs. 15,000/-). In such a case, contractor will be required to deposit Rs. 15,000 – Rs. 10,000 = Rs. 5,000 with the procuring entity. It may be noted that 9% interest will be paid on Rs. 5,000/- by the contractor. Only thereafter BG will be returned to the contractor. No reimbursement of BG charges will be paid to the contractor.*

Submission of claims and Time periods

14. Contractors should submit their claims through Government e-Marketplace (GeM), for which GeM will provide a dedicated link on their portal for implementation of this scheme. The link/ portal will provide functionality to contractors to register their claims through their authorized personnel. For non- GeM contracts of Ministry of Railways, contractors should register their claims on IREPS (www.ireps.gov.in). The information regarding contracts for which claim is to be lodged on IREPS will be provided on GeM as well as IREPS. The broad features of these portals are as under:

- Step 1: The registered contractor shall list out the eligible disputes which it is willing to settle under this scheme, on the portal. The list of the procuring entities will be available through drop down menu on the portal. The details of the dispute should contain atleast the following: contract number, procuring entity/ contracting authority, paying authority, net award amount (as detailed in para 10(a) and 10(b)), claim amount with details thereof and the status of the dispute.

Step 2: GeM shall intimate (through dashboard) such details to the procuring entities to verify the dispute under this scheme. The procuring entity shall verify the claim details and update the same, if any. Each entry on the portal shall be dispute specific. There can be more than one dispute under same contract, which shall be claimed, under this scheme, separately.

Step 3: The procuring entities shall evaluate the settlement amount due, as per this scheme and offer it to contractor for acceptance normally within two weeks of receipt of claims on the portal. The contractor will be required to accept the offer within the prescribed time period. If the contractor accepts the offer Step 4 shall follow else Step 5 shall follow. Time available for contractor to respond to the offer shall be 30 (thirty) calendar days only (Calendar day ending at midnight). There shall be no option for any relaxation, including claims of GeM portal not working on last day, etc. However, the procuring entity shall have the authority to amend/ withdraw the offer, under this scheme, at any time before the acceptance by the contractor.

Immediately on acceptance of the settlement offer under the scheme, an acknowledgement through email, of the parties reaching such settlement, shall be automatically generated and sent to both the parties by the portal.

Step 4: The contractor will be given 45 days (or longer period if permitted by the procuring entity), from the date of the acknowledgement email as indicated in Step 3 above, to file application for withdrawal of the case before the court. However, only after the contractor uploads the document indicating that court has permitted to withdraw the case, if applicable, should the settlement agreement under this scheme be executed and the payments made by the procuring entities.

In case the procuring entity has to withdraw the case from court, the procuring entity shall also file an application for such withdrawal within 45 days. The settlement agreement shall be executed within 30 days of submission of application of withdrawal of case from the court in such cases, without waiting for formal permission of the court regarding withdrawal of the case.

If the contractor agrees to the settlement under this scheme, a settlement agreement (a model agreement is at Annexure I which the procuring entities are free to appropriately modify, without changing core terms, based on their past experience, local needs etc.) may be digitally signed, preferably in pdf format, by both the parties. The settlement agreement shall have the same meaning and consequence as the settlement agreement consequent to successful conciliation as per The Arbitration and Conciliation Act, 1996. The settlement agreement shall be signed only by the parties without any need for attestation of any conciliator. Stamp duty for the settlement agreement, in all cases under this scheme, shall be paid by the contractor.

The settlement agreement shall clearly state that even though the dispute is finally settled, the settlement does not decide on any issue, either of law or of fact, under dispute. Further, it should be clearly stated and implied from the settlement agreement that as a process of settlement the parties shall withdraw all litigation pending related to this dispute, willingly, without duress and after fully understanding the consequences.

The Settlement Agreement shall contain a statement to the effect that each of the persons signing thereto (i) is fully authorized by the respective Party he/ she represents, (ii) has fully understood the contents of the settlement agreement, (iii) is signing on the settlement agreement out of complete free will and consent, without any pressure, undue influence, and (iv) the settlement agreement shall be final and binding on and enforceable against the Party and the persons claiming under/ through him.

The procuring entity or the contractor, as the case may be, shall make payments within 30 days of the execution of the settlement agreement.

Step 5: If the contractor does not accept the offer: the ongoing litigation process may continue.

Other Provisions:

15. The status of dispute shall not change, in case appropriate court passes an award on the dispute after 30.04.2023 and before settlement under this scheme. The only exception to this provision will be the cases discussed in para 16 as below.

Illustration 3:

An arbitral award has been passed in a dispute on 15.02.2022 (a date prior to 31.01.2023). Further, the said award, as on 31.01.2023, is under consideration of the appropriate court, through an appeal or challenge. The court has given/ upheld the same award on 03.05.2023 (a date after 30.04.2023). Even in such cases, only 65% of the award as per Para 10(b) will be payable under the scheme.

16. Procuring entities should continue to closely monitor any court awards, in all cases where claim, under this scheme, has been already lodged by the contractor, even subsequent to 31.01.2023 till the date of issue of acknowledgement email, as specified in Step 3 of para 14, above. Some court awards could be passed between 31.01.2023 and 30.04.2023, in which case status of the case will be as per the court award only.

However, there could be some cases where court awards may be in favour of the procuring entity i.e. net payable amount to the contractor, under this scheme, may decrease, if the court award published after 30.04.2023 is taken into consideration. In all such cases procuring entities should immediately send revised offers to the contractor, as per the same procedure specified in Step 3 of para 14, above. The contractor shall be given 30 days to consider the revised offer (from the date of revised offer) made by the procuring entity. However, in no case, revised offer is to be sent by the procuring entity after issue of the acknowledgement email. In case acknowledgement email has been issued, settlement agreement shall only be in terms of the offer of the procuring entity

already accepted by the contractor and any court order issued subsequent to the date of acknowledgement email shall be ignored.

Illustration 4: (Only for the purpose of principal amount payable under this scheme. The calculation for interest shall apply separately.)

Case A
<i>Net amount payable to contractor under this scheme based on status of case as on relevant cut-off date mentioned in para 6 is Rs. 1 cr. and procuring entity has not yet issued any offer to the contractor.</i>
<i>Amount payable as per the scheme on the basis of court award published on 30.05.2023 is Rs. 50 lakh</i>
<i>In such a case, procuring entity will make an offer of only Rs. 50 lakh to contractor.</i>
Case B
<i>Net amount payable to contractor under this scheme based on status of case as on relevant cut-off date mentioned in para 6 is Rs. 1 cr. and procuring entity has issued an offer to contractor of Rs. 1 cr. However, the contractor has not yet accepted the offer.</i>
<i>Amount payable as per the scheme on the basis of court award published on 30.05.2023 is Rs. 50 lakh</i>
<i>In such a case, procuring entity will modify the offer to Rs. 50 lakh to contractor.</i>
Case C
<i>Net amount payable to contractor under this scheme based on status of case as on relevant cut-off date mentioned in para 6 is Rs. 1 cr. and procuring entity has issued an offer to contractor of Rs. 1 cr. The contractor has accepted the offer resulting in automatic issue of the acknowledgement email by the portal.</i>
<i>Amount payable as per the scheme on the basis of court award published on 30.05.2023 is Rs. 50 lakh</i>
<i>In such a case, procuring entity will not make any changes in the settlement amount of Rs. 1 cr., which has been already agreed by the procuring entity as well as the contractor.</i>

17. The date of commencement of the scheme shall be 15.07.2023 and claims can be submitted by 31.10.2023.

18. In all cases where the claim amount is Rs. 500 crore or less, procuring entities will have to accept the claim, if the claim is in compliance with these guidelines.

19. Only in case the claim amount, by the contractor, under this scheme exceeds Rs 500 crore, the procuring entities will have an option not to accept the settlement request of the contractor. Wherever, it is decided by the procuring entities not to accept the claim of contractors, the same should normally be communicated to the contractor within 60 days of receipt of claim on portal (unlike two weeks for evaluation of the settlement amount under Step 3 of para 14 above).

Note: The contractor may, if he so desires, reduce the amount claimed, under this scheme, from the award amount while submitting his dispute for settlement on the portal under this scheme.

Illustration 5:

Net award amount payable to the contractor = Rs. 510 cr.

Claim amount lodged by the contractor under this scheme = Rs. 490 cr.

In such cases procuring entities will have to accept the same, as the claim amount is less than Rs. 500 cr., if the claim is otherwise in compliance with these guidelines and para 19 will not be applicable in such case.

20. However, wherever under paragraph 19, in respect of claims exceeding Rs. 500 crore, it is decided not to accept the request for settlement from the contractor, the reasons for the same shall be recorded on file by the procuring entities and approval of the Secretary concerned in case of Ministries/ Departments or Chief Executive Officer in case of CPSEs etc shall be obtained. The decision not to accept the request for settlement 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. The decision should be based on success rate of appealing against court/ arbitration awards in the past. A special committee may be set up to review the case, before it is decided not to accept the request for settlement. The 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 arising 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 settlement. In this regard para 16 of the General Instructions on Procurement and Project Management, issued by DoE vide OM No. F.1/1/2021-PPD dated 29.10.2021 may be specifically referred.


21. In case settlement could not be achieved for any reason under this scheme, any offer, including reduction of claim amount, by any of the parties during the settlement process under this scheme, shall not be quoted in any further litigation.

22. It may be possible that a Public Authority may have used a procuring entity to make procurement on their behalf. For example, a University (public authority in this case) gets a project executed through Central Public Works Department (procuring entity in this case). In such a case:

- i. The procuring entity shall be the competent authority to accept the settlement under the scheme including the cases where the award amount is more than Rs. 500 cr (refer paras 18 to 20 above)
- ii. Budget for meeting the settlement agreement shall be provided by the public authority which got the project executed through procuring entity.
- iii. The public authority and the procuring entity may also be the same in some cases.

23. It is clarified that the scheme does not apply to cases where parties, including the procuring entities, have already reached a settlement through conciliation agreement. However, in case conciliation process is underway even after such award, eligible for settlement under this scheme, either by the Arbitral Tribunal or the court, then such conciliation process should be kept in abeyance and the process provided in this scheme can be followed. In case no settlement is reached under this scheme, the conciliation, as prior to the scheme, can continue.

24. DoE may, from time to time, issue such directions or orders under the scheme, as it may deem fit, which may include giving clarifications or further directions/ instructions for implementation of the scheme and to remove difficulties arising in giving effect to the provisions of this scheme.


(Kanwalpreet)
Director(PPD)

Tel.No. 2309 3811; email: kanwal.irss@gov.in

To

1. Secretaries of all Ministries/ Departments of Government of India for information and necessary action. They are also requested to inform these provisions to all procuring entities under their administrative control.
2. Secretary, Department of Public Enterprises with a request to reiterate these orders in respect to public enterprises.
3. Secretary, Department of Financial Services with a request to reiterate these orders in respect to public sector financial institutions.
4. Chief Secretaries/ Administrators of Union Territories without legislature.
5. CEO/ GeM.

Copy to: Chief Secretaries of all State Governments and Union Territories (UTs) with legislature with a request to consider adoption of this scheme in their States/ UTs for which GeM will make necessary arrangements, if requested.

Settlement Agreement between (procuring entity) and Contractor under section 73(2) of the Arbitration and Conciliation Act, 1996.

This agreement is entered into this (date) day of (year) ("**Settlement Agreement**") between (**procuring entity**) (hereinafter referred to as "**PROCURING ENTITY**" which expression shall, unless, repugnant to the context or meaning thereof, include its legal successor, executors, permitted assignees) of the one part and

M/s.....having its registered office at.....hereinafter referred to as the "**CONTRACTOR**" which expression shall unless repugnant to the context or meaning thereof, include its legal successor, executors, permitted assignees) of the other part.

WHEREAS:

PROCURING ENTITY awarded a contract for.....(hereinafter referred as "Contract").

Dispute arose between PROCURING ENTITY and the CONTRACTOR in the above mentioned contract. The dispute has been considered by _____ Court/ Arbitral Tribunal and the award was issued vide _____ dated _____. The award directs as follows:

- A. Amounts due from PROCURING ENTITY to CONTRACTOR
 - i. (amount), (interest rate), (date of interest)
 - ii.
- B. Amounts due from CONTRACTOR to PROCURING ENTITY
 - i. (amount), (interest rate), (date of interest)
 - ii.

NOW THIS SETTLEMENT AGREEMENT WITNESSETH AS BELOW:

1. It is agreed between the parties to this Settlement Agreement that PROCURING ENTITY shall pay Rs...../- (Rupees in words.....) inclusive of taxes, if any to the CONTRACTOR as per full and final settlement of all the disputes mentioned hereinabove pertaining to the above mentioned contract.

Thus total amount of Rs...../- will be payable by PROCURING ENTITY to the CONTRACTOR within one month from the date of execution of this Settlement Agreement by the Parties towards full and final settlement of the claims and disputes set out hereinabove in reference to the said contract.

2. That both parties hereby agree that all differences arisen out of the said dispute mentioned hereinabove now stand resolved and fully settled on payment of the sum stipulated in **para no. 1** above, and no dispute of any nature whatsoever shall survive. Accordingly, subject to aforesaid both PROCURING ENTITY and CONTRACTOR agree that they shall neither raise any dispute nor they shall initiate any proceedings, legal or otherwise against each other with reference to the aforesaid dispute.
3. That this Settlement Agreement shall continue perpetually and shall be binding upon the parties, their successors and assignees.

4. The Settlement Agreement constitutes the entire agreement and supersedes all prior understandings and writings between PROCURING ENTITY and CONTRACTOR hereto concerning the disputes and/or subject matter of this Settlement Agreement.
5. PROCURING ENTITY and CONTRACTOR hereby agree that this Settlement Agreement shall have same status and effect as that of an Arbitral Award on agreed terms upon the substance of the dispute in accordance with Section 74 of the Arbitration and Conciliation Act, 1996 and shall be capable of execution as such.
6. PROCURING ENTITY and CONTRACTOR hereby agree and undertake that in terms of Section 75 of the Arbitration and Conciliation Act, 1996, they shall keep confidential all matters relating to the conciliation proceedings. They also agree that the confidentiality shall extend also to the Settlement Agreement, except where its disclosure is necessary for purposes of implementation and enforcement.
7. The two identical counterparts of the Settlement Agreement are hereby executed by and between PROCURING ENTITY and CONTRACTOR through their authorised signatories and with understanding that each shall be deemed original for all purposes.
8. The parties agree and understand that even though the dispute is finally settled the settlement agreement does not decide on any issue, either of law or of fact, under dispute. This is a settlement agreement under the one time dispute settlement scheme of the Government of India, without consideration of the factual or legal issues at stake.
9. The parties agree and understand that as a process of settlement the parties shall withdraw all litigations/ arbitral proceedings/ conciliation proceedings pending on the matters, willingly, without duress and after fully understanding the consequences.
10. Each of the persons signing this settlement agreement is fully authorized to do so, has fully understood the contents of the same and is signing on the same out of complete free will and consent, without any pressure and undue influence.

IN WITNESS WHEREOF, the parties here to have hereunto set their respective hands the day and year first above written.

(Signed for and behalf of PROCURING ENTITY)

Name:

Designation:

(Signed for and on behalf of.....)

Name:

Designation:

8. AMRCD – Recent Circular - Way forward - inclusion of railway claims and thresholds

8.1 Background and Introduction

- 8.1.1 An OM dated 22nd May 2018 issued by the Dept. of Public Enterprises [“DPE”] brought about a new mechanism namely ‘Administrative Mechanism for Resolution of CPSEs Disputes’ [“AMRCD”] and replaced the earlier mechanism namely 'Permanent Machinery of Arbitration' [“PMA”] for settlement of commercial disputes between Central Public Sector Enterprises [“CPSEs”] *inter se* and CPSEs and Government Department/Organization [“the disputing parties”].
- 8.1.2 The OM replacing the earlier PMA mechanism stated that the AMRCD will make the mechanism more effective and binding on the disputing parties.
- 8.1.3 Copy of the OM dated 22.05.2018, 20.02.2020, 14.12.2022 is annexed herewith as **Annexure “D” at Page No. 63-70.**

8.2 The AMRCD Mechanism: What it entails

The OM dt. 14 Dec. 2022 further streamlined the guidelines issued by the earlier OMs and the existing AMRCD mechanism entails the following:

- 8.2.1 **Coverage:** Earlier, all the disputes excluding disputes concerning Railways, Income Tax, Customs & Excise Departments were covered. By OM dated 20 Feb. 2020, the extent of the AMRCD was extended to all the matters other than those related to taxation.
- 8.2.2 **Applicability:** In the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contracts between the parties, AMRCD mechanism may be made applicable.
- 8.2.3 **Structure:** AMRCD envisages for a two-tier mechanism.

First Level/Tier:

#	Disputing Parties	Committee	Representation
1.	In cases where disputing parties belong to	1. Secretaries of the Administrative	The Financial Advisors [“FAs”]

#	Disputing Parties	Committee	Representation
	different Ministries, the commercial dispute	Mins./Depts. to which the disputing parties belong, and 2. Secretary of the Dept. of Legal Affairs ["DoLA"].	of the two concerned Administrative Mins./Depts.
2.	In case the disputing parties belong to the same Ministry/Dept.	1. Secretary of the Administrative Min./Dept. concerned, 2. Secretary of DoLA and 3. Secretary of DPE.	The FA and one Joint Secretary of that Min./Dept.
3.	In case of a dispute between CPSE and State Government/Dept./Org.	1. Secretary of the Union Min./Dept. to which CPSE belong, 2. Secretary of DoLA and 3. A senior officer (not below the rank of Secretary in the State Government) nominated by the Chief Secretary of the concerned state.	The FA of the concerned Administrative Min./Dept. and a nominated officer of the concerned State Min./Dept.

Second Level/Tier (Appeal):

If the dispute still remains unresolved, then the same may be referred to the Cabinet Secretary at the second level/tier within 15 days from the date of receipt of decision of the CoS, through its administrative Ministry/Department on DPE web-portal, whose decision shall be final and binding on all concerned. The appeal should be in the form of a concise self-contained Note which should invariably include the comments/views of the Opposite Party (Respondent) through its administrative Ministry/Department.

8.2.4 Procedure

At the First level/tier:

- a. The claiming party (Claimant) will approach the FA of its administrative Ministry/Department for referring the dispute to the DPE through DPE web-portal.
- b. Within 30 days of the receipt of the claim, the FA of the claimant after initial scrutiny will intimate DPE through DPE web-portal for notification of the constitution of the CoS.
- c. The DPE will then notify the constitution of the CoS to all the members of CoS and FAs within 15 days of receipt of FA's reference.
- d. Thereafter the meetings of CoS will be organized by FA of claimant and will take place in the administrative Ministry/Department of the claimant to examine the facts and resolve the dispute on merit.
- e. After arriving at a decision by the Committee, the Secretary of the administrative Ministry/Department of the claimant will write down the decision and it will be signed jointly by both the Secretaries and Secretary- D/o Legal Affairs. The CoS shall finalise its decision within three months of its constitution.
- f. A copy of the decision will be communicated by the Secretary of the administrative Ministry/Department of the claiming party to each party to the dispute for implementation and also uploaded on DPE web-portal (<http://pesurvey.nic.in>).

In case where one party (1st party) to the dispute is a Department/Organization of a State Government, the procedure for admitting the dispute will be same as above, however, all meetings in connection with resolution of the dispute will be held in the administrative Ministry/ Department (Union) of other party (2nd Party) irrespective of the position of the 1st Party whether as a Claimant or Respondent.

- 8.2.5 **Implementation of the decision:** The decision taken by the CoS/ Appellate Authority will be implemented by the concerned CPSEs within one month from the date of the decision and action taken would be updated on web portal of DPE.

8.2.6 Arbitration Clause: The CPSEs to ensure inclusion of a clause to that effect in all the existing and future commercial contracts with any other CPSEs or with Government Dept./Org.

8.3 Mechanism under Railway Claims Tribunal (RCT)

With the inclusion of matters relating to Railways Department in the AMRCD mechanism, it is imperative to compare the mechanism involved under the Railway Claims Tribunal Act, 1987 with the newly established AMRCD and in case of dispute which mechanism should be preferred. A comparative chart can be presented below:

#	Head	AMRCD	RCT
1.	Nature	<ul style="list-style-type: none"> • Temporary (only when required) • Purely Administrative Body constituted for arbitration of the matter. 	<ul style="list-style-type: none"> • Permanently established by the Central Government • A quasi-judicial body not bound by the procedure laid down by the Code of Civil Procedure, 1908, but shall be guided by the principles of natural justice.
2.	Level/Tier	1. Committee of Secretary (CoS) 2. Cabinet Secretary (CS)	1. RCT 2. High Court
3.	Composition	CoS shall comprise of: 1. Secretaries of the disputing parties/DoLA/DPE	RCT shall comprise of: 1. A Chairman, 2. Four Vice-Chairmen, and 3. Such number of Judicial Members

#	Head	AMRCD	RCT
			and Technical Members. Whereas, a bench shall comprise of a Judicial and a Technical Member.
4.	Representation	FA/Officer as the case may be.	In-person or Legal practitioner.
5.	Limitation	Not prescribed.	<p>1. Within three years from the date on which the goods in question were entrusted to the railway administration for carriage by railway;</p> <p>2. Within one year of occurrence of the accident;</p> <p>3. Within three years from the date on which the fare or freight is paid to the railway administration.</p>
6.	Procedure	<p>1. The claiming party (Claimant) will approach the FA for referring the dispute to the DPE.</p> <p>2. FA after initial scrutiny will intimate DPE.</p> <p>3. DPE will then notify the constitution of the CoS to</p>	<p>1. The claiming party (Claimant) will make an application to the RCT in such form as prescribed.</p> <p>2. Every application shall be decided on a perusal of documents, written</p>

#	Head	AMRCD	RCT
		<p>all the members of CoS and FAs.</p> <p>4. Thereafter the meetings of CoS will be organized by FA of claimant and will take place in the administrative Ministry/Department of the claimant to examine the facts and resolve the dispute on merit.</p> <p>5. The Claimant Secretary will write down the decision and it will be signed jointly by both the Secretaries and Secretary- D/o Legal Affairs.</p> <p>6. A copy of the decision will be communicated by the Claimant Secretary to each party to the dispute for implementation and also uploaded on DPE web-portal.</p>	<p>representations and affidavits and after hearing such oral arguments as may be advanced.</p> <p>3. The Claims Tribunal shall have, for the purposes of discharging its functions, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the matters named in the RCT Act.</p>
7.	Timelines	<p>1. Within 30 days of the receipt of the claim, the FA of the claimant after initial scrutiny will intimate DPE through DPE web-portal for notification of the constitution of the CoS.</p>	<p>1. Apart from the limitation period prescribed, no such timeline has been prescribed during the proceedings.</p> <p>2. An appeal can be filed within 90 days</p>

#	Head	AMRCD	RCT
		<p>2. Within 15 days of receipt of FA's reference, the DPE will then notify the constitution of the CoS to all the members of CoS and FAs.</p> <p>3. Within three months of its constitution, the CoS shall finalise its decision.</p> <p>4. Within 15 days from the date of receipt of decision of the Committee at First level, the appeal shall lie.</p>	of the decision by RCT which also can be condoned in specific cases.
8.	Decision	To be given within three months of the constitution of the CoS.	Expedientiously as possible.
9.	Appeal	To CS within 15 days from the date of receipt of decision of the CoS.	To HC within 90 days from the date of the order of RCT.
10.	Execution	The decision will be implemented by the concerned CPSEs within one month from the date of the decision and action taken would be updated on web portal of DPE.	Execution of the order shall be done by the RCT as a decree of civil court.

8.4 Conclusion

8.4.1 On a bare perusal of AMRCD and the mechanism provided under the Railway Claims Tribunal, it is clear that AMRCD is a purely administrative

decision making body guided by the specific timelines. Whereas, RCT is a quasi-judicial body having trappings of a civil court and functions on the principles of Natural Justice with no timelines prescribed once the matter reaches the tribunal.

- 8.4.2 On the other hand, Railways being one of the most litigating parties among the Government departments and on the inclusion of Railway claims in the ambit of AMRCD, there are certain issues which can be a matter of concern for the disputing parties. *First*, since the CoS comprises of Secretaries only and assisted by FAs who may not possess the requisite expertise in dispute resolution mechanism and particularly in the understanding of law may lead to lack of uniformity and inconsistency in the decision making. *Secondly*, AMRCD being a purely administrative body may go against the spirit of rule of law and arbitrariness. *Thirdly*, the mechanism under AMRCD might turn out to be adding another layer in the decision making process. Though the decision by the Cabinet Secretary in Appeal is final and binding, still the same may be challenged in the High Court or the Supreme Court of India on certain specific grounds. *Fourthly*, Secretaries being already over-burdened with a lot of administrative work and giving them AMRCD responsibilities might turn out to be bad policy decision.
- 8.4.3 The Government is constantly making efforts to reduce government litigation in courts so that valuable court time is spent in resolving other pending cases. Government intends that the disputes between various Mins./depts./Orgs. do not reach the court. AMRCD is one of the steps in that direction. However, having completed half a decade since its inception, the efficacy and effectiveness of the AMRCD is yet to be examined and looked into.

F. No. 4(1)/2013-DPE(GM)/FTS-1835
Government of India
Ministry of Heavy Industries & Public Enterprises
Department of Public Enterprises

Public Enterprises Bhawan,
Block No. 14, CGO Complex,
Lodhi Road, New Delhi-110003.
Dated: 22nd May, 2018

OFFICE MEMORANDUM

Subject: Settlement of commercial disputes between Central Public Sector Enterprises (CPSEs) *inter se* and CPSE(s) and Government Department(s)/Organization(s) - Administrative Mechanism for Resolution of CPSEs Disputes (AMRCD).

The undersigned is directed to refer to Department of Public Enterprises guidelines issued vide OM No. 4(1)/2011-DPE (PMA)-GL dated 12.06.2013, No.4(1)2011-DPE(PMA) dated 24.03.2014, No. 4(1)/2011-DPE (PMA) dated 26.03.2014 and No. 4(1)/2013-DPE(PMA)/FTS-1835 dated 11-04-2017 regarding the resolution of commercial disputes between Central Public Sector Enterprises (CPSEs) *inter se* and also between CPSEs and Government Departments/Organizations (excluding disputes concerning Railways, Income Tax, Customs & Excise Departments) through PMA (Permanent Machinery of Arbitration) mechanism.

2. To make the mechanism more effective and binding on the disputing parties, a new mechanism namely Administrative Mechanism for Resolution of CPSEs Disputes (AMRCD) having two level (tier) structure has been evolved in consultation with various stakeholders to replace the existing PMA mechanism which stands wound up from the date of issue of this OM.

3. Applicability

In the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs)/ Port Trusts *inter se* and also between CPSEs and Government Departments/Organizations (excluding disputes concerning Railways,

Income Tax, Customs & Excise Departments), such dispute or difference shall be taken up by either party for its resolution through AMRCD.

4. As per the approved new mechanism to resolve the commercial disputes, the following structure and procedure shall be followed by the concerned disputing parties:

A. Structure:

- i. At the First level (tier), such commercial disputes shall be referred to a Committee comprising of Secretaries of the Administrative Ministries/Departments to which the disputing CPSEs/Parties belong and Secretary-D/o Legal Affairs. The Financial Advisors (FAs) of the two concerned Administrative Ministries/Departments will represent the issues related to the dispute in question before the above Committee. In case the two disputing parties belong to the same Ministry/Department, the above said Committee will comprise Secretary of the administrative Ministry/Department concerned, Secretary-D/o Legal Affairs and Secretary-Department of Public Enterprises. In such a case, the matter may be represented before the Committee by the FA and one Joint Secretary of that Ministry/Department.

Further, in case of a dispute between CPSE and State Government Department/Organization, the above said Committee will comprise the Secretary of the Ministry/Department of the Union to which the CPSE belongs and Secretary-D/o Legal Affairs and a senior officer nominated by the Chief Secretary of the State concerned. In such a case, the matter will be represented before the Committee by the FA of the concerned administrative Ministry/Department and the concerned Principal Secretary of the State Government Department/ Organisation.

- ii. In case the dispute remains unresolved even after consideration by the above Committee, the same will be referred at the Second level (tier) to the Cabinet Secretary, whose decision will be final and binding on all concerned.

B. Procedure:

- i. At the First level(tier), the claiming party(Claimant) will approach the FA of it's administrative Ministry/Department for representing the dispute before the Secretary of it's administrative Ministry/Department. The Secretary of administrative Ministry/Department of claiming party will intimate the same to the Secretary of administrative Ministry/Department of responding party (Respondent) and Secretary-D/o Legal Affairs and thereafter meetings will take place in the administrative Ministry/Department of the claiming party to examine the facts and resolve the dispute on merit. The FAs of the concerned administrative Ministries/Departments will represent the issues related to the dispute in question before the above Committee. After arriving at a decision by the Committee, the Secretary of the administrative Ministry/Department of the claiming party will write down the decision and it will be signed jointly by both the Secretaries and Secretary- D/o Legal Affairs. A copy of the decision will be communicated by the Secretary of the administrative Ministry/Department of the claiming party to each party to the dispute for implementation.

In case where one party (1st party) to the dispute is a Department/Organization of a State Government, the procedure for admitting the dispute will be same as above, however, all meetings in connection with resolution of the dispute will be held in the administrative Ministry/Department (Union) of other party(2nd Party) irrespective of the position of the 1st Party whether as a Claimant or Respondent. The presentation of the issues before the above Committee in this case will be done by the FA of the concerned Administrative Ministry/Department and concerned Principal Secretary of the State Government Department/Organization.

- ii. The Committee of Secretaries at the First level(tier) shall finalise its decision within 3 months after having received the reference/notice in writing regarding the dispute from the concerned aggrieved party.

5. Appeal

Any party aggrieved with the decision of the Committee at the First level (tier) may prefer an appeal before the Cabinet Secretary at the Second level (tier) within 15 days from the date of receipt of decision of the Committee at First level, through it's administrative Ministry/Department, whose decision will be final and binding on all concerned.

6. Arbitration Clause

- (i) The CPSEs will ensure inclusion of a clause in all the existing and future commercial contracts between CPSEs, *inter-se* and CPSEs and Government Departments/Organizations as under:-

"In the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs)/ Port Trusts inter se and also between CPSEs and Government Departments/Organizations (excluding disputes concerning Railways, Income Tax, Customs & Excise Departments), such dispute or difference shall be taken up by either party for resolution through AMRCD as mentioned in DPE OM No. 4(1)/2013-DPE(GM)/FTS-1835 dated 22-05-2018".

- (ii) The on-going contracts shall also be suitably amended accordingly.

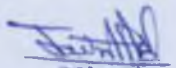
7. Disposal of pending cases in PMA

All pending cases with Sole Arbitrator-PMA and Appellate Authority shall stand transferred with immediate effect to concerned administrative Ministries/Departments to be dealt with as per above mentioned laid down mechanism of dispute resolution. All cases in which the hearing has been completed

by Sole Arbitrator, the award will be made by Sole Arbitrator. Appeal if any, made against such cases will lie with the Cabinet Secretary at Second level(tier).

8. All the administrative Ministries/Departments concerned with Central Public Sector Enterprises/ Port Trusts etc. are requested to bring these guidelines to the notice of all CPSEs under their administrative control for strict compliance.

9. This issues with the approval of the Competent Authority.


(J. N. Prasad)
Director
Tel. 24360736

To.


1. Secretary of all Ministries/Departments of the Government of India.
2. Chief Secretary of all the States and Union Territories.

Copy to:

1. Sh. G. S. Yadav, Joint Secretary & Arbitrator-PMA, DPE.
2. Chief Executive of all CPSEs for information and necessary compliance.

Copy forwarded for kind information to:

- (i) The Prime Minister's Office, South Block, New Delhi.
- (ii) The Cabinet Secretariat, Rashtrapati Bhawan, New Delhi.
- (iii) PS to the Minister (HI&PE), Udyog Bhawan, New Delhi.
- (iv) Secretary(DPE), CGO Complex, New Delhi
- (v) Secretary (Law), D/o Legal Affairs, Shastri Bhawan, New Delhi.


(J. N. Prasad)
Director
Tel. 24360736

Annexure D2: Office Memorandum dated 20.02.2020

DPE-GM-05/0003/2019-FTS-10937

Government of India

Ministry of Heavy Industries & Public Enterprises

Department of Public Enterprises

**Public Enterprises Bhawan,
Block no. 14, CGO complex,
Lodhi Road, New Delhi-110003.**

Dated: 20th February, 2020

OFFICE MEMORANDUM

Subject: Settlement of commercial disputes between Central Public Sector Enterprises (CPSES), inter se and CPSE(s) and Government – Department(s) / Organization(s) – Administrative Mechanism for Resolution of CPSEs Disputes (AMRCD).

The undersigned is directed to refer to DPE OM No. 4(1)/2013-DPE(GM)/FTS-1835 dated 22nd May, 2018 on the above subject matter wherein Para 3 of said guidelines provides that in the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSES) / Port Trusts inter se and also between CPSES and Government Departments / Organizations (excluding disputes concerning Railways, income Tax, Customs & Excise Departments), such dispute or difference shall be taken up by either party for its resolution through AMRCD.

2. In the meeting of Committee of Secretaries (CoS) held on 23-01-2020 on the subject matter of "Evolving mechanism for resolving Inter-Ministerial / Departmental legal Disputes" it was inter alia decided that existing AMRCD mechanism be made applicable to disputes other than those related to taxation and extended to all Ministries / Departments.

3. In view of the above decision of CoS, it is clarified that under the existing AMRCD mechanism, all disputes (other than those related to taxation matters) between CPSES inter se and other Government departments / organizations shall be taken up by either party for resolution only through the AMRCD. The other provisions of the AMRCD guidelines dated 22-05-2018 will remain unchanged.

P.T.O.

4. All the concerned Ministries / Departments of CPSEs are requested to advise CPSEs under their administrative control accordingly.
5. This issues with the approval of Competent Authority.



(P.K. Sharma)

Deputy Secretary to Government of India

Tel: 24363066

E-mail: pksharma.ship@nic.in

To

Secretaries of all Ministries / Departments concerned with CPSEs through e-mail as per list.

Copy to:-

- (I) CMD / Chief Executive of all CPSEs through e-mail.
- (II) Secretary, Department of Legal Affairs, 4th Floor, Shastri Bhawan, New Delhi in reference to D.O. No. 332619/338367/LS/2019 dated 14.02.2020.
- (III) Cabinet Secretariat in reference to communication no. 401/1/4/2019-TS dated 27.01.2020 in respect of minutes of CoS meeting held on 23.01-2029.
- (IV) NIC, Cell DPE for uploading on DPE web-site under what's -new and DPE guidelines / Chapter-VII-(a)

No. 05/0003/2019-FTS-10937
Government of India
Ministry of Finance
Department of Public Enterprises

Public Enterprises Bhawan,
Block No. 14, CGO Complex,
Lodhi Road, New Delhi-110003.

Dated: 14th December, 2022

OFFICE MEMORANDUM

Subject: Settlement of commercial disputes between Central Public Sector Enterprises (CPSEs) *inter se* and CPSE(s) and Government Department(s)/Organization(s) - Administrative Mechanism for Resolution of CPSEs Disputes (AMRCD).

Whereas guidelines for resolution of commercial disputes between Central Public Sector Enterprises (CPSEs) *inter se* and also between CPSEs and Government Departments/Organizations were issued vide DPE OM No. 4(1)/2013-DPE(GM)/FTS-1835 dated 22nd May, 2018 followed by clarification dated 4th July, 2018 and 11th July, 2018. These guidelines were further amended vide DPE OM No. DPE-GM-05/0003/2019-FTS-10937 dated 20.02.2020.

2. And whereas a need has been felt to streamline the existing guidelines with a view to consolidate them and institutionalise a better monitoring mechanism for faster resolution of disputes.

Now therefore the Revised Guidelines (in supersession of the aforesaid notifications/Office Memoranda) shall be as follows: -

3. Replacement of PMA and Applicability: -

- 3.1 Permanent Machinery of Arbitration (PMA) stands wound up from the date of issue of DPE OM dated 22-05-2018. All pending cases with Sole Arbitrator, PMA and Appellate Authority stand transferred to concerned administrative Ministries/Departments.
- 3.2 A decentralised 'Administrative Mechanism for Resolution of CPSEs Disputes' (AMRCD) having two level (tier) structures shall replace the erstwhile Permanent Machinery of Arbitration (PMA) mechanism of DPE.

3.3 Any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs)/ Port Trusts *inter se* and also between CPSEs and Government Departments/Organizations (excluding disputes relating to Railways, Income Tax, Customs & Excise Departments), shall be taken up by either party for its resolution through AMRCD only.

3.4 No appeals are to be made to Cabinet Secretary in such matters, including those in which Sole Arbitrator has passed order before the date of notification of AMRCD, unless the resolution of the disputes has been considered at the level of Administrative Ministry / Department as per procedure prescribed below.

4. Procedure and Structure of Committees: -

- 4.1 At the First level (tier), the disputes shall be arbitrated upon by a Committee comprising of Secretaries of the Administrative Ministries/Departments to which the disputing CPSEs/Parties belong and Secretary, Department of Legal Affairs. In case the two disputing parties belong to the same Ministry/Department, the above said Committee will comprise Secretary of the Administrative Ministry/Department concerned, Secretary, Department of Legal Affairs and Secretary, Department of Public Enterprises. In case of a dispute between CPSE and State Government Department/Organization, the matter shall be arbitrated through a committee comprising Secretary of the Ministry/Department of the Union to which the CPSE belongs, Secretary- Department of Legal Affairs and a Senior Officer (not below the rank of Secretary in the State Government) nominated by the Chief Secretary of the State concerned.
- 4.2 In case the dispute remains unresolved even after consideration by the above Committee, the same will be referred through DPE at the Second level (tier) to the Cabinet Secretary whose decision will be final and binding on all concerned.
- 4.3 At the First level (tier), the claiming party (Claimant) will approach the FA of its administrative Ministry/Department for referring the dispute to the DPE through DPE web-portal. The FA of the administrative Ministry/Department of the claimant after initial scrutiny would intimate DPE through DPE web-portal for notification of the constitution of CoS. This may be done within 30 days of the receipt

of the dispute claim. DPE will notify the constitution of the CoS to all members of CoS and FAs of the concerned administrative Ministry/Department within 15 days of receipt of FA's reference. The meetings of CoS will be organized by FA of claimant party and would be held in the Administrative Ministry / Department of the claiming party to examine the facts and resolve the dispute on merit. The FAs of the concerned Administrative Ministries / Departments will represent the issues related to the dispute in question before the above Committee. After arriving at a decision by the Committee, the Secretary of the administrative Ministry / Department of the claiming party will write down the decision and it will be signed jointly by the two Secretaries and Secretary, Department of Legal Affairs. A copy of the decision will be communicated by the Secretary of the administrative Ministry / Department of the claiming party to each party to the dispute for implementation and also uploaded on DPE web-portal (<http://pesurvey.nic.in>).

4.4 In case where one party (1st party) to the dispute is a Department /Organization of a State Government, the procedure for admitting the dispute will be the same as above. However, in such cases, all meetings in connection with resolution of the dispute will be held in the Administrative Ministry/Department (Union) of other party (2nd Party) irrespective of the position of the 1st Party whether as a Claimant or Respondent. The presentation of the issues before the above Committee in this case will be done by the FA of the concerned Administrative Ministry/Department and the nominated officer of the State Government Department/Organization.

4.5 The CoS at the first level (tier) shall finalise its decision within three months of the constitution of the Committee by DPE.

5. Appeal

5.1 Any party aggrieved with the decision of the Committee at the First level (tier) may prefer an appeal before the Cabinet Secretary at the Second level (tier) within 30 days from the date of receipt of decision of the Committee at First level, through its administrative Ministry/Department on DPE web-portal. The appeal should be in the form of a concise self-contained Note which should invariably include the comments / views of the Opposite Party (Respondent) through its administrative Ministry / Department.

5.2 Appeal in reference to resolution of the dispute as per para 5.1 above is to be made to Cabinet Secretary only after exhausting the channel of dispute resolution at the first level (1st tier) of the Committee of Secretaries as per procedure prescribed *ibid*.

5.3 The decision of Cabinet Secretary will be final and binding on all concerned.

6. Arbitration Clause

6.1 All CPSEs will ensure inclusion of a clause in all the existing and future commercial contracts between CPSEs, *inter-se* and CPSEs and Government Departments/Organizations as under: -

"In the event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs) / Port Trusts inter se and also between CPSEs and Government Departments/Organizations (excluding disputes relating to Railways, Income Tax, Customs & Excise Departments), such dispute or difference shall be taken up by either party for its resolution through AMRCD as mentioned in DPE OM No. 05/0003/2019-FTS-10937 dated 14th December, 2022 and the decision of AMRCD on the said dispute will be binding on both the parties."

6.2 The on-going contracts shall also be suitably amended accordingly.

7. Review of Progress:-

7.1 DPE shall be the single point for capturing all details related to AMRCD cases through its web-portal (<http://pesurvey.nic.in/>). DPE shall also provide secretarial assistance to the Cabinet Secretariat in all matters relate to AMRCD including appeal cases.

7.2 The decision taken by the CoS / Appellate Authority will be implemented by the concerned CPSEs within one month from the date of the decision and action taken would be updated on web portal of DPE.

7.3 A monthly status report of pending cases will be sent to Cabinet Secretariat through DPE web-portal. The FA of the concerned Administrative Ministry / Department of the claimant CPSE will get the position updated by 10th of the following month so that a consolidated report could be sent by 15th of every month to Cabinet Secretariat.

7.4 The administrative Ministry of the claimant CPSEs will also report the delay in disposal of the cases beyond the stipulated three months' time in their monthly DO to Cabinet Secretariat with reasons of delay and the likely extended date for final disposal.

8. All the administrative Ministries / Departments concerned with Central Public Sector Enterprises/ Govt. Organisations / Port Trusts etc. are requested to bring these consolidated guidelines to the notice of all CPSEs/organisations under their administrative control for strict compliance of the above guidelines including adhering to the timelines stipulated therein.

9. This issues with the approval of the Competent Authority.



पवनेश कुमार शर्मा/(Pavanesh Kumar Sharma)

निदेशक/ Director

Tel.:011- 24363066

- (i) Secretary of all Ministries / Departments of the Government of India.
- (ii) Chief Secretary of all the States and Union Territories.

Copy to:

Chief Executive of all CPSEs for information and necessary compliance.

Copy forwarded for kind information to:

- (i) The Prime Minister's Office, South Block, New Delhi.
- (ii) The Cabinet Secretariat, Rashtrapati Bhawan, New Delhi.
- (iii) PS to the Minister (Finance), Udyog Bhawan, New Delhi.
- (iv) Secretary (DPE), CGO Complex, New Delhi
- (v) Secretary (Law), Department of Legal Affairs, Shastri Bhawan, New Delhi.



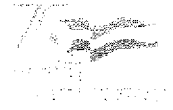
पवनेश कुमार शर्मा/(Pavanesh Kumar Sharma)

निदेशक/ Director

Tel.:011- 24363066



सत्यमेव जयते



डा. नितेन चन्द्र, भा.प्र.से.

सचिव

Dr. Niten Chandra, IAS

Secretary

विधि कार्य विभाग
विधि और न्याय मंत्रालय
भारत सरकार

DEPARTMENT OF LEGAL AFFAIRS
MINISTRY OF LAW & JUSTICE
GOVERNMENT OF INDIA

D.O No. LA-84/3/2023-Adv. 'A'

Dated: February 6, 2023

Dear Secretary,

It has been the endeavour of the Government to ensure that disputes between various Ministries/Departments/CPSEs/Boards/Authorities etc., under the administrative control of the various Ministries/Departments do not reach any Court.

2. A meeting of Committee of Secretaries (CoS) Chaired by Cabinet Secretary was held on 23.01.2020, wherein it was recommended that the existing AMRCD mechanism be made applicable to disputes other than those related to taxation, and extended to all Ministries/Departments. Subsequently, to give effect to the decision, DO Letter dated 28.02.2020 and the O.M dated 31.03.2020 were issued by the Department of Legal Affairs.

3. In an Order dated 01.02.2023 passed by the Hon'ble Supreme Court of India in C.A. No.1400-1438/2017, Rashtriya ISPAT Nigam Ltd. vs. UOI, the Court has observed as under:

"....., we find it appropriate that in a matter of the present nature where the petitioner is a Public Sector Undertaking and the respondent is Western Railways is under the Union of India, we expect that a situation of this nature should be discussed amongst themselves and a procedure be laid down so that the matter could be resolved and disputes in future also could be avoided. For doing so, they may also discuss with regard to the present claim which has been made for an amicable settlement."

4. All the Ministries/Departments are requested to ensure that the inter-se disputes of various Ministries/Departments/CPSEs etc., other than those related to taxation, are resolved through the existing AMRCD/AMRD mechanism

5. The Ministries/Departments shall accordingly issue necessary instructions in this regard to all CPSEs/Boards/Authorities etc., under their administrative control.

Warm regards,

Yours sincerely,

N. Chandra

(Dr. Niten Chandra)

All Secretaries to the Government of India (As per standard list)

Copy for information to:

Shri Rajiv Gauba, Cabinet Secretary, Rashtrapati Bhawan, New Delhi.

PAGE 74A

9. Stamping of Agreement in view of recent Supreme Court Judgment - Way forward

9.1 Introduction

- 9.1.1 The law relating to stamping in India is governed by the Indian Stamp Act, 1899 (for short '**Stamp Act**').
- 9.1.2 The Stamp Act contemplates payment of stamp duty on certain defined documents/instruments.
- 9.1.3 When instruments covered under the Stamp Act are executed, stamp duty is levied on such instruments based on the value of the instrument and the corresponding calculation provided under the Stamp Act.
- 9.1.4 Section 3 of the Stamp Act provides for the instruments to be charged with stamp duty. The rates of stamp duty and exceptions are provided under Schedule I of the Act.
- 9.1.5 Section 33 of the Stamp Act provides that when an instrument is not duly stamped, the authority receiving it as evidence may impound the same.
- 9.1.6 Inadmissibility in evidence or bar on being acted upon of instruments which are not duly stamped is provided under Section 35 of the Stamp Act. However, impounded documents can be rectified after payment of requisite stamp duty (Section 42).

9.2 The argument in Section 11 applications for appointment of arbitrators

- 9.2.1 In an application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short '**A&C Act**'), the court is only required to look into the existence of the arbitration agreement before referring the parties to arbitration.
- 9.2.2 One of the Objections by the opposite parties in such cases has been that the arbitration agreement not being valid by reason of non-stamping and hence it cannot be given effect to in view of Sections 33 and 35 of the Stamp Act.

- 9.2.3 The counter-argument to this has been that under Section 3 read with Schedule I of the Stamp Act, an arbitration agreement being not an instrument is not required to be registered.
- 9.2.4 The controversy with regard to stamping of the Arbitration Agreement has reached the footsteps of Apex Court in numerous occasions, with Court testing an arbitration agreement against the mandate of Sections 33 and 35 of the Stamp Act viz-a-viz Section 11 of A&C Act.

9.3 Stamping of arbitration agreement – N.N. Global Judgment

- 9.3.1 In *N.N. Global Mercantile Private Limited v/s. Indo Unique Flame Ltd and Ors.* [2023 SCC OnLine SC 495] a 5 Judge Constitution Bench has finally decided the issue of stamping of Arbitration Agreement, and for the time being settled the position that Arbitration Agreement are required to be adequately stamped.
- 9.3.2 The reference was made to the constitution bench in view of contrary view expressed by the coordinate benches of the Hon'ble Supreme Court in *N.N. Global Mercantile (P) Ltd. vs. Indo Unique Flame Ltd (2021) 4 SCC 379*, and *Vidya Drolia vs. Durga Trading Corporation (2021) 2 SCC 1* reiterating the position in *Garware Wall Ropes Ltd vs. Coastal Marine Construction & Engg. (2019) 9 SCC 209*.
- 9.3.3 The rationale has been pronounced with the majority of 3:2 in the 5 Judges bench.
- 9.3.4 The issue before the Apex Court being as to whether statutory bar contained in Section 35 of the Stamp Act which applies to instruments chargeable with stamp duty would also render the arbitration agreement contained in an instrument which is not stamped as non-existent in law.
- 9.3.5 The Court relied and upheld *SMS Tea Estates (P) Ltd. vs. Chandmari Tea Co., (2011) 14 SCC 66* wherein it was clarified that Section 35 bars unstamped documents from being acted upon which would include the arbitration clause in such document, since the instrument not duly stamped is required to be dealt as per Section 38 of the Stamp Act.
- 9.3.6 In *Garware Wall Ropes Ltd. vs. Coastal Marine Constructions & Engg. Ltd., (2019) 9 SCC 2019*, the Court had held that the arbitration clause

contained in the sub-contract would be non-existent if the sub-contract is also non-existent by reason of not being duly stamped.

- 9.3.7 *Vidya Drolia vs. Durga Trading Corporation*, (2021) 2 SCC 1 confirmed that an arbitration agreement must satisfy the statutory requirements of both the A&C Act as well as the Indian Contract Act, 1872.
- 9.3.8 The Court referred to but disagreed with the view in *Hindustan Steel Limited vs. Dilip Construction Company*, (1969) 1 SCC 597 that the Stamp Act is a fiscal statute not meant to be used as a weapon by a litigant. The Court clarified that the decision in *Hindustan Steel* failed to take into consideration Sections 17 and 33 of the Stamp Act which provide for time period within which the instrument is to be stamped and compulsory impounding of instruments that are not duly stamped, respectively. The 5 Judge bench opined that although the Stamp Act is a fiscal enactment, it must be implemented with full vigour.
- 9.3.9 On the point of enforceability of an arbitration agreement which is unstamped, the Court relied on Section 2(h) of the Contract Act wherein an agreement when it ceases to be enforceable by law, becomes void. As long as the instrument remains unstamped, it cannot be taken notice of for any purpose, as contemplated in Section 35 of the Stamp Act, rendering it unenforceable.
- 9.3.10 The Court found that the decisions in *N.N. Global Mercantile (P) Ltd. vs. Indo Unique Flame Ltd* (2021) 4 SCC 379 to be incorrect, while in *SMS Tea Estates (P) Ltd v Chandmari Tea Co. (P) Limited; Garware Wall Ropes Ltd. vs. Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209; and *Vidya Drolia vs. Durga Trading Corporation* (2021) 2 SCC 1 to be laying the correct law.
- 9.3.11 It was held that the arbitration agreement, even as a separate agreement is chargeable to stamp duty. When it is unstamped or insufficiently stamped, it shall not be acted upon. Such agreements are unenforceable as long as it remains in the said condition.
- 9.3.12 It also held that all agreements falling within the domain of Section 7 of the A&C Act, being an agreement in writing, would attract the provisions of the Stamp Act. Moreover, Section 11 of A&C Act empowers Hon'ble Courts to examine the existence of Arbitration Agreement. Likewise, Section 16 of the A&C Act mandates the Arbitral tribunal competent to

rule on its own jurisdiction with respect to existence / validity of the Arbitration Agreement.

9.3.13 The requirement of stamp duty should not be treated as a mere 'technicality'.

9.4 Effects of NN Global on the Liability of PSUs to pay stamp duty

9.4.1 Public Sector Undertakings are as bound by the provisions of the Stamp Act as any other individual or entity, deeming it necessary for PSUs to pay stamp duty on contracts including work contracts. Even though PSUs fall within the ambit of State under Article 12 of the Indian Constitution, it cannot be equated with the Government. In *A.K. Bindal v/s. Union of India*, (2003) 5 SCC 163 it was held that a Government Company is distinct from the Government, it is not identified with the Union.

9.4.2 Article 366 (29A) (b) of the Indian Constitution defines '*tax on the sale or purchase of goods*' to include tax on the transfer of property in goods involved in the execution of a work contract.

9.4.3 A work contract is an agreement between the parties for delivery of some goods or any services. In exchange for the services to be rendered or goods to be delivered by the contractor, the Owner agrees to pay certain consideration.

9.4.4 A work contract being a valid agreement having offer, acceptance and consideration falls within the definition of 'Instrument' u/s 2(14) of the 1899 Act, as clearly in a work contract rights and liabilities are created and extended between the contractor and Owner.

9.4.5 Even though the Stamp Act does not explicitly recognize Work Contracts, the Maharashtra Act 1958 and the UP Stamp Act 2008 in Article 63 & 64 of Schedule I respectively impose duty upon execution of Work Contract.

9.4.6 Thus, any instrument or contract that a PSU seeks to enter or execute is also liable to levy of stamp duty, unless they are explicitly barred by the Government.

9.4.7 The exemptions related to stamp duty may depend on the specific stamp rules of each State and the nature of transaction mentioned in the Act or rules thereunder.

- 9.4.8 However, the PSUs are not barred from applying for an exemption before the designated authority.
- 9.4.9 The proviso 1 to Section 3 of the Stamp Act provides that no duty shall be chargeable in respect of “*any instrument executed by, or on behalf of, or in favour of, the Government in cases where, but for this exemption, the Government would be liable to pay the duty chargeable in respect of such instrument;*” However, PSUs being commercial entity shall be liable under the Stamp Act.
- 9.4.10 The 5 Judge Bench decision does not expressly clarify as to whether the proposition set out can be applied to agreements relating to PSUs, but provided clarity to Contracts/ instruments in general.
- 9.4.11 As per the explanation of the majority view, unstamped agreements are not legally enforceable and are not considered contracts under Section 2(h) of the Contract Act of 1872. The majority also came to the conclusion that an unstamped document or contract, that is subject to stamp duty, which may contain an arbitration clause cannot be described as a legal contract, deeming both the contract and the Arbitration agreement unenforceable in law.
- 9.4.12 In understanding whether a certain instrument is exempt from stamp duty, reference may be made to Schedule I of the Stamp Act and specific State amendments.
- 9.4.13 The bench further added that until the default of the instrument being unstamped or insufficiently valued is cured following the procedures prescribed under the provisions of the Stamp Act till then it would not exist ‘in law’.
- 9.4.14 The implication of decision in *N.N. Global* on PSUs does not take a different route as compared to other kinds of contracts or organizations. The decision deals with the validity/invalidity of agreements when they are not duly stamped.
- 9.4.15 It does settle the position as to necessity of stamping of a Contract as well as arbitration agreements, upon the contrary both of them become non-existent *de jure*.

9.5 Way Forward

- 9.5.1 Comprehending the *ratio* of the majority in *N.N. Global* it is ascertained that unstamped and inappropriately valued instruments are curable, however Section 17 of the Stamp Act provides for the precise time, at which, the instrument is to be stamped i.e. before execution.
- 9.5.2 If an unstamped or inappropriately valued contract, which is eligible to stamp duty, is not enforceable under law, therefore, does not exist in law; until it is validated.
- 9.5.3 Some way forward for specifically PSU could be:
- a. Providing terms in the tender that proper stamp shall be paid by Contractor
 - b. An undertaking may be obtained from Contractor at the time of award of work to ascertain and pay the stamp duty.
 - c. It must be ensured that the contract/ work orders issued are adequately stamped as per the rate at its respective states.
 - d. For contracts which are not adequately stamped, contractor should be called upon to pay the adequate stamp duty.
 - e. PSU are also statutorily bound to bring the factum of inadequate stamping in cases of pending petition under section 11 of the A&C Act as well as on-going Arbitration proceedings.
- 9.5.4 In view of the decision, it is beneficial for the litigants to duly stamp the arbitration agreements, before proceeding in the courts or adducing such instrument as evidence. Otherwise, substantial delay in the proceedings shall be caused in order to cure the inherent defects in the documents.

10. Holiday listing aspects such as Suspension; termination of contract before holiday listing, whether mandatory

10.1 Introduction

- 10.1.1 Holiday Listing in other words means the blacklisting/debarment/ banning of Agencies, forbidding the Agency from participating as Vendor/Supplier, for its requirement related to procurement.
- 10.1.2 The Object of Holiday Listing is to be entitle the commercial entity/ Authority/ etc. falling under the category of 'State' under Article 12 of the Constitution of India to avoid participation and awarding any tender/ work to undesirable party which have entered into fraudulent/ corrupt acts, apart from breaches of the contract, etc.
- 10.1.3 This listing deprives the agency from submitting bids in future tenders while the holiday listing period subsists.
- 10.1.4 The grounds and/or conditions for holiday listing of any agency are normally enumerated in the contract, or addendum to the contract as general or special conditions or guidelines.
- 10.1.5 Termination on the other hand refers to putting an end to an active contract before it has been fully completed in accordance with the terms and conditions agreed upon by both parties upon breaches by either of the parties.
- 10.1.6 Unsatisfactory performance by the contractor/ agency qualifies as a tenable ground for termination of contracts.

10.2 Legal Status of Holiday Listing

- 10.2.1 Holiday Listing methods are adopted in order to curb down commission of Frauds including but not limited to misrepresentation, falsification of records and other breaches statutory regulations and guidelines.
- 10.2.2 It has been time and again enunciated by various precedents that prior to a holiday listing order a show-cause notice and a fair opportunity is to be granted to the Agency; as per the rule of Natural Justice.

- 10.2.3 In *Erusian Equipment & Chemicals Ltd. v/s. State of West Bengal, and Anr.* : AIR 1975 SC 266, it was opined that an organization cannot choose to exclude any entity/ agency/ individual by discrimination, a holiday listing order shall be backed by the principles of natural justice, and without prejudice.
- 10.2.4 In *Gorkha Security Services v. Government (NCT of Delhi)*, (2014) 9 SCC 105, the Hon'ble Supreme Court enumerated the principles of Natural Justice and equity, such as stating material grounds, charges, etc. before putting a contractor on holiday list.
- 10.2.5 In *Kulja Industries Limited vs. Chief General Manager, Western Telecom Project Bharat Sanchar Nigam Limited and Others* [(2014) 14 SCC 731], the Hon'ble Supreme Court has held that for determining the period of holiday listing, it is necessary that entity/ authority/ etc should formulate broad guidelines to meet objectivity and transparency, which shall provide for the period of holiday listing based on the gravity of the offences, violations and breaches, that may be prescribed by such guidelines.
- 10.2.6 In *Patel Engineering Limited vs. Union of India and Another* [(2012) 11 SCC 257], it was enunciated that while determining the period of holiday listing an organization shall give due consideration to the nature and gravity of the violations.
- 10.2.7 In *Shanti Construction v/s. Aavantika Gas Ltd.*, 2021 SCC OnLine MP 1666, the settled legal position was reiterated that a holiday listing order can be challenged on the touch stone of principles of natural justice and proportionality aspect.

10.3 Interplay of Termination & Holiday Listing

- 10.3.1 Both termination and holiday listing are per-se separate cause of action. On one hand, holiday listing is an administrative decision to not allow the contractor to participate in the future contract, while on the other hand, termination is putting an end to the contract with the contractor due to breaches committed by the contractor.

- 10.3.2 An organization may termination a contract upon dissatisfactory performance, however the conditions leading to holiday listing are much wider in scope. Though in most cases Holiday listing follows a termination, however the vice versa of the same is not mandatory.
- 10.3.3 In '*Ace Integrated Solutions Ltd. -vs- Food Corporation of India*' [2019 SCC OnLine Del 8422], the Hon'ble Delhi High Court has held that holiday listing and termination are two separate matters and stated that while termination is a mode of ending an existing contractual relationship; holiday listing or debarment or blacklisting is a mode of pre-emptively disqualifying a party from future contractual relationships and both being separate and distinct matters should not be rolled into one.
- 10.3.4 In *Indian Oil Corpn. Ltd. v. Servotech Power Systems Ltd., 2022 SCC OnLine Ker 3471* it was enumerated that merely because a contract is terminated by an organization does not prevent the organisation from putting the contractor on holiday list, especially when the right to holiday listing is reserved in the orders of termination.
- 10.3.5 Evidently, the act of Holiday Listing an entity is distinctive to termination of the contract with the same entity. Each commercial entity/ Authority / etc. has its own holiday listing guidelines such as 'Holiday Listing Guidelines of Indian Oil Corporation Limited' (copy attached herewith as **Annexure "E1" at Page No. 85**); 'Guidelines for Holiday Listing (Banning of Business Dealing)' of HPCL (copy attached herewith as **Annexure "E2" at Page No. 94**); 'Policy for holiday listing of vendors in BPCL' (copy attached herewith as **Annexure "E3" at Page No. 105**); 'Oil Industry Transport Discipline Guidelines' of MOP&NG (copy attached herewith as **Annexure "E4" at Page No. 120**), etc.
- 10.3.6 In *M/s Shiv-Vani Oil & Gas Exploration Services Ltd. v/s. Oil India Limited WP(C) 164/2015*, it was held that holiday listing is distinct and separate and it is not dependent or contingent upon termination of the contract. The Court clearly laid down and the para is reproduced herein "*Termination of contract may also be effected along with putting a contractor WP(C) 164/2015 on Holiday List, but it also envisages that a contractor can be put on Holiday List without terminating his existing contract. The choice is with the company.*"

10.4 Conclusion

- 10.4.1 Therefore, in light of the abovementioned principles of law enlightened by the Courts, it can be concluded that it is not mandatory to terminate an existing contract before invoking the holiday listing.
- 10.4.2 However, termination of the contracts should invariably follow the holiday listing order, since, otherwise, the entity which is putting forth the holiday listing order upon contractor shall have to justify its contrary stand, as to on one hand holiday listing the contractor while on the other getting the contract executed with the same contractor.
- 10.4.3 Pertinently, it is to be kept in consideration that Holiday listing being an administrative decision, the possibility of contractor approaching the Hon'ble High Court under the Writ Jurisdiction is immensely probable and as such it is imminent that due process of show cause, personal hearing and all such opportunities be afforded to the contractor in consonance with equity and good conscience. The detailed reasoned orders of holiday listing have been most of time upheld by the Hon'ble Courts.
- 10.4.4 As far as termination is concerned, it is germane of the contractual dispute which require introspection from the contract execution point of view and invariable before terminating the contract, the adherence to principles of Natural Justice and equity provides for stronger ground to defend the termination notice as and when the same is challenged. It shall not be out of place to mention that reasoned detailed termination notice with quoting the clauses which has been categorically breached goes long way in defending the termination notice. In all circumstances, the damages arising to the entity/ authority/ etc. on account of breach of the contractor is to categorically put to the notice of the contractor along with calling the contractor for joint measurement/ joint reconciliation/etc.
- 10.4.5 To conclude it should be taken into consideration that both Holiday listing and termination being two separate causes of action, under no circumstance, same are to be included into one proceeding.

Annexure E1: Holiday Listing Guidelines of IOCL

Holiday Listing Guidelines of Indian Oil Corporation Ltd

(To be published in IOC public portal)

1. Definitions:

a) Blacklisting / Holiday listing / Debarment/ Banning:

The meaning of "blacklisting", "holiday listing", "debarment" and "banning" is legally one and the same. Hence hereafter the subject matter shall be referred as "Holiday listing" only.

b) "Approving Authority" for holiday listing shall mean Refinery Head/ Functional Head / Regional Head / State Head / Departmental Head, not below Grade H. However, for placing a party on holiday for a period in excess of 2/ 3 years, Functional Director concerned shall be the Approving Authority.

c) "Appellate Authority" shall be one rank higher than the Approving Authority.

d) "Corporation" means Indian Oil Corporation Limited (IOCL) with its Registered Office at G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai-400 051.

e) "Party" shall include Licensor / Consultant / Contractor / Vendor / Bidder / Supplier/ Agency/ Seller / Sub-Vendor/ Sub-contractor/ Sub-consultant" and shall mean and include a public limited company or a private company or a Limited Liability Company, a Joint Venture, consortium, HUF, a firm whether registered or not, an individual, cooperative society or an association or a group of persons engaged in any commerce, trade, industry etc.

f) "Transgression" and "Integrity Pact" shall be as per the definition and details of Integrity Pact Policy as maintained on www.iocl.com

g) "Administrative Ministry" is Ministry of Petroleum & Natural Gas, Government of India

2. Reasons for putting a Party on Holiday:

2.1. The purpose of putting a party on holiday list is to protect the Corporation from dealing with an undesirable party. Reason for putting a party on holiday list may include any one or more of the following:

If a party

a) has indulged in malpractices such as bribery, corruption, fraud, pilferage, bid rigging/price rigging, injury to reputation or property of the Corporation, acting dishonestly causing wrongful financial loss to the Corporation or wrongful gain to the Party.

b) is bankrupt or insolvent or is being dissolved or has resolved to be wound up or proceedings for bankruptcy or liquidation or insolvency resolution process or winding up or dissolution have been initiated

c) has submitted fake, false, fabricated, or forged documents/ certificates

d) has substituted materials in lieu of materials supplied by IOCL or has not returned or has short returned or has unauthorizedly disposed off materials/ documents/ drawings/ tools or plants or equipment supplied by IOCL.

e) has obtained official company information or copies of documents, in relation to the tender/ contract, by questionable methods/ means.

f) has violated and circumvented the provisions of laws including labor laws/ regulations/ rules, safety, environment norms or other statutory requirements.

- g) has indulged in construction and erection of defective works or supply of defective materials
- h) has not cleared IOCL's dues
- i) has committed Breach of Contract or has failed to perform a contract or has abandoned the contract
- j) has not accepted Notice of Acceptance / Letter of Acceptance / Purchase Order / Work Order after the same is issued by IOCL within the validity period and /or as per agreed terms & conditions.
- k) After opening of Bid, the techno-commercially qualified and acceptable bidder withdraws / revises his bid upwards within the validity period.
- l) has parted with, leaked or provided confidential/ proprietary information of IOCL to any third party without prior consent of IOCL
- m) if the security consideration, including questions of loyalty of the party to the State, so warrants
- n) if the Director/ Owner of the party, proprietor or partner of the party is convicted by a Court of Law under process of law for offences involving moral turpitude in relation to its business dealings during the last five years.
- o) If the party uses intimidation/ threatening/ coercion or brings undue pressure on IOCL or its official(s) in acceptance/ performances of the job under the contract.
- p) Poor/ unsatisfactory performance of the party in one or several contracts.
- q) Transgression of Integrity Pact for which in the opinion of IOCL makes it undesirable to deal with the party.
- r) Based on the findings of the investigation report of any investigative agency, Government Audit, any law enforcement agency or government regulator.
- s) If CBI, or any other investigating agency(ies) recommends such a course along with credible evidence in respect of a case under investigation and if a prima-facie case is made out that the party is guilty of criminal negligence or an offence involving moral turpitude in relation to business dealings which if established may result in business dealing with it being banned.
- t) Any other ground which in the opinion of the Corporation makes it undesirable to deal with the Party.

Note: The grounds/ reasons for holiday listing indicated above are merely illustrative.

2.2. **Communication by Administrative Ministry to IOCL:**

- a) If a communication is received from the Administrative Ministry of IOCL to ban a party from dealing with IOCL, the party shall be automatically put on Holiday list.
- b) Holiday listing by other PSUs/ Government Departments shall not automatically extend to IOCL unless the Administrative Ministry of IOCL advises for the same
- c) Where a Ministry seeks to debar a Vendor across Ministries/ Departments, they will write to Deptt of Expenditure (DoE), who, in turn, will take action after due diligence at their end. In case DoE takes a decision to debar a Vendor across Ministries/ Departments, DoE will maintain list of such debarred firms, and display on the Central Public Procurement Portal. This list needs to be followed by all and can be accessed from the CPP Portal (present address: <https://eprocure.gov.in/eprocure/app>).

3. Show Cause Notice:

- a) Before placing the party on holiday list, a fair opportunity of hearing the party shall be given by means of a Show Cause Notice. The Show Cause Notice should be issued to the Party before placing the party on holiday list except for cases under CI 2.2.
- b) A proforma of the Show Cause Notice is enclosed **Attachment- 1**. A reasonable time (of 15 days) for a reply to the show cause notice shall be given. This time may be extended at the request of the party, if so warranted, for a period not exceeding 7 days.
- c) The Show Cause Notice shall be issued to the party and a copy may be endorsed to its CEO (Chairman/ President/ Managing Director/ Proprietor/ Managing Partner etc.)
- d) The decision to place the party on holiday list shall be taken considering the reply, if any, of the party, and by passing a reasoned Speaking Order in respect of all the allegations contained in the Show-Cause notice.

4. Effect of putting a party on holiday list :

- 4.1. No enquiry/ bid/ tender shall be issued to a party as long as the party's name appears on the current holiday list (i.e. within the holiday period).
- 4.2. If a party is put on holiday list during tendering (of works/ purchase):
 - 4.2.1. If a party is put on holiday after issue of the enquiry/ bid/ tender but before opening Technical bids, the EMD, if applicable, shall be returned to the party.
 - 4.2.2. If a party is put on holiday after opening technical bid but before opening the price bid, the price bid of the party shall not be opened and EMD submitted by the party shall be returned to the party.
 - 4.2.3. In case a party is put on holiday after opening of price bid, EMD made by the party shall be returned; the offer of the party shall be ignored & will not be further evaluated. The party will not be considered for issue of order even if the party is the lowest (L1). In such situation next lowest shall be considered as L1.
- 4.3. If a party is put on Holiday List and is performing/ executing any other job(s), it may be allowed to complete such works which have already been awarded. In case of ongoing Rate Contracts on single vendor, Call Up orders shall be allowed on the holiday listed vendor till a new Rate Contract is finalized. In case of availability of Multiple Vendors against Rate Contract/ Unit Rate contract, the holiday listed Vendor shall be allowed to complete such works for which Call up orders have already been placed. Fresh Call Up orders shall not be awarded once the Vendor is holiday listed.
- 4.4. The holiday listing shall be party specific & when the party is put on holiday, all the offices of the party shall be on holiday for all locations of IOCL & for all Services/ locations of the party. The Functional Director may however, if he considers this to be in the interest of the Corporation, remove the bar in respect of any specific service/ location.

If the party placed on holiday, is a proprietary concern, all the concerns of the same proprietor shall also be considered to be on holiday and if that proprietor is the partner of any firm, such firm shall also be considered to be on holiday.

In case where a joint venture (formed specifically for the bidding process) / consortium is debarred, all partners of the joint venture / consortium shall stand debarred for the period specified in the debarment order. Communication of holiday listing shall be sent to all the partners.

- 4.5. Removal of party from Approved/ Registered list, wherever Approved/ Registered list of parties are followed.

5. Delisting (from Holiday list) procedure after expiry of the holiday period:

- 5.1. Delisting (from Holiday list) after expiry of the holiday period shall be automatic and will not need further approval unless any information towards extension of holiday period is received. The party may be considered for issue of enquiry/ bid after the specified holiday period is over.
- 5.2. However, where Approved/ Registered list of parties are followed, the party may, after expiry of holiday period, approach relevant Tender/ Enquiry Issuing Authority, for getting itself re-listed.

6. Appeal and Review of holiday period (Delisting from holiday list within the holiday period):

a) **Appeal:**

The holiday listed party may file an appeal, along with a non-refundable fees of Rs.10,000, before the 'Appellate Authority' against the Speaking Order for Holiday Listing. Non-refundable fees to be paid by the way of a Demand Draft in favor of Indian Oil Corporation Limited. Such an appeal shall be preferred within one month from the date of the Holiday Listing Order.

Appeal Process may be completed within 60 days of filing of appeal with the Appellate Authority.

b) **Review:**

Suo moto, review of holiday period (delisting from holiday list within the holiday period) shall be done in exceptional cases and in the interest of the Corporation only with the approval of the Appellate Authority.

7. Intimation of holiday listing/ de-listing to the Party:

- 7.1. The party shall be informed by the initiating Deptt. about their inclusion in holiday list. A draft of the communication to be sent to the party is enclosed as Attachment-3.
- 7.2. De-listing from holiday list after expiry of the specified holiday period need not be communicated to the party.
- 7.3. If holiday period is changed after appeal/ review, the party shall be informed accordingly.
- 7.4. In holiday listing cases, where the proprietor of the firm, its employee, partner or representative is convicted by a Court of law for offences involving moral turpitude in relation to business dealings, may be revoked if, in respect of the same facts, accused has been wholly exonerated by court of law.

8. PSU Company:

Whether the party is Private Sector or a PSU Company, guidelines for holiday listing and delisting shall be the same.

9. Disposal Tenders:

The above guidelines shall also apply to parties for disposal tenders. In such cases "Lowest Bidder (L1)" shall mean "Highest Bidder (H1)".

10. Declaration of Holiday Listing

Every Bidder shall, at the time of submission of bid, give a declaration in the proforma of the Declaration attached as Attachment-2

11. GeM Tenders

In case of GeM procurements, Incident Management (IM) Policy of GeM shall be applicable. Terminologies used in GeM shall be as defined in the relevant policy. Buying Unit to ensure that vendor suspended due to IOCL's incident raising is blocked in SAP for the period for which they have been put on Suspension list of GeM, and the same is also updated on IOCL e-tender portal, as is done for other holiday listed vendors.



(Proforma of Show Cause Notice)

BY
REGD. POST/SPEED POST/COURIER

No.:

Date:

To
M/s

Attn.: Shri

Sub: **Show Cause Notice**

Ref: [Name of Tender / PO / LOA / Work Order or any other reference]

Dear Sir,

You are hereby required to show cause in writing within 15 days from the date hereof why you be not placed on the "holiday list" and be debarred from entering into any contracts with Indian Oil Corporation Ltd./ be not de-listed from the list of approved Vendors/ Contractors of Indian Oil Corporation Ltd., for the following reasons :

[Give detailed reasons]

Your reply, if any, should be supported by all documents and documentary evidence which you wish to rely in support of your reply.

Should you fail to reply to this Show Cause notice within the time and manner aforesaid, it will be presumed that you have nothing to say, and we shall proceed accordingly.

Your reply, if any, and the documents/ documentary evidence given in support shall be taken into consideration prior to arriving at a decision.

You are also requested to provide the details of Firms/ Agency/ Company where you are a proprietor or you are a partner.

Yours faithfully,
For & On behalf of Indian Oil Corporation Ltd.



PROFORMA OF DECLARATION OF BLACKLISTING / HOLIDAY LISTING

In the case of a Proprietary Concern:

I hereby declare that neither I, in my personal name nor in the name of my Proprietary concern, M/s _____ which is submitting the accompanying Bid/ Tender nor any other concern in which I am proprietor nor any partnership firm in which I am involved as a Partner are presently on any blacklist or holiday list declared by Indian Oil Corporation Ltd. or by Ministry of Petroleum & Natural Gas (MOPNG), nor any inquiry is pending by Indian Oil Corporation Ltd. or MOPNG, in respect of any corrupt or fraudulent practice(s) against me or any other of my proprietorship concern(s) or against any partnership firm(s) in which I am or was at the relevant time involved as a partner, except as indicated below:

(Here give particulars of blacklisting or holiday listing, and /or inquiry and in absence thereof state "NIL")

In the case of a Partnership Firm:

We hereby declare that neither we, M/s _____, which is submitting the accompanying Bid/ Tender, nor any partner involved in the said firm either in his individual capacity or as proprietor or partner of any other firm or concern presently, are placed on any blacklist or holiday list declared by Indian Oil Corporation Ltd. or by Ministry of Petroleum & Natural Gas (MOPNG), nor any inquiry is pending by Indian Oil Corporation Ltd. or MOPNG, in respect of corrupt or fraudulent practice(s) against us or any partner or any other concern or firm of which he is proprietor or partner, except as indicated below:

(Here give particulars of blacklisting or holiday listing and/or inquiry and in the absence thereof state "NIL")

In the case of Company:

We hereby declare that we are presently neither placed on any holiday list or blacklist declared by Indian Oil Corporation Ltd. Or by Ministry of Petroleum & Natural Gas (MOPNG), nor any inquiry is pending by Indian Oil Corporation Ltd. or MOPNG, in respect of corrupt or fraudulent practice(s), except as indicated below:

(Here give particulars of blacklisting or holiday listing and/or inquiry and in the absence thereof state "NIL")

In the case of Consortium:

We hereby declare that none of the members of the Consortium are presently placed on any holiday list or blacklist declared by Indian Oil Corporation Ltd. Or by Ministry of Petroleum & Natural Gas (MOPNG), nor any inquiry is pending by Indian Oil Corporation Ltd. or MOPNG, in respect of corrupt or fraudulent practice(s), except as indicated below:



(Here give particulars of blacklisting or holiday listing and/or inquiry and in the absence thereof state "NIL")

It is understood that if this declaration is found to be false in any particular. Indian Oil Corporation Ltd. shall have the right to reject my/ our bid, and if the bid has resulted in a contract, the contract is liable to be terminated without prejudice to any other right or remedy (including blacklisting or holiday listing) available to Indian Oil Corporation Ltd.

Place:

Signature of Bidder

Date:

Name of Signatory

(Proforma of Intimation of placement of a party on Holiday list)

No.

Date:

To,

M/s _____

Attn: Ms. / Mr. _____

Sub: Holiday Listing/ De-listing of Vendors/ Contractors – Intimation of placement on Holiday List

Dear Sir,

In spite of the opportunity given to you, you have failed to show cause as required * / your reply to the Show Cause Notice (and the documents and documentary evidence submitted in support of your reply) has/ have been duly considered. *

[Speaking order: either to agree or rebut the reply furnished by Party, allegation wise]

After considering the allegations made in the Show case Notice and your reply to the Show Cause Notice (and documents and documentary evidence furnished in support thereof) *, it has been decided that you be placed on Holiday List and debarred from entering into any contracts with Indian Oil Corporation Ltd. for a period of months* / years* effective from the date hereof and be removed from the list of approved Vendors/ Contractors.*

Yours faithfully,

*Strike out if not applicable (the entire running underlined text).



ANNEXURE – 21**21. GUIDELINES FOR HOLIDAY LISTING (BANNING OF BUSINESS DEALING)****1. Introduction :**

- 1.1. Works and procurement contracts have become a major activity for corporation in current times. In course of such contracting the corporation deals with various Agencies viz. vendors/ parties/ contractors/ suppliers/ consultants/ licensors/ bidders. These entities are expected to adopt ethics of highest standards and a very high degree of integrity, safety, quality, commitments and sincerity towards the work undertaken. However, in few occasions the terms are found to be infringed and deviations from expected behavior are observed. It is not in the interest of the Corporation to deal with Agencies who commit deception, fraud or other misconduct in the tendering and execution process.
- 1.2. Banning of business dealings with the Agency involves civil consequences for the “Agency” concerned. Hence, the same requires adherence to the Principles of Natural Justice. Therefore, it is incumbent that adequate opportunity of hearing is provided and the explanation, if tendered, is considered before passing any order in this regard keeping in view the facts and circumstances of the case. Banning of business dealings/Black listing/Holiday listing would mean same and the term Holiday Listing (Banning of business dealings) shall be used hereinafter in this document.

2. Scope:

- 2.1. The information for Bidders/ Instruction to Bidders and even the General Terms & Conditions of Contract (GTC) generally provide that HPCL shall have the rights to remove an agency from list of approved suppliers / contractors or to ban business dealings if any Agency has been found to have committed misconduct or fraud or poor performance or anything unethical not expected from a reputed supplier / contractor.
- 2.2. The procedure of (i) Suspension (ii) Holiday listing (Banning of business dealing) of Agencies, has been laid down in these guidelines.
- 2.3. These guidelines ***shall be applicable across HPCL and shall form part of all the tenders. The same is part of Procurement Manual and are displayed on HPCL website as “Guidelines for Holiday listing (Banning of business dealing)”. The GTC (General Terms and conditions) has a clause exclusively stating that the Guidelines for Holiday listing (Banning of business dealing) as adopted and available on HPCL website shall be applicable to all tenders floated and all Purchase orders / contracts placed by HPCL.***
- 2.4. It is clarified that these guidelines do not deal with such decisions of management of HPCL or its **Procurement authorities**, taken from time to time, as not to have any form of business dealings based on past performance of the contractors/ Agencies or for any other reasons to be recorded in writing by the appropriate authority with out in any way formally suspending or banning the agency. Such decisions would be only on case to case basis and not to be followed as a general rule.
- 2.5. The banning shall be with prospective effect, i.e. for future business dealings.

3. Definitions:

In these guidelines, unless the context otherwise requires:

- i. **"Agency"**: "Vendor / Party / Contractor / Supplier / Consultant / Bidder / Licensor" shall mean and include a public limited company or a private limited company, a joint venture, consortium, HUF, a firm whether registered or not, an individual, cooperative society or an association or a group of persons engaged in any commerce, trade, industry etc. "Vendor / Party / Contractor / Supplier / Consultant / Bidder / Licensor" in the context of these guidelines is indicated as 'Agency'.
- ii. **"Allied Firm"**: All concerns which come within the sphere of effective influence of banned / suspended firm shall be treated as allied firms. In determining this, the following factors may be taken into consideration:
 - a. Whether the management is common;
 - b. Majority interest in the management is held by the partners or directors of banned / suspended firm.
 - c. Substantial or majority shares are owned by banned / suspended firm and by virtue of this it has a controlling voice.
- iii. **"Holiday Listing (Banning of Business dealing)"** shall mean officially debarring or forbidding an Agency from participating as Vendor/Supplier with HPCL, for its requirement related to procurement.
- iv. **"Appellate Authority"** *shall be the respective Executive Committee for less than three years of Holiday listing (Banning of business dealing) and CFD for more than three years.* The Appellate authority shall be higher than the "Competent Authority".
- v. **"Competent Authority"** shall mean the authority, who is competent to take final decision for:
 - a. Suspension of business dealings with a firm/ party pending investigation / examination.
 - b. **Holiday listing (Banning of business dealing)** of firms / parties.
 - c. Debarment for indefinite period

And *shall be the respective, Contracts Committee (CC) for holiday listing (Banning of business dealing) upto three years and Executive Committee (EC) for more than three years. Competent authority to pass order for suspension of business with an 'Agency' pending investigation shall be respective CC.*
- vi. **"EIC"**: Engineer in charge / Designated in-charge shall mean the person(s) designated to act for and on behalf of the Corporation for the execution of the work as per requirement of the user department.
- vii. **"Firm"**: The term used in this 'Policy includes individual or persons, a company a co-operative society, a Hindu Undivided Family and an association and body of persons whether incorporated or not, engaged in trade and business.
- viii. **"Interconnected Agency"** shall mean two or more companies having any of the following features:

- a. If one is a subsidiary of other;
 - b. if the Director(s), Partner(s) or Representative(s) are common;
 - c. if management is common;
 - d. if one owns or controls the other in any manner.
- ix. **“Investigating Agency”** shall mean any department or Unit of HPCL investigating into the conduct of Firm / Party / PSE and shall include the Vigilance Department of the Corporation, Central Bureau of Investigation, State Police or any other agency set up by the central or state government having powers to investigate.
- x. **“Moral Turpitude”** means to be a conduct contrary to justice, honesty, modesty or good morals and contrary to what a man owes to a fellowman or to society in general.
- xi. **“Proprietor”** shall include Director of a private limited company, members of Hindu undivided family, a member of an association of persons and a director of a Public limited company.
- xii. **“Affiliate” of a Party shall mean any company or legal entity which:**
- a. **controls either directly or indirectly a Party** (including any Foreign Entity), or
 - b. **which is controlled directly or indirectly by a Party; or**
 - c. **is directly or indirectly controlled by a company, legal entity or partnership which directly or indirectly controls a Party. “Control” means actual control or ownership of at least a 50% voting or other controlling interest that gives the power to direct, or cause the direction of, the management and material business decisions of the controlled entity.**
 - d. **‘Foreign entity’ means a body corporate incorporated outside India.**
- xiii. **Corporation: “Corporation” means Hindustan Petroleum Corporation Ltd with its registered office as 17, J Tata Road, Mumbai -400020**

4. Initiation of Suspension of business dealings:

Action for Suspension/Holiday listing (banning of business dealing) of any Agency shall be initiated on notice of the irregularities or misconduct on the part of Agency concerned by the EIC or the designated in-charge or the department responsible for invitation of bids.

Vigilance Department based on the facts of the case gathered during investigation may recommend appropriate action against the agency as per the banning policy. **Proposal for Suspension/Holiday Listing (banning of business dealing) of any Agency shall be submitted to the concerned CC.**

5. Suspension of business dealings:

5.1. Suspension of business with an agency may be ordered by the competent authority of the Corporation pending full enquiry in to the allegations, if it is considered not desirable to continue business with the firm. Such an order may be passed:

- i. If CBI or any other investigating agency recommends such a course along with credible evidence in respect of a case under investigation and;
- ii. If a prima-facie case is made out that the firm is guilty of criminal negligence or an offence involving moral turpitude in relation to business dealing, which if established, may result in business dealing with it being banned.

The order of suspension would operate for a period not more than six months and is to be communicated to the "Agency" as also to the investigating agency. The Competent Authority may extend the period of suspension by another three months pending completion of investigation.

5.2. *Based on CC decision the secretary of CC shall issue the order of suspension and show cause notice to the Agency and the same shall be communicated to the Nodal Department which in turn will block the code in the system.* During this period of suspension, no new business dealing may be held with the "Agency".

5.3. The existing contract(s) with the Agency may continue unless the "Competent Authority", having regard to the circumstances of the case, decides otherwise.

5.4. It is necessary to give a show-cause notice to the Agency along with the order for suspension, unless it is not expedient in the public interest to do so. The Agency has to be allowed to submit its written defense to the show-cause notice within 15 days. *Competent Authority* has to take the decision within thirty days of receipt of written defense.

5.5. Period of suspension shall be accounted for in the final order passed for Holiday listing (Banning business dealing) with the "Agency".

6. Grounds on which holiday listing (banning of business dealings) of Agencies can be initiated:

Some of the eventualities on occurrence of which the firms can be Holiday listed (Banned for business dealing) are indicated below. The list is suggestive and is not exhaustive. The Competent Authority may decide to ban business dealing for any good and sufficient reason:

6.1. If the security consideration, including questions of loyalty of the Agency to the State, so warrants.

6.2. If the Director / owner of the Agency, proprietor or partner of the firm, is convicted by a Court of Law under normal process of law for offences involving moral turpitude in relation to its business dealings during the last five years.

6.3. If there is strong justification for believing that the Directors, Proprietors, Partners, employee(s), representative(s) or owner of the Agency have been either jointly or severally held guilty of malpractices such as bribery, corruption, fraud including submission of fake, false or forged documents / certificates, pilferage, substitution of tenders, bid rigging / price rigging, interpolations, substitution of materials in lieu of materials supplied by HPCL or other violations including misrepresentation of facts.

6.4. If the agency is bankrupt or insolvent or being dissolved or has resolved to be wound up or proceedings for winding up or dissolution have been instituted.

6.5. If the agency has deliberately violated and circumvented the provisions of Labour laws / regulations / rules, safety norms or other statutory requirements.

6.6. If a communication has been received from the MOP&NG to ban the agency from dealing with the Corporation, the party should be automatically put in the banned list.

- 6.7. If the agency has parted with, leaked or provided confidential proprietary information of the Corporation given to the agency only for their use (in discharge of their obligations against an order) to any third party without prior consent of the Corporation.
- 6.8. If the agency uses intimidation / threatening or brings undue outside pressure on the Corporation or its official/s in acceptance /performances of the job under the contract.
- 6.9. Based on the findings of the investigation report of any investigative agency, Government audit, any law enforcement agency or government regulator against the Agency for malafide / unlawful acts or improper conduct on their part in matters relating to the Corporation or even otherwise.
- 6.10. Poor performance of the Agency in one or several contracts.
- 6.11. If the Agency violates the conditions of tender / contract or vitiates the tender process.
- 6.12. ***If the agency, in the context of its dealings with the Corporation has:***
- i. ***Substituted materials in lieu of materials supplied by the corporation or has not returned or has unauthorizedly disposed of materials/ documents/ drawings/ tools or plants or equipments supplied by the corporation without prior permission of the corporation.***
 - ii. ***Deliberately indulged in construction and erection of defective works or supply of defective materials***
 - iii. ***Committed breach of contract or has abandoned the contract***
 - iv. ***Not honoured the LOI/ LOA/ Contract/ Purchase order after the same is issued by the Corporation.***
 - v. ***Withdraws / revises the bid upwards after becoming L1.***
- 6.13. Any other ground including transgression of Integrity Pact of which, in the opinion of the Corporation makes it undesirable to deal with the party. ***In case of transgression of Integrity Pact, the same should be substantiated by the verdict of the Independent External Monitor/s.***

7. Holiday listing (Banning of Business dealings):

Vendor Management cell of CPO will be the Nodal department for maintaining, updating and publishing the list of Agencies with whom HPCL has decided to Holiday list(Banning of business dealing).

- 7.1. When culpability of an agency is detected during the course of a Vigilance investigation or otherwise and there is adequate ground to believe that the continuance of business dealings with the agency is not in the best interest of the Corporation, CVO may bring the matter to the notice of concerned Director of the Corporation, where upon banning proceedings may be initiated as detailed under Section 5 to 8. A ***Functional*** Director or C&MD may also direct for such an exercise without any reference from Vigilance or other investigating agencies suo-moto.

- 7.2. In case, any external investigating agency has recommended the banning of the business with a supplier, its role comes to an end with the recommendation and HPCL shall undertake further proceedings through its own officers.
- 7.3. EIC or the designated in-charge or concerned procurement department ***either independently or collectively having been*** satisfied that prima facie the case is fit for banning, shall submit the proposal along with draft show cause notice and all relevant papers and documents to the ***respective Contracts Committee (CC). The proposal shall state a brief background of the case, the action proposed and all the supporting documents, including a note from EIC or the designated in-charge or the department responsible for invitation of bids. The proceedings would start with this proposal for initiating the action against the Agency.***
8. Show – Cause Notice:
- Proceedings for Holiday Listing (Banning of business dealing) shall be initiated against an Agency when a prima facie case for banning business dealing comes up under the circumstances mentioned in clause 6. Before taking a decision, a fair opportunity of hearing the party should be given by means of a show cause notice.***
- 8.1. On preliminary examination of the proposal if the CC is of the opinion that the action is to be initiated against the Agency, a fair opportunity of hearing the party shall be given by means of a Show Cause notice. The show cause notice shall indicate clearly and precisely the charges / misconduct which should be based on facts as can be proved as distinct from mere allegations. ***Secretary CC will issue the Show cause notice to the Agency with an intimation to Nodal department along with copy of showcause notice / suspension order. If the show cause notice includes suspension order then the nodal department will update in the system accordingly.*** Statement containing the imputation of misconduct or misbehavior may be appended to the show cause notice and the “Agency” shall be asked to submit within 15 days a written statement in its defence. A proforma of Show Cause notice (Attachment I) is attached.
- 8.2. If the ‘Agency’ requests for inspection of any relevant document in possession of the Corporation, necessary facility for inspection of documents may be provided.
- 8.3. If no reply is received from the “Agency” within the specified period, the decision may be taken ex-parte.
- 8.4. The Competent Authority will pass an appropriate speaking order after examining the materials on record. ***. If CC decides it to be Holiday listed (Banning of business dealing) upto three years then it issues the verdict or if it decides that the agency is to be Holiday listed (Banning of business dealing) for more than three years, then the case is put up to EC.*** The Competent authority can also take assistance from Officers of the Corporation, such as Legal and other Departments. ***The Competent authority shall act in a quasi-judicial capacity and will work independently.***
- 8.5. If it decides to ban business dealings, the period for which the ban would be operative shall be mentioned in the banning order. The order may also specify the names of proprietors, all partners, directors etc of the “Agency”. The order may be extended to its Allied / ***Interconnected / Affiliate*** concerns, as defined at 3(ii)/3(vii)/3(xi), if there are instances of recurrence of lapses from the same group.

- 8.6. The decision regarding suspension/Holiday listing (Banning of business dealing) should be communicated by the **Secretary of the concerned CC/EC** to the “Agency” concerned **with a copy to Nodal department to update the system**. A proforma for intimation of banning order to party is attached (Attachment-II) .
- 8.7. The banning process should be completed within six months period from the initiation of the case by concerned EIC/ department responsible for invitation of bids.
- 9. Effect of Holiday listing (Banning of Business dealing):**
 Effect of suspension will be same as that of Holiday listing (Banning of business dealing) with an Agency.
- 9.1. No enquiry / bid / tender shall be entertained with a party as long as the “Agency’s”
- 9.2. name appears in the Banning List i.e. Holiday list.
- 9.3. If an “Agency” is put on the Banning List during tendering:
- 9.3.1. If an “Agency” is put on banning list after issue of the enquiry / bid / tender but before opening Technical bids, the bid submitted by the “Agency” shall be returned to the “Agency”/ **will be rejected in case of e-tendering thru E-Proc with approval from purchase authority**. Bank Guarantee (BG) / Earnest Money Deposit (EMD) if submitted shall also be returned.
- 9.3.2. If an “Agency” is put on banning list after opening technical bid but before opening the price bid, the price bid of the “Agency” shall not be opened **in E-Proc and unopened price bid in case of physical tendering shall be returned with approval from purchase authority**. BG / EMD if submitted shall also be returned to the ‘Agency’.
- 9.3.3. In case an “Agency” is put on banning list after opening of price bid, BG/EMD made by the “Agency” shall be returned; the offer of the “Agency” shall be ignored & will not be further evaluated. The “Agency” will not be considered for issue of order even if the “Agency” is the lowest (L1). In such situation next lowest shall be considered as L1.
- 9.4. If contract with the “Agency” concerned is in operation (**including cases where purchase order has been already awarded before decision of banning**), normally order for banning business dealings cannot affect that contract because contract is a legal document and unless the same is terminated in terms of the contract, unilateral termination will amount to breach and will have civil consequences.
- 9.5. Tenders invited for purchase of Goods and Services for both International Competitive Bidding (ICB) and Indigenous basis should have the provision that the bidder should submit a declaration to the effect that neither the bidder themselves nor any of their directors or proprietors involved in any capacity, or any of its subsidiary, affiliate, sister concern or any other agency over which the bidder has substantial control are currently serving any banning orders issued by the Corporation or MOP&NG debarring them from carrying on business dealings with the Corporation / MOP&NG. Offers not accompanied with a declaration may be incorporated in rejection criteria. **Any wrong declaration in**

this context shall make the Agency liable for holiday listing(banning of business dealing) procedure.

10. Appeal against the Decision of the Competent Authority:

- 10.1. The “Agency” may file an appeal against the order of the “Competent Authority” Holiday listing (Banning business dealing)etc. The appeal shall be filed to “Appellate Authority”. Such an appeal shall be preferred within one month from the date of receipt of the order banning business dealing, etc.
- 10.2. After examining the facts of the case, the Appellate Authority may pass appropriate order which shall be communicated through the concerned **secretary of the Appellate Authority** to the Agency, the “Competent Authority” **and Nodal department for consequential changes in the system.**
- 10.3. Appeal process may be completed within 45 days from the date of receipt of Appeal by the “Appellate Authority”.
- 10.4. ***No Appeal is permitted in case an Agency is Holiday Listed (Banning of business dealing) based on Ministry’s advice.***

11. Duration of Banning :

Ordinarily the period for which an Agency is banned should not be less than **six** months and should not exceed 3 years. However in extraordinary circumstances the period can be more than 3 years.

12. Circulation of the names of Agencies with whom Business Dealings have been banned :

- 12.1. The name(s) and details of the Agency(ies) banned shall be updated in the system.
- 12.2. Banning by any sister PSE will not automatically extend to HPCL unless MOP&NG advises for the same after undertaking appropriate due diligence and process.

13. Revocation:

- 13.1. An order for banning / suspension passed for a certain specified period shall deemed to have been automatically revoked on expiry of that specified period provided no new evidence for continuation of revocation” is taken on record and suspension period is extended and it will not be necessary to issue a specific formal order of revocation, except that an order of suspension / banning passed on account of doubtful loyalty or security consideration shall continue to remain in force until specifically revoked.

- 13.2. In banning cases, where the proprietor of the firm, its employee, partner or representative is convicted by a court of law for offences involving moral turpitude in relation to business dealings, may be revoked if in respect of the same facts, accused has been wholly exonerated by court of Law.
- 13.3. A banning / suspension order may, on a review be revoked by the competent authority if it is of the opinion that the disability already suffered is adequate in the circumstances of the case.

Annexure - I**(Proforma of Show Cause Notice)****BY REGD. POST/SPEEDPOST/COURIER**

No.

Date

To

M/s.....

Attn: Shri.....

Sub; Show Cause Notice

Ref; (Name of Job)

Dear Sir,

You are hereby required to show cause in writing within 15 days from the date hereof why there should not be banning of Business with you and you be debarred from entering into any contracts with XYZ Ltd for the following reasons:

(Give Reasons) .

Your reply (if any) should be supported by documents and documentary evidence which you wish to rely in support of your reply.

Should be fail to reply to this Show Cause Notice within the time and manner aforesaid, it will be presumed that you have nothing to say and we shall proceed accordingly.

Your reply, if any, and the documents/documentary evidence given in support shall; be take into consideration prior to arriving at a decision.

Yours faithfully,

For & On behalf of XYZ Corporation

Annexure-II

(Proforma for intimation of Banning Order to the Party)

BY REGD. POST/SPEEDPOST/COURIER

No.

Date

To,

M/s.....

Attn: Shri.....

Sub : Intimation of Banning of Business dealings.

Dear Sir,

WHEREAS, our Show Cause Notice served to you dated _____.

WHEREAS, In spite of the opportunity given to you, you have failed to show cause as required/your reply to the Show Cause Notice*(and documents and documentary evidence submitted in support of your reply) has /have been duly considered.

(Speaking Order: either to agree or rebutt the reply furnished by agency allegationwise)

After considering the a/legations made in the Show Cause Notice/your reply to the Show Cause Notice *(and documents and documentary evidence furnished in support thereof) as cited above, it has been decided that business dealings with you and * you will be debarred from entering into any contracts with XYZ/Corporation/* for ____ years effective from the date hereof.

Yours faithfully,

* Strike out if not applicable



Policy for holiday listing of vendors in BPCL

1. Introduction :

Works and procurement contracts have become a major activity for corporate in current times. In course of such contracting Oil sector PSEs deal with various “Agencies” (which shall include vendors/parties/contractors/suppliers/ consultants/Licensors/bidders). These entities are expected to adopt ethics of highest standards and a very high degree of integrity, safety and quality consciousness, commitments and sincerity towards the work undertaken and dealing with BPCL in such matters. However, in few occasions, the terms are found to be infringed and deviations from expected behavior are observed. It is not in the interest of BPCL to deal with Agencies who commit deception, fraud or other misconduct including compromising quality and safety in the tendering and execution process.

Also, while participating in the tender and performing the contract, vendors are required to meet certain basic performance criteria and adherence to the terms and conditions of the tender/contract. In case the vendor fails to meet the above parameters, it is prudent to put the vendor on holiday list for specific periods in order to deter the vendors from committing such defaults. Such decisions shall be taken based on the gravity of the default and after following a laid down process, on case to case basis.

Holiday Listing from business dealings involves civil consequences for the “Agency” concerned. Hence, the same requires adherence to the Principles of Natural Justice. Therefore, it is incumbent that adequate opportunity of hearing is provided and the explanation, if tendered, is considered before passing any order in this regard keeping in view the facts and circumstances of the case. The meaning of “Black listing”, “Holiday Listing” and “Banning” is considered one and the same and shall hereafter be referred to only as “Holiday Listing” and the term Holiday Listed Companies is used accordingly in this document.

2. Scope :

- 2.1 The information for Bidders/Instruction to Bidders and even the General Conditions of Contract (GCC) or General Purchase Conditions (GPC) generally provide that BPCL shall have the rights to remove from list of approved suppliers / contractors or to ban business dealings if any Agency has been found to have committed misconduct or fraud or poor performance or anything unethical not expected from a reputed agency.
- 2.2 The procedure of Holiday Listing of Agencies from Business Dealings with BPCL has been laid down in these guidelines.
- 2.3 These guidelines are applicable across BPCL and shall form part of all the tenders. These guidelines shall be published as a separate document in BPCL website and the General Conditions of Contract (GCC) or General Purchase Conditions (GPC) shall have a clause expressly stating that the Guidelines and Procedures for Holiday Listing as adopted by BPCL and available separately in BPCL website shall be applicable in the context of all tenders floated and consequently all orders/ contracts / purchase orders placed by BPCL.

2.4 The Holiday Listing shall be with prospective effect, i.e. for future business dealings.

3. **Definitions :**

In these Guidelines, unless the context otherwise requires

- (i) Agency; "Party/Contractor/Supplier/Vendor/Consultant/Bidder/Licensor" in the context of these guidelines is indicated as 'Agency'.;
"Party/Contractor/Supplier/Vendor/Consultant/bidders/Licensor" shall mean and include a public limited company or a private limited company, a joint venture. Consortium, HUF, a firm whether registered or not, an individual, co-operative society or an association or a group of persons engaged in any commerce, trade, industry etc.
- (ia) Allied Agency means: All concerns which come within the sphere of effective influence of the debarred firms shall be treated as allied firms. In determining this, the following factors may be taken into consideration:
 - a. Whether the management is common
 - b. Majority interest in the management is held by the partners or directors of banned / suspended firm
 - c. Substantial or majority shares are owned by the banned / suspended firm and by virtue of this it has a controlling voice
 - d. Directly or indirectly controls, or is controlled by or is under common control with another bidder
 - e. All successor firms will also be considered as allied firms.
- (ii) Appellate Authority: "Appellate Authority" shall mean the concerned functional Director of BPCL or any other authority nominated by the C & MD. The Appellate authority shall be higher than the "Competent Authority".
- (iii) Competent Authority: "Competent Authority" shall mean the authority, who is competent to take final decision for Banning of business dealings with Agencies, in accordance with these guidelines:
The Competent Authority for a Procurement Department which is initiating the Holiday Listing process should be the Regional head (or) SBU / Entity head as the case may be relevant to the said Procurement Department, but not below the level of General Manager
- (iv) Corporation: "Corporation" means Bharat Petroleum Corporation Ltd. with its Registered Office at Bharat Bhavan-I, 4&6 Currimbhoy Road, Ballard Estate, Mumbai-400001.
- (v) Corrupt Practice: "Corrupt Practice" means the offering, giving, receiving or soliciting, directly or indirectly, anything of value to improperly influence the actions in selection process or in contract execution. Corrupt Practice" also includes any omission for misrepresentation that may mislead or attempt to mislead so that financial or other benefit may be obtained or an obligation avoided.
- (vi) Fraudulent Practice: "Fraudulent Practice" means and include any act or omission committed by a agency or with his connivance or by his agent by misrepresenting/ submitting false documents and/ or false information or concealment of facts or to deceive in order to influence a selection process or during execution of contract/ order;
- (vii) Collusive Practice : "Collusive Practice" amongst bidders (prior to or after bid submission)" means a scheme or arrangement designed to establish bid prices at artificial non-

- competitive levels and to deprive the Employer of the benefits of free and open competition.
- (viii) Coercive Practice: “Coercive practice” means impairing or harming or threatening to impair or harm directly or indirectly, any agency or its property to influence the improper actions of an agency, obstruction of any investigation or auditing of a procurement process.
 - (ix) Officer-in-Charge: “Officer –in-Charge (OIC)” or “Engineer-in-Charge (EIC)” shall mean the person (s) designated to act for and on behalf of BPCL for the execution of the work as per requirement of the concerned department.
 - (x) Malpractice : Malpractice means any Corrupt Practice, Fraudulent Practice, Collusive Practice or Coercive practice as defined herein;
 - (xi) Mis-Conduct : “Mis-conduct” means any act or omission by the Agency, making it liable for action for Holiday Listing as per these guidelines
 - (xii) Nodal Department: “Nodal Department” means the Department primarily assigned with the role of overseeing the Holiday Listing Process to ensure adherence to guidelines, maintaining, updating and publishing the list of Agencies with whom BPCL has decided to ban business dealings and shall be the Corporate Finance Department.
 - (xiii) Vendor De-listment Committee: “Vendor De-listment Committee” relevant to the procurement department which initiates the holiday listing process would be the same as the vendor enlistment Committee as per DR&A of the concerned SBU/Entity.

4. Holiday Listing:

4.1 Reasons for Holiday Listing : An Agency may be placed in Holiday List for any one or more of the following circumstances:

4.1.1. If the Agency , in the context of its dealings with the Corporation:

- a. has indulged in malpractices ;
- b. has submitted fake, false or forged documents / certificates
- c. Has substituted materials in lieu of materials supplied by BPCL or has not returned or has unauthorized disposed off materials / documents / drawings / tools or plants or equipments supplied by BPCL.
- d. Has deliberately violated and circumvented the provisions of labor laws/ regulations / rules, safety norms, environmental norms or other statutory requirements.
- e. has deliberately indulged in construction and erection of defective works or supply of defective materials
- f. Has not cleared previous dues to BPCL if applicable.
- g. Has committed breach of contract or has abandoned the contract.
- h. Poor performance of the Agency in one or several contracts;
- i. Has not honored the fax of award / letter of award / Contract / Purchase order after the same is issued by BPCL.
- j. Withdraws/ revises the bid upwards after becoming the L1 bidder.
- k. Has parted with, leaked or provided confidential / proprietary information of BPCL to any third party without the prior consent of BPCL.



4.1.2. The following additional grounds can also be reasons for Holiday listing of an agency:

- a. If a communication is received from the Administrative Ministry of the Corporation (i.e. MOP&NG) to ban Agency from dealing with the Corporation ;
- b. If the Agency Is or has become bankrupt , OR is being dissolved OR has resolved to be wound up OR if proceedings for winding up or dissolution has been instituted against the Agency;
- c. Any other ground, including transgression of Integrity Pact, which, in the opinion of the Corporation, makes it undesirable to deal with the Agency; In the case of transgression of Integrity Pact, the same should be substantiated by the verdict of the Independent External Monitor.

4.2 Procedure :

- 4.2.1.** Proceedings for Holiday Listing shall be initiated against an Agency when a prima facie case for Holiday Listing comes up, under any of the above mentioned circumstances; before taking a decision, a fair opportunity of hearing the party should be given by means of a Show Cause notice. The show cause notice should indicate clearly and precisely the charges/misconduct which should be based on facts as can be proved as distinct from mere allegations. Statement containing the imputation of misconduct or misbehavior may be appended to the show-cause notice and the “Agency” should be asked to submit within 15 days a written statement in its defense. A proforma of Show Cause notice is attached at Annexure-I. ;
- 4.2.2.** The proceedings shall start with a proposal for initiating action against the Agency, to be raised by the Procurement Department which, in the first instance, is to be cleared by the relevant Vendor De-listment Committee.
- 4.2.3.** The proposal shall state a brief background of the case, the action proposed and all supporting documents, including a note from the Engineer / Officer – In –Charge or the designated incharge or the department responsible for execution of a work, in the case the proposal is related to the performance of a contract. A draft show cause notice is also to be attached to the proposal.
- 4.2.4.** On preliminary examination of the proposal with attached documents, if the vendor delistment committee is of the opinion that action is to be initiated against the Agency, the committee will approve the proposal along with the proposed Show Cause Notice.
- 4.2.5.** Thereupon the Show Cause Notice, as approved, will be issued by the concerned Procurement Department. Before issuing the Show Cause Notice, concerned procurement department should give intimation to the Nodal Department regarding the proposed action against the Agency, along with a copy of the Show Cause notice for record. The Nodal Department, shall in turn publish this information in BPCL website for information and reference of all procuring departments across the corporation



- 4.2.6. On receipt of the explanation from the Agency, the procurement Department will put up the proposal for holiday listing, to the competent authority, through the vendor de-listment committee & the Nodal Department; This proposal would consist of a background of the case, copy of initiation proposal approved by vendor de-listment committee, copy of the Show Cause Notice issued and Agency's reply received and the procurement departments' comments on the same. The period for which holiday listing is recommended should also be clearly mentioned in the proposal. All relevant supporting documents should also be attached; In case no explanation is received from the Agency within the stipulated time, the case shall be preceded with ex-parte.
- 4.2.7. The proposal along with the reply from the Agency would be examined by the Vendor de-listment Committee; thereafter, with the recommendation from the vendor de-listment Committee, the proposal would be put up through the Nodal Department to the Competent Authority for final decision on banning or otherwise.
- 4.2.8. The competent authority, after examining all the materials on record, including the explanation from the Agency, will give their decision on the proposal. Competent Authority in its decision may :
- Approve the proposal for Holiday Listing as such, OR
 - Approval the proposal for holiday listing for a period higher than that was recommended, in case the competent authority is of the opinion that banning for a longer period is required in view of the gravity of the case, OR
 - Approve the proposal for holiday listing for a period lesser than that was recommended, in case the competent authority is of the opinion that lesser period would meet the requirement, considering the gravity of the case, OR
 - Reject the proposal, in case, based on explanation furnished by the Agency, the Competent Authority is of opinion that the alleged misconduct / malpractice was either not substantiated or has happened on account of circumstances on which Agency had no control.
- 4.2.9. The decision of the Competent Authority regarding Holiday Listing of business dealings should be communicated to the 'Agency' concerned, by the concerned procurement department. A draft proforma for intimation of Holiday Listing to Agency is at Annexure II.
- 4.2.10. The Holiday Listing process should be completed at the earliest, and in any case within 45 days from initiation of case by concerned Engineer / Officer – In-Charge /Department responsible for invitation of bids.

However, if any agency , which is under holiday listing process with BPCL, has participated in a tender by submitting bid, the department responsible for initiating the holiday listing process shall expedite completion of the same within 21 days of technical bid opening , based on which the tender can be proceeded with.

4.2.11. Competent Authority shall decide on the period of holiday listing, on case to case basis, depending on the gravity of the case and considering the implications for BPCL on account of the Act/Omission on the part of the Agency, intentions of the Agency as established from the circumstances of the case, frequency of tendering for work of similar nature etc.

4.2.12. Ordinarily the period for which as Agency is Holiday listed should not be less than 1 year (6 months in less serious cases with proper justification) and should not exceed 3 years. However, in extraordinary circumstances as mentioned below, banning of 15 years can be done. The broad guidelines for the period of holiday listing based on the circumstances under which they were put on holiday listing is as under :

S.No	Reasons for holiday listing	Period of holiday listing
1	Indulged in malpractices resulting in financial loss to the Corporation	15 years
2	Submitted fake, false or forged documents / certificates	3 years
3	has substituted materials in lieu of materials supplied by BPCL or has not returned or has unauthorisedly disposed off materials / documents / drawings / tools or plants or equipment's supplied by BPCL	15 years
4	Has deliberately violated and circumvented the provisions of labour laws/ regulations / rules, safety norms, environmental norms or other statutory requirements	3 years
5	has deliberately indulged in construction and erection of defective works or supply of defective materials	3 years
6	has not cleared BPCLs previous dues if applicable	1 year
7	has committed breach of contract or has abandoned the contract	3 years
8	Poor performance of the Agency in one or several contracts	1 year
9	has not honoured the fax of award / letter of award / Contract / Purchase order after the same is issued by BPCL	1 year
10	Withdraws/ revises the bid upwards after becoming the L1 bidder	1 year
11	has parted with , leaked or provided confidential / proprietary information of BPCL to any third party without the prior consent of BPCL	15 years
12	If the Agency Is or has become bankrupt , OR is being dissolved OR has resolved to be wound up OR if proceedings for winding up or dissolution has been instituted against the Agency	3 years
13	Transgression of Integrity Pact , which, in the opinion of the Corporation, makes it undesirable to deal with the Agency;	3 years

4.2.13. In cases where Holiday Listing is proposed based on advice from the Administrative Ministry, no show cause or formal decision by competent authority will be required. The Nodal Department will directly intimate the Agency that they have been placed in Holiday Listing by BPCL based on the Ministry's advice

4.2.14. Provision for Appeal;

- (i) An agency aggrieved with the decision of the Competent Authority shall have the option of filing an appeal against the decision of the Competent Authority within a maximum of 15 days from the date of receipt of intimation of holiday listing.
- (ii) Any appeal filed after expiry of the above period shall not be considered by the Appellate Authority;
- (iii) On receipt of the Appeal from the Agency, the Appellate Authority, if it so desires, may call for comments from the Competent Authority;
- (iv) After receipt of the comments from the Competent Authority, the Appellate Authority, if it so desires, may also give an opportunity for personal hearing, to the Appellant Agency;
- (v) After examining the facts of the case and documents available on record and considering the submissions of the Appellant Agency, the Appellate Authority may pass appropriate order by which the Appellate Authority may either :
 - a) Uphold the decision of Competent authority with or without any variation /lesser period of Holiday Listing; OR
 - b) Annul the order of the Competent Authority.
- (vi) Appellate Authority shall pass its order within a maximum period of 45 days from the date of receipt of Appeal.
- (vii) Order of the Appellate Authority shall be communicated to the Agency by the Procurement Department copy of which shall be given to the Competent Authority and also to the Nodal Department as well. A draft proforma for communicating the decision of the Appellate Authority is at Annexure III
- (viii) No Appeal is permitted in case an Agency is placed in Holiday List by BPCL, based on Ministry's advice.

4.2.15. Effect of Holiday Listing

- (i) No enquiry / bid / tender shall be entertained with an Agency (including Allied Agency) as long as the 'Agency' name appears in the Holiday list.
- (ii) If an 'Agency' is put on the Holiday list during tendering :
 - a) If an 'Agency' is put on Holiday List after issue of the enquiry / bid / tender but before

opening of the un-priced bid, the un-priced bid of the 'Agency' shall not be opened and BG/EMD, if submitted by the 'Agency' shall be returned. If an 'Agency' is put on Holiday List after un-priced bid opening but before price bid opening, the price bid of the 'Agency' shall not be opened and BG/EMD submitted by the 'Agency' shall be returned.

- b) If an 'Agency' is put on Holiday List after opening of price bid but before finalization of the tender, the offer of the 'Agency' shall be ignored and will not be further evaluated and the BG/EMD if any submitted by the 'Agency' shall be returned, The 'Agency' will not be considered for issue of order even if the 'Agency' is the lowest (L1). In such situation next lowest shall be considered as L1;
 - bb) In case, any debarred firms has submitted the bid, the same will be ignored. In case such firm is lowest (L-1), next lowest firm shall be considered as L-1. Bid security submitted by such debarred firms shall be returned to them.
 - c) If contract with the 'Agency' concerned is in operation, (including cases where contract has already been awarded before decision of holiday listing) normally order for Holiday Listing from business dealings cannot affect the contract, because contract is a legal document and unless the same is terminated in terms of the contract, unilateral termination will amount to breach and will have civil consequences.
- (iii) In cases where holiday listing proposal has been initiated by some procurement department in the Corporation, but the process is yet to be completed and order of Competent Authority is awaited, the tendering process may be taken forward till price bid opening and after price bid opening, decision on the tender may be kept on hold till such time order of Competent Authority is issued.

5. Declaration by Bidders regarding Holiday Listing status:

Tenders invited for purchase of Goods and Services for both Open Tenders as well as Limited Tenders, should have the provision that the bidder should submit a declaration to the effect that they are not currently serving any Holiday Listing orders issued by BPCL or MOPNG debarring them from carrying on business dealings with the BPCL/MOPNG. Offers not accompanied with a declaration should be incorporated in rejection criteria. Any wrong declaration in this context shall make the Agency liable for action under this Holiday Listing procedure.

Bidder should submit a declaration to the effect that he has not been convicted of an offence—

- (a) under the Prevention of Corruption Act, 1988: or
- (b) the Indian Penal Code or any other law for the time being in force, for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract.



6. Revocation of Holiday Listing:

6.1 An order for Holiday Listing once passed for a certain specified period shall be revoked as under:

6.1.1. An order for Holiday Listing passed for a certain specified period shall be revoked on the expiry of that specified period, subject to the Agency giving a request in writing clearly mentioning the corrective action which has already been taken / proposed to be taken, to avoid recurrence. Specific order of revocation shall be issued by the concerned Procurement Department Vendor Enlistment Committee, which had recommended the Holiday Listing, after considering the Vendor's request, with copy to the Nodal Department.

6.1.2. A Holiday Listing order may, on a review during its currency of operation, be revoked by the competent authority if it is of the opinion that the disability already suffered is adequate in the circumstances of the case, and the Agency has taken appropriate action to avoid recurrence.

7. Publishing of holiday listing information in BPCL Web-site:

7.1 Once an order of Holiday Listing of an Agency is passed by a Competent Authority, the said information shall be published in the BPCL web-site, by the Nodal Department;

7.2 All Procurement Agencies, should before issue of tender in limited tender cases and before opening of price bids in all cases, verify with this published information that the bidder concerned is not currently serving any Holiday Listing orders issued by BPCL; suitable declarations to this effect shall be incorporated in the concerned approval notes/TEC Note.

7.3 All orders of revocation of holiday listing shall, immediately on revocation, be made available to the Nodal Department, who in turn shall update the information in the web-site accordingly.

7.4 To take cognizance of the holiday listing process in the initiation stage itself, the Nodal Department should update the information in the BPCL web site, as soon as they get intimation from the Procurement Group, along with copy of proposed show cause notice.

7.5 If any Communication is received from the Administrative Ministry (i.e. MOP&NG) advising banning of business dealings with any Agency, the Nodal Department should take immediate action to circulate the same to all Procurement Departments within the Corporation, update the website and also send intimation to the concerned Agency in format Ann. IV



Annexure –I
(Proforma of Show Cause Notice)

BY REGD. POST/SPEED POST/COURIER

No.

Date.....

To M/s

Attn.: Shri

Sub: Show Cause Notice

Ref :

Dear Sir,

You are hereby required to show cause in writing within 15 days from the date hereof why you should not be placed on Holiday List and be debarred from entering into any contracts with BPCL for the following reasons:

(Give Reasons)

Your reply (if any) should be supported by documents and documentary evidence which you wish to rely in support of your reply should you fail to reply to this Show Cause Notice within the time and manner aforesaid, it will be presumed that you have nothing to say and we shall proceed accordingly.

Your reply, if any, and the documents / documentary evidence given in support shall; be taken into consideration prior to arriving at a decision.

Yours faithfully,

For & On behalf of BPCL.



Annexure –II

(Proforma for Intimation of Holiday Listing)

BY REGD. POST/SPEED POST/COURIER

No.....

Date.....

To M/s

Attn.: Shri

Sub: Intimation of Banning of Business Dealings / Holiday Listing

Dear Sir,

WHEREAS our Show Cause Notice served to you dated WHEREAS, in spite of the opportunity given to you, you have failed to show cause as required / your reply to the show cause notice *(and documents and documentary evidence submitted in support of your reply) has / have been duly considered;

(Speaking Order either to agree or rebut the reply furnished by Agency – allegation wise)

After considering the allegations made in the show cause notice/your reply to the show cause notice*(and documents and documentary evidence furnished in support thereof) as cited above, it has been decided that business dealings with you will be banned and you are hereby debarred from entering into contracts with BPCL for Years/months, effective from the date hereof.

This order shall have the following effects:

1. No enquiry / bid / tender shall be issued to you nor will the bids submitted by you be entertained;
2. In cases where tenders have already been issued to you and price bids are yet to be opened, the price bid submitted by you shall not be opened and BG/EMD, if any, submitted by you shall be returned.
3. In cases where tenders have already been issued to you and price bids have already been opened , but final decision is pending, your quote will not be considered for further evaluation and finalization of the tender, and BG/EMD, if any, submitted by you shall be returned.
4. In case of ongoing contracts between you & BPCL, (including cases where contract has already been awarded before) you will be required to continue with the execution and perform as per terms of the contract.

In case you are aggrieved by this order, you may file an Appeal before (Indicate here the relevant Appellate Authority), within a maximum of 15 days from the date of receipt of this order.

You may represent your case before the Appellate Authority, along with necessary justification.

On expiry of the above period of holiday listing, you may approach.....(indicate the concerned procurement department) , with request for revocation of the order mentioning inter-alia the steps taken by you to avoid recurrence of misconduct which has led to the Holiday Listing. (Give Reasons)

Yours faithfully,

For & On behalf of BPCL.



Annexure –III

(Proforma for communication of Appellate Decision on Holiday Listing Order)

BY REGD. POST/SPEED POST/COURIER

No.
Date
To M/s
.....
Attn.: Shri

Sub: Banning of Business Dealings / Holiday Listing- Intimation of decision of Appellate Authority

Ref: 1. Order dated placing M/s on Holiday List by BPCL;
2. Your Appeal reference Dt.....

Dear Sir,

This has reference to the order dt..... placing you on Holiday List and your appeal petition reference dt.... on the same.

After considering the findings of the Original Authority in order dt....., submissions made by you in your appeal, and the documents/documentary evidences available on record, it has been decided finally that:

- There is no infirmity in the order of the Original Authority, and the allegations stand substantiated and the Holiday Listing for the period of years/month from the date of order, as ordered by the original Authority is upheld,
- Considering your submissions, the order of Holiday Listing passed by the original authority is upheld, but with a reduction in period of holiday listing for years/months from the date of order of original authority.
- Considering your submissions and the evidence available on record, there is enough justification to annul the order of the original authority.

(*** Incorporate any one of the above as applicable)

Yours faithfully,

For & On behalf of BPCL.



Annexure –IV

(Proforma for Intimation of Holiday Listing- based on Ministry's Advice)

BY REGD. POST/SPEED POST/COURIER

No.

Date To M/s

.....

.....

Attn.: Shri

Sub : Intimation of Banning of Business Dealings / Holiday Listing

Ref: MOP&NG's letter ref dt....., advising banning of business dealings with M/s.....

Dear Sir,

WHEREAS we have been advised by MOP&NG that all business dealings with you is to be banned and you should be placed on Holiday List for a period ofyrs/months from.....; You are hereby informed that the business dealings with you would be banned and you are hereby debarred from entering into contracts with BPCL for Years/months, effective from the date hereof.

On expiry of the above period of holiday listing, you may approach.....(indicate the concerned procurement department) , with request for revocation of the order mentioning inter-alia the steps taken by you to avoid recurrence of misconduct which has led to the Holiday Listing

Yours faithfully,

For & On behalf of BPCL.



FORMAT for Declaration of Holiday Listing orders issued by BPCL or MOPNG debarring us from carrying on business dealings with BPCL/ MOPNG.

(On Company Letter Head, to be signed by the duly authorized person)

Date: _____

TENDER NO. :

TITLE OF TENDER:

To,
Bharat Petroleum Corporation Ltd

Dear Sir/Madam,

I /We declare and confirm that we are currently not serving any Holiday Listing orders issued by BPCL or MOPNG debarring us from carrying on business dealings with BPCL/ MOPNG or convicted of an offence –

- (a) under the Prevention of Corruption Act, 1988: or
- (b) the Indian Penal Code or any other law for the time being in force, for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract.

(Signature and Stamp of the Bidder)

Bidder Name:

Date :

Address:

Annexure E4: Oil Industry Transport Discipline Guidelines of MOP&NG

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 62 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

OIL INDUSTRY TRANSPORT DISCIPLINE GUIDELINES

VERSION : 4.0

Effective Date- 23 March 2016

(The First Oil Industry Transport Discipline Guidelines (ITDG) for transportation of bulk petroleum products by road was prepared in 2007, which was revised in 2009 and in June 2014. Now, ITDG revised w.e.f 23.03.2016)

PREAMBLE

The First Oil Industry Transport Discipline Guidelines (ITDG) for transportation of bulk petroleum products by road was prepared in 2007, which was revised in 2009 and in June 2014. Now, in view of new initiatives taken by OMCs with regards to improving the effectiveness of Vehicle tracking system and certain changes made in tender conditions about Marker Testing etc. as advised by MOP&NG.

A need was felt, to revise the existing Oil Industry Transport Discipline Guidelines by way of issue of an amendment to clauses as explained in annexure-I. Accordingly, a committee comprising following members studied the issues involved and revised the existing Oil Industry Transport Discipline Guidelines to be implemented effective 23.03.2016.



Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 63 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

Chapter No.	Contents
1	Introduction
2	Transportation
3	Product Loading
4	Product Receipt
5	Tank Truck / Tank Lorry Monitoring
6	Vehicle Tracking System
7	Health ,Safety & Environment
8	Adulteration/Malpractices/ Irregularities/Penalties

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 64 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

OIL INDUSTRY TRANSPORT DISCIPLINE GUIDELINES

1. INTRODUCTION

1.1 Objective

To evolve uniform Oil Industry Transport Discipline Guidelines (ITDG) for transportation of bulk petroleum products by Tank Truck/ Tank Lorry (TT) for:

- a. Delivery of products to Retail Outlets and Direct Customers
- b. Stock Transfers from one location to another, i.e. Bridging

1.2 Purpose

The purpose of Industry Transport Discipline Guidelines is to ensure that:

- 1.2.1 Petroleum products are filled in TT in accordance with Industry Quality Control Manuals.
- 1.2.2 Petroleum products are transported and delivered to dealers/direct customers and receiving locations in good condition conforming to the specifications.
- 1.2.3 A well-defined system of checks exists at various stages of handling of petroleum products.

1.3 Scope

- 1.3.1 The procedure/code outlined in these guidelines are only the minimum required in order to ensure quality and quantity of the petroleum products during receipt, storage, transit and delivery. Therefore, standard operating procedures with due regard to safety in handling of petroleum products in general shall be followed as laid down in the respective safety and operations guidelines/manuals. It is expected that such standard procedures will be followed at all times in addition to the instructions contained in the following chapters of these guidelines.
- 1.3.2 Changes, if any, in these guidelines will be advised through serially numbered amendments and will be displayed at the location notice board/website. The amendment record (Annexure-I) of these guidelines shall be updated accordingly. These changes will be implemented with effect from the date of its amendment.

2. TRANSPORTATION

2.1 Transport Agreement

- 2.1.1 Industry Transport Discipline Guidelines (ITDG) shall be part of the transport agreement.
- 2.1.2 TT shall not be used for any product other than the designated petroleum products and will operate only for the Oil Company with whom the agreement has been entered into.

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 65 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

- 2.1.3 Carrier shall ensure that TT is painted and maintained as per the color scheme advised by the Oil Company from time to time. Carrier shall also ensure that the name of Oil Company & Logo is prominently displayed on the tank of TT and the name of the base location in the information panel as per the directions of the Oil Company.

2.2 Fitness of Tank Lorry

- 2.2.1 Carrier shall be responsible for providing a TT fit in all respects to carry petroleum products and shall be transporting/delivering the same in good condition, as per specifications, to the dealers/direct customers/receiving locations and shall be held accountable for any malpractice/adulteration en route.
- 2.2.2 TT shall be duly approved for its design/fittings by Petroleum and Explosives Safety Organisation (PESO) Department. The carrier shall be responsible for ensuring that the integrity of the TT fittings is maintained in accordance with the conditions laid down by the licensing authority at all times.
- 2.2.3 The original and a copy of the valid Explosives License shall be submitted to the loading location. Original certificate shall be returned to the Carrier after verification. TT shall carry valid Explosive License in original issued by Petroleum and Explosives Safety Organisation Department at all times.
- 2.2.4 TT without valid Explosives License shall not be utilized, unless authorized by Petroleum and Explosives Safety Organisation Department to use the TT pending renewal.
- 2.2.5 Carrier shall ensure compliance to various statutory rules and regulations, including provisions of Motor Vehicle Acts/Motor Vehicle Rules/The Carriage by Road Act in force at all times during the period of agreement.
- 2.2.6 Carrier as per the design given by the Oil Company from time to time shall provide the product sealing/security locking/electronic sealing arrangements (security locking system) as advised by Oil Company from time to time. The transporter to ensure that, the integrity of the locking arrangements is maintained against any tampering at all the times.
- 2.2.7 Carrier shall ensure that the Vehicle Mounted Unit (VMU) along with fittings & fixtures installed on the TT for tracking of the TT is kept always in working condition and its on/ off operation is done according to the instructions given by the Oil Company.

2.3 Calibration of Tank Lorry

- 2.3.1 The original and a copy of the valid calibration certificate shall be submitted to the loading location. Original certificate shall be returned to the Carrier after verification. TT shall carry valid Calibration Certificate in original issued by Weights and Measure Department at all times.
- 2.3.2 TT shall be calibrated for single capacity in line with MV Act/Petroleum Rules/Weights & Measures Act.
- 2.3.3 Carrier to provide manhole on top of the tank in the geometrical center of the compartment of TT.
- 2.3.4 Carrier to provide dip hole/dip pipe in the geometrical center of the manhole with manhole fittings duly welded.
- 2.3.5 Datum Plate height should not be more than 10 mm from the bottom plate and should be shown in the drawing.
- 2.3.6 Tampering with calibration of vehicle in any manner shall be construed as a malpractice and penal action will be taken against the carrier as outlined under clause no. 8. Further, alleged product losses will be recovered from the carrier from the date of last calibration.

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 66 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

- 2.3.7 The calibration of the TT should be done at the calibration facility provided by the Oil Company or as directed by the Oil Company. Carrier shall produce TT for verification/ checking as and when required by the Oil Company.
- 2.3.8 Carrier shall provide brass/aluminum dip rods individual compartment-wise or single dip rod as per prevailing W&M rules.

2.4 Tank Lorry Accident

- 2.4.1 In case of TT accident, the crew shall inform the nearest Police Station, loading location, carrier, nearest Oil Company location and shall guard the vehicle as well as product.
- 2.4.2 Carrier shall arrange to transfer/salvage the product in another fit TT immediately on receipt of the information, after obtaining permission from the Oil Company and various statutory authorities. Proper safety precautions are to be followed while transferring the product from the damaged vehicle.
- 2.4.3 Carrier shall complete all the statutory formalities including lodging of FIR & shall submit accident report to the base location. Non-lodging of FIR, not reporting the accident to the Oil Company shall be construed as a malpractice & penal action will be taken against the carrier as outlined under clause no. 8.
- 2.4.4 Spilled or trans-shipped product salvaged in TT/ barrels shall be brought to the loading location or the receiving location as advised by the Oil Company.
- 2.4.5 Draw three (six nos. in case of MS) composite samples (TMB), 1 liter each from each TT compartment/ barrel in the presence of carrier/TT crew carrying the salvaged product. Prepare sample tags as per specimen given in Annexure-II. Locking/ sealing of the TT/ barrel and sample containers and signing on the sample tags shall be done jointly by the Oil Company representative and carrier/TT crew. One set of sample shall be sent to the Oil Company's lab for testing, one set to be given to carrier/TT crew and one set to be retained at the location.
- 2.4.6 On receipt of test results from the lab, the carrier shall be suitably advised and action taken.

2.5 Other formalities

- 2.5.1 Carrier shall engage TT driver who has undergone training on transportation of hazardous goods as stipulated under the Motor Vehicle Acts/Rules. The driving license of the driver should be endorsed by Road Transport Authorities to this effect.
- 2.5.2 Emergency Information Panels shall be correctly displayed on the TT as stipulated.
- 2.5.3 The TT registration number shall be painted on the fire extinguishers carried by the TT.
- 2.5.4 Carrier shall submit details of TT crew, verification of antecedents of the TT crew obtained from local Police and a copy of valid driving license of the driver, duly endorsed by RTO for having undergone training for transportation of hazardous goods as per MV Act/Rules, to the base location and obtain entry pass from the location.
- 2.5.5 Before embarking for the delivery it will be carrier's or his representative's responsibility to ensure that TT crew has :
- Correct Challan/ Invoice
 - Correct TREM CARD and standing instructions
 - Switched on the VMU.
- 2.5.6 The crew of the tank truck who are signing the Invoice at the loading location should deliver product at the destination. In case of substitution of crew due to any reason, the same should be done only after obtaining permission from the location.

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 67 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

3. PRODUCT LOADING

3.1 Quality Control

- 3.1.1 Petroleum products shall be received, stored and delivered ex loading locations in accordance with Industry Quality Control Manual.
- 3.1.2 a) Sales document: Dispatch density of the product at 15°C Celsius shall be indicated on sales document.
b. Stock transfer document: Dispatch temperature & density of the product at 15°C shall be indicated on stock transfer documents.

3.2 Sealing / Locking of Tank Lorry

- 3.2.1 Security locking of the TT shall be done in accordance with the guidelines of the Oil Company.
- 3.2.2 Carrier to ensure that the integrity of the security locking system is intact at all times.
- 3.2.3 Carrier shall ensure that the TT is always in locked condition (as per security locking system) including on its return journey except during loading/unloading operation. Any act of tampering with the security locking system shall be construed as malpractice and action shall be taken against the carrier.

3.3 Log 'out', 'in' Time System And Delivery Route.

- 3.3.1 The departure time from the loading location shall be recorded on the invoice/stock transfer document itself by the loading location and the dealer/direct customer/receiving location shall record the arrival and departure time of the TT on the same document.
- 3.3.2 Carrier shall ensure that the trip time and the VTS route specified for the destination are strictly adhered to.

4. PRODUCT RECEIPT

The procedure outlined hereunder is applicable for the receipts of product at the supply locations, dealers and direct customers.

Responsibility towards handling of product shall be in accordance with the Marketing Discipline Guidelines in force and Industry Quality Control Manual in force.

4.1 Actions to be taken on arrival of the TT

4.1.1 Recording of timings

Arrival & departure time of the TT shall be recorded in the delivery document. If a bridging TT is used for deliveries by receiving location, it shall report back at the receiving location after completion of delivery.

4.1.2 Checking security locking system

Central Procurement Organization (Mktg.)

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 68 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

4.1.2.1 The security locking system shall be checked and if it is found O.K then proceed to clause 4.1.3. If found tampered, then it will be construed as a malpractice and action shall be taken as mentioned in clause 4.2 and 8.

4.1.2.2 Dip rod and Calibration checking

The dip rod should match the calibration chart provided by Weights & Measures for markings at the dip level, proof level and the total length.

4.1.3 Density checking

On arrival of TT, dealer / customer shall check the density @15 deg C of product from each compartment. If the variation is found to be within +/- 3 kg/cum as compared with the invoice density, steps as mentioned in clause 4.1.4 to be followed. However, if variation in the observed density is beyond +/- 3 kg/ cum, the TT shall not be unloaded and action shall be taken as mentioned in 4.5.1.

4.1.4 Retained Tank Lorry samples

If density check is found to be within +/- 3 kg/cum, dealer/dealer's representative shall draw 2x1 liters of MS and/or 1x1 liter of HSD bottom samples (composite samples from all the compartments proportionate to the quantity of the product received in each compartment after removing approximately 20 liters of product from each compartment). Before drawing samples, the empty aluminum sample containers should be rinsed with the same product from the TT. Sample shall be sealed & labeled and jointly signed by dealer / dealer's representative and TT driver before unloading the TT.

The transporter will have the option to obtain another set of samples (2x1 liter of MS and/or 1x1 liter HSD) duly labeled and jointly signed, for retention. On such request from the transporter, dealer should hand over this set of samples against payment to the TT driver/transporter's representative. In addition, the carrier/TT driver will have to pay a deposit of Rs.300/- per sample container or as revised from time to time to the dealer.

In case the TT driver refuses to sign the label, TT shall not be unloaded and dealer shall contact supply location/field officer.

4.1.5 Marker Testing

The tank lorry may be subjected to the marker test en route or at the dealer / direct customer location premises. If the product carried through TT is found failing in the marker test then actions shall be taken as mentioned in 4.2.

The Marker Test is currently not applicable. However the same clause will be applicable as and when Marker Test is reintroduced".

4.2 Procedure for Dealing with Suspected Irregularities

The following procedure shall be followed for dealing with the suspected irregularities.

- a. Inform sales officer/ loading location.

Central Procurement Organization (Mktg.)

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 69 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

- b. The TT shall be detained.
- c. The Sales officer/ loading location officer shall draw the samples as mentioned in 4.3.
- d. **The sales officer/ loading location officer, TT crew/ carrier's representative & consignee/ consignee's representative, inspecting authority shall prepare a joint statement mentioning the compartment wise observed density / result of the marker test / status of the security locking system and shall sign the statement.**
- e. In case of TT receipt at the location the loading location officer & TT crew/ carrier's representative shall prepare a joint statement mentioning the compartment wise observed density / result of the marker test / status of the security locking system and shall sign the statement.
- f. The TT, thereafter, shall be sealed by the sales officer/ loading location officer and detained at the place of the consignee's premises.
- g. **If the product passes in the lab test, the TT shall be decanted at the consignee's premises. If the product fails in the lab test, then the TT shall be sent for the disposal of the product as directed by the Oil Company.**
- h. Action shall be taken against the carrier as outlined under clause no. 8.

4.3 Sampling Procedure for Suspected Irregularities

4.3.1 At the dealer / Direct customer premises

The sales officer / location officer shall draw eight nos. composite samples (TMB) in case of MS (four in case of other products) of 1 liter each from every TT compartment in the presence of carrier/ TT crew and consignee/ consignee's representative. **Prepare sample tags as per specimen given in Annexure-II. Signing on the sample tags and sealing of the sample containers shall be done jointly by the sales officer/ loading location officer, TT crew/ carrier's representative and consignee/ consignee's representative. One set of sample shall be sent to the Oil Company's lab for testing, one set to be given to carrier/ TT crew, one set to be given to consignee/ consignee's representative and one set to be retained by the sales officer/ loading location**

4.3.2 Receipt at the locations

The location officer shall draw six nos. composite samples (TMB) in case of MS (three in case of other products) of 1 liter each from every TT compartment in the presence of carrier/ TT crew. Prepare sample tags as per specimen given in Annexure-II. Signing on the sample tags and sealing of the sample containers shall be done jointly by the loading location officer and TT crew/ carrier's representative. **One set of sample shall be sent to the Oil Company's lab for testing and one set to be given to carrier/ TT crew and one set to be retained by the loading location.**

4.4. Testing of samples at lab

The TT samples drawn by the sales officer / loading location officer at the consignee's premises shall be tested in the lab. If the product passes in the lab test, the TT shall be decanted at the consignee's premises. If the product fails in the lab test, then the corresponding supply location retention sample shall be tested. If the supply location retention sample passes in the lab test then it would be construed as malpractice done by the carrier & action shall be taken as outlined in clause no 8. If the supply location retention sample fails in the test then no action shall be taken against the carrier. In any case of failure

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 70 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

of the TT sample, the TT shall be sent for the disposal of the product as directed by the Oil Company.

4.5 **Testing of “Retained Tank Lorry Samples” at lab as per Clause no. 2.5(D) of MDG of 2012 effective 08-01-2013.**

4.5.1 **Testing for specifications**

Laboratory will test the RO sample, the last TT retention sample (TL1) and the corresponding supply location sample (SL1) simultaneously and compare the reproducibility / permissible limits of the test values. In case RO sample fails & TL-1 also fails but SL-1 passes, action shall be taken against the transporter of TL-1 as per clause 8.1 of ITDG. However, in case RO sample and supply location sample (SL1) meet the specification norms, no action is to be taken against the Tank truck.

In case RO sample fails and TL1 passes, then (the second last retention sample) TL2 & (supply location sample corresponding to TL2) SL2 will be tested. In case TL2 fails and SL2 passes, action shall be taken against transporter (TL2) as per clause 8.1 of ITDG.

Note: While collecting the samples from RO for testing at the lab, the field officer shall also collect TL2 in addition to TL1 and Nozzle sample so that TL2 can be tested immediately upon passing of TL1 and failure of RO sample.

4.5.2 **Testing for Marker**

If the product sample drawn from the retail outlet is found failing in the marker test then the last “Retained Tank Lorry samples” kept at the retail outlet shall be tested for marker test. The marker test of “Retained Tank Lorry samples” will be carried out after giving prior notice to the dealer & the concerned carrier so that they can be present at the test venue if they so desire for witnessing the testing. Field officer or the representative of the divisional office/ regional office/ territory office will also be present & conduct/ witness the marker test. This team will submit its report in the approved industry format. If the “Retained Tank Lorry samples” is also failing in the marker test then the corresponding location sample will be tested. If the supply location sample is passing in the marker test then it shall be construed as a malpractice done by the carrier & penal action would be taken against the carrier as outlined under clause no. 8.

The Marker Test is currently not applicable. However the same clause will be applicable as and when Marker Test is reintroduced”.

5. **TANK TRUCK/TANK LORRY MONITORING**

- 5.1 Carrier having agreement with the Oil Company for a TT shall not enter into agreement with other company for the same TT. Carrier shall not enter into agreement with the Oil Company for the blacklisted TT. If it is subsequently proved that the carrier has entered in to agreements with other Oil Company for the same TT then it shall be construed as malpractice & penal action would be taken against the carrier as outlined under clause no.8.
- 5.2 The TT/ Carrier/ transporter blacklisted by any one Oil Company shall be construed to be black listed by all Oil Companies.

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 71 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

- 5.3 Carrier shall not enter into agreement with the Oil Company by submitting forged documents/ false information.
- 5.4 Bridging TT, only after verifying the product acknowledgement for the previous trip, and seeking clarification in the cases where trip time has exceeded, the TT will be accepted for loading.
- 5.5 In case a TT has not reported for delivery at the receiving location/destination after a reasonable transit time, carrier shall inform loading location and receiving location/destination the reasons for delay and likely date/time of reporting. In case the Corporation does not find the reasons valid, action will be taken as per clause no. 8.

Even in case of valid reason, not informing the delay as above shall be construed as a malpractice and action will be taken against the carrier as outlined under clause no. 8.

- 5.6 Bridging TT arranged by receiving locations shall be accepted only on the basis of indent slips issued by receiving locations. The receiving location shall issue a serially numbered indent slip before it proceeds to the loading location for uplifting the product. In case of missing of such TT, action as mentioned in item 5.5 above shall be taken.
- 5.7 In case a TT is not received at the receiving location, action shall be taken against the carrier as outlined under clause no. 8.

6. VEHICLE TRACKING SYSTEM

- 6.1 If VMU of the TT is not in working condition, it would be considered that the TT is not fit for loading.
- 6.2 Carrier or his representative shall inform the Oil Company within 30 minutes of stoppage of VMU functioning.
- 6.3 Carrier shall strictly follow the specified route authorised by the respective Oil Company. Any repetitive deviation from authorised route shall be construed as malpractice unless explanation given to the Location In-charge/ nominated officer is accepted as an established genuine case. In case of any established deviation, action will be taken against the carrier as outlined under clause no. 8.2.2.
- 6.4 If it is observed that the VMU, its fittings or fixtures installed on the TT is damaged deliberately by the carrier or his representative, the VMU is switched off en-route, VMU is removed from TT, VMU is used on other vehicles then it would be construed as a malpractice and action will be taken against the carrier as outlined under clause no. 8. Company's decision would be final in determining as to whether it has been damaged deliberately or not.
- 6.5 TT should not make repetitive un-authorised stoppages enroute at a particular spot. Such stoppages shall be construed as malpractice unless explanation given to the Location In-charge/nominated officer is accepted as established genuine case. If not, action will be taken against the TT/Carrier as outlined in clause 8.2.2.
- 6.6 Carrier has to ensure that the TT reaches the destination and delivers product to the consignee within specified trip time. The TT not reaching the destination or unauthorized delays shall be construed as a malpractice and action will be taken against the carrier as outlined under clause no. 8.
- 6.7 Carrier shall ensure that TT does not exceed the speed limits prescribed by the concerned authorities. In case of repetitive/habitual over speeding, action shall be taken as per clause

Central Procurement Organization (Mktg.)

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 72 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

8.2.2. Any accident shall be analyzed for over speeding and action shall be taken as per clause 8.2.2.

7. HEALTH, SAFETY & ENVIRONMENT

- 7.1 All rules/ regulations and statutory requirements shall be strictly followed by the carrier and their work force i.e. drivers/ cleaners at the work place and on the road while transporting petroleum products.
- 7.2 Driver and cleaner shall wear retractable seat belt and uniform as specified by respective OMC, while driving vehicle.
- 7.3 No TT shall be plied by the driver without cleaner, either on the road or at any work place.
- 7.4 The TT crew would not be permitted to enter the location premises without use of the personal protective equipment i.e. safety shoes, helmet, spectacles (wherever necessary).
- 7.5 The crew of TT shall check safety fittings, fitness conditions of vehicles to ply on road before the TT is brought for loading.
- 7.6 Safety procedures for unloading and loading of vehicles at the supply location as well as at the destination i.e. retail outlets, direct customer, supply location, etc. shall be strictly adhered to.
- 7.7 It shall be mandatory for all drivers to undergo refresher training course / training programs organized by the location.
- 7.8 The TT should be driven by driver having valid driving license duly endorsed by RTO for having undergone training to carry hazardous goods.
- 7.9 TT crew to undergo routine health check up once in every six months and certificate issued by the authorities to be submitted to the loading location.
- 7.10 The carrier shall ensure that the TT crew are not in intoxicated state while on duty.
- 7.11 Any deviation from/violation of above requirements shall be construed as an irregularity and action will be taken against the carrier as outlined under clause no. 8.

8. ADULTERATION/ MALPRACTICES/ IRREGULARITIES/ PENALTIES

TT caught for having indulged in adulteration/ malpractices/ irregularities shall be immediately suspended by the location-in-charge. However, an investigation shall be conducted as per the laid down procedure of the company. On investigation, if the adulteration/ malpractice/ irregularities is established then penal actions stipulated as under shall be taken.

8.1 Penalties in case of adulteration

In all cases of failure of the products/ adulteration in TT as well as deemed failure (i.e. sample test value falls within specification range however, it is beyond the repeatability / reproducibility limits w.r.t. reference sample) of the product, action against the Carrier shall be initiated as under :

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 73 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

a. **i. Carriers with single TT**

On the first incident (during the tenure of the contract) of adulteration, the contract with the concerned carrier shall be terminated and the concerned carrier & the particular TT shall be blacklisted on Industry basis.

ii. Carriers with multiple TTs

On the first incident (during the tenure of the contract) of adulteration, the particular TT shall be blacklisted on Industry basis along with the TT crew. In case of second incident of adulteration, the whole contract comprising of all the TTs belonging to the concerned carrier shall be terminated and the concerned carrier & their all TTs shall be black listed on industry basis.

However, if the complicity of the carrier is detected in case of adulteration of the first incident, then the whole contract comprising of all the TTs belonging to the concerned carrier shall be terminated and the concerned carrier & their all TTs shall be black listed on industry basis.

- b. Disposal of the contaminated product shall be done as directed by the company.
- c. Cost of product as determined by the company shall be recovered from the carrier.
- d. Incidental expenses and any other expenses sustained by the concerned Oil Company for disposal of the contaminated product shall also be recovered from the transporter.
- e. Transportation charges, octroi, toll taxes, other levies shall not be paid for the futile trip to the dealer/ direct customer or receiving location as well as for the subsequent trip for delivering the adulterated/ contaminated product to the concerned Oil Company's nominated location for disposal of the product.

8.1 Penalties for malpractices/ irregularities

8.2.1 Malpractices/ irregularities will cover any of the following:

- a. Unauthorized deviation from specified route/ unauthorized delay/ unauthorized en-route stoppage/ not reaching destination/ over speeding/ en-route switching off VMU/ unauthorized removal of VMU/ use of VMU on other vehicles
- b. TT crew found in intoxicated state while on duty.
- c. Irregular reporting of TT at loading location without permission of the location.
- d. Refusal to carry loads allocated by the location.
- e. Reported case of non-wearing of retractable seat belt while driving.
- f. Driving vehicle without cleaner/helper.
- g. Non-functioning of Fire Extinguisher carried by TT.
- h. Polluting environment due to product spillage from tilting or leaky vehicles on road, in case of accident/ unsafe driving
- i. Accident involving injury or damages to the facilities at the work place
- j. Fatal accident at the work place

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 74 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

- k. Tampering with standard fittings of TT including the sealing, security locks, security locking system, calibration, Vehicle Mounted Unit or its fittings/ fixtures
- l. Unauthorized use of TT for products other than the petroleum products for which it has been engaged
- m. Entering into contract based on forged documents/ false information
- n. Entering into an agreement for the same TT with other oil companies
- o. Irregularities under W&M Act
- p. Not lodging FIR with the Police in case of accident, not informing/ submitting accident report to the Oil Company about the accident
- q. Pilferage/ short delivery of product
- r. Any act of the carrier/ carrier's representative that may be harmful to the good name/ image of the Oil Company, its' products or its services.

8.2.2 Penalties upon detection of malpractice/ irregularities

The carrier shall attract penalties for the malpractice/irregularities as given below and the TT mentioned in the following instances shall be suspended/blacklisted along with TT crew. However, an investigation, wherever required, shall be conducted and if the malpractice/ irregularity is established then penal actions stipulated as under shall be taken, including blacklisting :

Clause No.	Type of malpractice / irregularity	Penalty against number of instance		
		First	Second	Third
8.2.2.1	(a) Reported non-wearing of retractable seat belt while driving. (b) Repetitive / Habitual Over speeding. (c) Driving vehicle without cleaner / helper.	TT shall be suspended for one week.	TT shall be suspended for 3 months.	TT shall be blacklisted.
8.2.2.2	(a) Established repetitive unauthorized stoppage en route. (b) Established repetitive unauthorized diversion from specified route. (c) Refusal to carry loads allocated by the location. (d) Irregular reporting of TT at loading location without permission of the location.	TT shall be suspended for 3 months.	TT shall be blacklisted.	
8.2.2.3	Short delivery of product for established malpractice.	TT shall be blacklisted.		
8.2.2.4	(a) Non-availability/non-functioning of TT fire extinguisher.	TT shall be suspended for one week.	TT shall be suspended for 3 months.	TT shall be blacklisted.

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 75 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

	(b) TT crew found in intoxicated state while on duty. (c) Not wearing uniform. (d) Not wearing PPEs at loading/un-loading locations.			
8.2.2.5	(a) Established tampering/ damaging of VMU. (b) Established disconnection of power/cable of VMU enroute. (c) Removal of VMU from original mounting.	TT shall be blacklisted.		
8.2.2.6	Accident at the location leading to injury of persons or damages to the facilities.	TT shall be suspended for 3 months.	TT shall be blacklisted.	
8.2.2.7	Polluting environment due to product spillage from TT.	TT shall be suspended for 3 months.	TT shall be blacklisted.	
8.2.2.8	Established case of pilferage/non-delivery of product.	TT shall be blacklisted.		
8.2.2.9	Fatal accident at the work place.	TT shall be blacklisted.		
8.2.2.10	Irregularities under W&M Act.	TT shall be blacklisted.		
8.2.2.11	Tampering with standard fittings of TT including the sealing, security locks, security locking system, Calibration.	TT shall be blacklisted.		
8.2.2.12	Unauthorized use of TT outside the contract.	TT shall be blacklisted.		
8.2.2.13	Entering into contract based on forged documents/ false information.	TT shall be blacklisted.		
8.2.2.14	Entering into an agreement for the same TT with other oil companies.	TT shall be blacklisted.		
8.2.2.15	Not lodging FIR with the Police in case of accident, not informing/ submitting accident report to the Oil Company about the accident.	TT shall be blacklisted.		
8.2.2.16	Any act of the carrier/ carrier's representative that may be harmful to	As decided by the company		

Tender No.: 18000298-HD-10157	Hindustan Petroleum Corporation Limited	Page 76 of 132
Transportation Ex – Nalagarh IRD	Tender for Road Transportation of Bulk POL products: MS /HSD and Branded fuels	

	the good name/ image of the Oil Company, its' products or its services.			
--	-------------------------------------------------------------------------	--	--	--

During the validity of transportation contract, in the first instance of blacklisting for a transporter, as per the above provisions, damage of Rs.1Lakh will be imposed on the Transporter apart from blacklisting of the involved TT. In second instance of blacklisting, a damage of Rs 3 Lakhs will be imposed and the involved TT will be blacklisted. In third instance of blacklisting, a damage of Rs 5 Lakhs will be imposed and 25% of the remaining TTs will be blacklisted along with the involved TT. In fourth instance, a penalty of Rs 8 Lakhs will be imposed and 50% of remaining TTs will be blacklisted along with involved TT. In case of any further incident of malpractice, the entire fleet will be blacklisted and the SD will be forfeited and the transportation contract will be terminated. The percentage of TT blacklisted will be in proportion of own & attached offered and will be rounded off to the higher numerical.

Above damages imposed are in addition to the recovery of the product quantity found short or recovery due to contaminated product involving the cost of product, expenses and losses incurred as determined by the company.

However, in case, complicity of the transporter is established even in first instance of malpractice, the entire fleet will be blacklisted, contract terminated & carrier blacklisted along with forfeiture of SD.

The blacklisting of TTs shall be on Industry basis.

In the following irregularities, the complicity of the carrier shall be deemed to be existent and the whole contract comprising of all the TTs belonging to the concerned carrier shall be terminated, security deposit forfeited and the concerned carrier & their all TTs shall be blacklisted on Industry basis:

1. False/hidden compartment, unauthorized fittings or alteration in standard fittings affecting Quality and Quantity.
2. Illegal/un-authorized duplicate keys of security locks.
3. Duplicate dip rod/calibration chart.

8.2.3 Period of blacklisting

The period of blacklisting for the carrier & TTs shall be minimum 2 years or as per the respective corporation's assessment depending upon seriousness of the offence, but not exceeding 5 years. The TTs, on completion of Black listing period, can ply under the same contract in case the validity of contract exists and the company so desires.

In case, the same TT is found to indulge in malpractice again (after completion of the first blacklisting period), the second time blacklisting shall be of 5 years. The blacklisting of TTs shall be on Industry basis.

11. Notified Claims

11.1 Introduction

11.1.1 A pre-requisite for deciding a mode or means for the resolution of a dispute is that it shall be a dispute. A “claim” is not the same as a “dispute”. In the Engineering, Procurement, and Construction (EPC) contracts, a “claim” is a possible entitlement of a contractor, but it does not become a dispute until the principal denies such entitlement of the contractor. Arbitration, though an Alternative Dispute Resolution (ADR) process, is a formal process of adjudication of disputes involving investment of resources, making it crucial that the claims become disputes after undergoing a filtration process. The “Notified Claims” clause in the EPC contracts is that filtration process which ensures that any and all claims are not being brought before Arbitration.

11.2 Notified Claims Clause – IOCL

11.2.1 In the EPC contracts of Indian Oil Corporation Limited (IOCL), the Arbitration clause provided in the General Clauses of Contract (GCC), i.e., Clause 9.0.1.0 provides that only the disputes arising out of a “notified claim” of the Contractor which is included in the Final Bill can be referred to Arbitration. A “notified claim” as defined in the GCC is a claim for any extra payment or compensation to which the Contractor considers his entitlement; or a dispute over the validity of any actual or potential deduction. Hence for a claim to be of notifying nature, the same has to fall within the ambit of either of the above. The clause further states that a claim will be said to be “notified” when notice of such claim shall be given to both the Engineer-in-Charge (for short “EIC”) and the Site Engineer within 10 (ten) days from happening of any event which Claimant considers entitles him to additional payment or compensation. The clause overall stipulates two conditions: a) the claim should be of the nature which can be notified, and b) such claim was notified in the requisite manner. Furthermore, the Clause also excludes the jurisdiction of the Tribunal to decide whether or not a claim is a notified claim, and only General Manager is authorized to do so. A copy of the Arbitration Clause i.e., clause 9 of GCC is annexed herewith as **Annexure “F” at Page No. 138**.

11.3 Notified Claims Clause – A Restrictive Clause and a Pre-Arbitration Procedure

11.3.1 The Clause as stipulated above requires certain pre-conditions to be fulfilled before the commencement of arbitration proceedings and non-fulfillment of these conditions ousts the jurisdiction of the Arbitral Tribunal to adjudicate on such claims. The clause thus acts as a restriction on filing any or all claims for adjudication before the Arbitral Tribunal and provides for a “pre-arbitration procedure” required to be followed before proceeding for Arbitration. Pre-arbitration procedures are not “per se” mandatory in nature, but have been time and again upheld by the courts. In *Indian Oil Corporation Limited vs Era Construction (India) Limited* (2012) 189 DLT 120, the Delhi High Court stated that a counterclaim not being a notified claim should not have been entertained by the Ld. Arbitrator. Further, in *IOT Infrastructure & Energy Service Ltd. vs. Indian Oil Corporation Limited* (2015) SCCOnline Del 14653, the Hon’ble Delhi High Court opined that once General Manager decides that a claim is not notified and cannot be referred to arbitration, the question of referring those claims to arbitration does not arise. The Delhi High Court had the same observation in *Institute of Geoinformatics Private Limited vs Indian Oil Corporation Limited* (2015) SCC Online Del 9562, wherein the SLP preferred by Geoinformatics before the Supreme Court was also dismissed. Thus, the clause has been upheld as a mandatory pre-arbitration procedure.

11.4 IOCL vs NCC Limited

11.4.1 The questions about the validity of the clause and the decision of General Manager on the arbitrability of the dispute as to whether a claim is notified or not came before the Hon’ble Supreme Court in *Indian Oil Corporation Limited vs NCC Limited* (2022 Online SC 896), wherein the Court dealt with the issues in depth and while focusing on party autonomy and their right to agree on applicability of proper law of contract, the proper law of arbitration agreement, and proper law of the conduct of arbitration observed that the parties were governed by the GCC. The court stressed that strict interpretation must be applied on the terms between the parties and as such, only Notified Claims would be liable to be considered by IOCL and whether a Notified Claim exists as of date would be solely decided by the General Manager. When General Manager dealt

with the claims and decided that the same were not Notified Claims, NCCL could not have thereafter referred the said claims to arbitration. The Court had thus upheld the clause as valid and enforceable in this landmark decision.

11.5 Essence and Purpose of the Clause

11.5.1 The Courts have not in general held the “Pre-arbitration procedures” as mandatory or directory in nature, and the issues relating to it have been decided in view of the facts, circumstances, and the intention of the parties in each peculiar case. The Clause as stipulated in GCC of IOCL has been upheld by the Supreme Court, being a mandatory pre-arbitration procedure. Though the reasoning of the Court was based on party autonomy. However, the Clause even otherwise is practically important for the reason that it ensures that resources invested in the adjudication of the disputes do not go into vain by having unnecessary and frivolous claims being adjudicated by the Tribunal. Arbitration is a procedure of adjudication subject to payment of fees to the Arbitrators, which is decided based on the claim, whether or not the Fourth Schedule is followed by the parties. If a frivolous claim of a sum goes for adjudication, it will lead to incurring unnecessary expenses, time, and other resources, for which both the parties have to suffer as they have to both incur the fees and eventually if the Arbitration costs are awarded to one of the parties, then the party against whom an Award is passed has to bear the consequences for such frivolous claims. The clause is thus essential to prevent such consequences.

11.6 Conclusion

11.6.1 In EPC Contracts, a clause involving a pre-arbitration procedure, be it in a nature similar to that of the “Notified Claims Clause” as existing in the GCC clause of IOCL, or of any other nature which serves the purpose of filtering the claims is necessary. It ensures that only “disputes” are being referred to the Arbitration and frivolous claims are not being made the subject of the same, as eventually, it is the parties that have to bear the consequences. It is often seen that the parties raise frivolous claims merely in the hope or assumption that they may get the benefit of it, and this practice needs to be prohibited, for which the Notified Claims clause acts as an important tool.

SECTION 9

ARBITRATION

9.0.0.0 ARBITRATION

9.0.1.0 Subject to the provisions of Clauses 6.7.1.0, 6.7.2.0 and 9.0.2.0 hereof, any dispute arising out of a Notified Claim of the CONTRACTOR included in the Final Bill of the CONTRACTOR in accordance with the provisions of Clause 6.6.3.0 hereof, and any dispute arising out of any claim(s) of the OWNER against the CONTRACTOR shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 9.0.1.1 hereof. It is specifically agreed that the OWNER may prefer its claim(s) against the CONTRACTOR as counter-claim(s) if a Notified Claim of the CONTRACTOR has been referred to arbitration. The CONTRACTOR shall not, however, be entitled to raise as a set-off defence or counter-claim any claim which is not a Notified Claim included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

9.0.1.1 The Sole Arbitrator referred to in Clause 9.0.1.0 hereof shall be selected by the CONTRACTOR out of a panel of 3 (three) persons nominated by the OWNER for the purpose of such selection, and should the CONTRACTOR fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the OWNER for the purpose, the Sole Arbitrator shall be selected by the OWNER out of the said panel.

9.0.1.2 If a dispute arises with reference to any of the matters referred to in Paragraphs (i) to (iv) of Clause 9.0.2.0 hereof before the appointment of the sole Arbitrator under this clause, such dispute shall be referred for arbitration under Clause 9.0.2.0 hereof and the appointment of the sole Arbitrator under this Clause shall be subject to and without prejudice to Clause 9.0.2.0 and the sole Arbitrator so appointed shall refrain from proceeding in the arbitration so far as concerns any such disputed matter under the decision of the General Manager or his nominee under Clause 9.0.2.0 in respect thereof. If the dispute arises during the course of the arbitration proceedings commenced under Clause 9.0.1.0 with respect to any of the said matters, the sole Arbitrator shall forthwith refrain from proceeding further in the arbitration so far as concerns any such disputed matters until the decision of the General Manager or his nominee under Clause 9.0.2.0, and if necessary, the sole Arbitrator so appointed under this Clause shall direct the parties before him for the purpose to make reference of such dispute(s) to the General Manager or his nominee under Clause 9.0.2.0.

9.0.2.0 Any dispute(s) or difference(s) with respect to or concerning or relating to any of the following matters are hereby specifically excluded from the scope, purview and ambit of the Arbitration Agreement embodied in Clause 9.0.1.0 with the intention that any dispute or difference with respect to any of the said following matters and/or relating to the Arbitrator's or Arbitral Tribunal's jurisdiction with respect thereto shall not and cannot form the subject-matter of any reference or submission to arbitration under Clause 9.0.1.0, and the Arbitrator or the Arbitral Tribunal shall have no jurisdiction to entertain the same or to render any decision with respect thereto, and such matter shall be referred to the General Manager for decision by the General Manager or his nominee and shall be decided by the General Manager or his nominee, as the case may be (whose decision shall be final and binding on the OWNER and the CONTRACTOR) prior to the Arbitrator appointed under Clause 9.0.1.0 proceeding with or proceeding further with the reference, as the case may be. The said excluded matters are:

- (i) With respect to or concerning the scope or existence or otherwise of the Arbitration Agreement;
- (ii) Whether or not a Claim sought to be referred to arbitration by the CONTRACTOR under Clause 9.0.1.0 is a Notified Claim;
- (iii) Whether or not a Notified Claim is included in the CONTRACTOR's Final Bill in accordance with the provisions of Clause 6.6.3.0 hereof.

- 9.0.2.1 The General Manager or his nominee shall act as a persona designate or expert and not as an arbitrator and the provisions of the Indian Arbitration and Conciliation Act, 1996 or any law governing arbitration shall not apply to proceedings before the General Manager.
- 9.0.2.2 The General Manager shall render his decision on the basis of the material placed before him either by the OWNER or by the CONTRACTOR, and if the CONTRACTOR fails to place material before him, the General Manager shall assume that the CONTRACTOR has no material to place and may render his decision accordingly.
- 9.0.3.0 The provisions of the Indian Arbitration & Conciliation Act, 1996 and any re-enactment(s) and/or modification(s) thereof and of the Rules framed there under shall apply to arbitration proceedings pursuant hereto subject to the following conditions:
- (a) The Arbitrator shall give his Award separately in respect of each Claim and /or Counter-Claim as the case may be; and
 - (b) The Arbitrator shall not be entitled to review any decision, opinion or determination (howsoever expressed) which is stated to be final and/or binding on the CONTRACTOR in terms of the Contract Documents.
 - (c) Any procedure applicable to the arbitration shall be subject to the provisions of Clauses 9.0.1.0 and 9.0.2.0.
- 9.0.4.0 The venue of the arbitration under Clause 9.0.1.0 shall be New Delhi, provided that the Arbitrator may with the consent of the OWNER and the CONTRACTOR agree upon any other venue, while the arbitration under Clause 9.0.2.0 shall be at the place where the General Manager is located, provided that the Arbitrator may with the consent of the Contractor agree upon any other venue..
- 9.1.0.0 CONCILIATION
- 9.1.1.0 At any time prior to or during arbitration of any arbitrable dispute(s) pursuant to Clause 9.0.1.0, the CONTRACTOR may seek resort to the Conciliation Machinery under the Indian Oil Conciliation Rules, 2014 as amended and/or re-enacted from time to time. The proposal for conciliation shall be made to the General Manager.
- 9.1.2.0 The said Rules are available on the OWNER's website.
- 9.2.0.0 GENERAL
- 9.2.1.0 The CONTRACTOR shall not refuse to make a selection within the provisions of Clause 9.0.1.1 hereof nor shall be entitled to contest the Award or otherwise refuse to be bound by the decision of the Arbitrator appointed under Clause 9.0.1.1 and/or Clause 9.0.2.0 hereof on the ground that one or more or all the persons nominated by the OWNER for selection of the sole Arbitrator to be appointed under Clause 9.0.1.1 or the Arbitrator appointed under clause 9.0.2.0 hereof, as the case may be, is or was an officer of the OWNER or is otherwise connected with the OWNER..
- 9.2.2.0 Notwithstanding the existence of any arbitration or the adoption of the Alternative Dispute Resolution Machinery in terms hereof or otherwise, the CONTRACTOR shall continue and be bound to continue and perform all its/ his outstanding obligations in all respects under the Contract (unless the Contract is determined by the OWNER), and the CONTRACTOR shall remain liable and bound in all respects under the Contract.

- 9.2.3.0 The provisions of this Section 9 shall apply for the resolution of disputes between the OWNER and the CONTRACTOR irrespective of whether the CONTRACTOR is a foreign entity or an Indian entity, or whether the CONTRACTOR is an undertaking in public sector or the private sector.

Indian Oil Corporation Limited
Refineries Division
Mathura Refinery

NOTICE INVITING E-TENDER

1.	e-Tender No.	BPIMR-CON-008
2.	Type of Bid	Domestic Bidding Under Two Bid System
3.	Name of Work	Balance Civil Work for 220kV BGPIP at Mathura Refinery
4.	Time Schedule	The overall completion schedule for the entire work shall be within 3.5 (Three and half) months from the date of LOA within which entire Civil works excluding barbed wire fencing to be completed within 3 (Three) months and total Civil work including fencing to be completed within 3.5 (Three and half) months from the date of LOA.
5.	Tender download schedule	From 05.04.2022 (09:00 Hrs) to 19.04.2022 (17:00 Hrs). Tender documents can be downloaded free of charge from the website https://iocletenders.nic.in during the above period.
6.	Pre-Bid Meeting	No Pre-bid Meeting will be held for this tender, However bidders may visit the site at any time.
7.	Last date of submission of tender	19.04.2022 up to 17:00 Hrs.
8.	Techno-commercial Tender opening date	20.04.2019 at 17:30 Hrs. or at a later date/time convenient thereafter. Date and time of Priced Bid opening will be communicated only to techno-commercially acceptable bidders.
9.	Earnest Money Deposit (EMD)	In lieu of EMD, Bidder shall furnish a Bid Security Declaration, on their company letter head, as per the enclosed format – Annexure-M below.
10.	Pre-qualification Criteria (PQC)	The intending bidders shall have to furnish proof of their pre-qualification and experience along with the Part-I (Techno-commercial Bid).
10.1	Annual Turnover	Minimum annual turnover in one of the last three preceding (immediate past) financial years should be Rs. 182.53 Lakhs. In case the NIT publication date is within 06 (six) months from close date of preceding financial /accounting year, the bidder can submit the balance sheets of any of the previous three years (excluding the immediate preceding year), if the balance sheet of immediate preceding year is not available. The bidder shall submit audited annual financial reports for the above 3 (three) financial years in support of their meeting the stipulated requirements as above.

		<p>Documents to be furnished by the bidder in support of meeting the annual turnover as indicated above, shall be:</p> <ul style="list-style-type: none"> Duly certified by Statutory Auditor of the bidder or a practicing Chartered Accountant (not being an employee or a Director and not having any interest in the bidder's company). <p>OR</p> <ul style="list-style-type: none"> In case of published financial report of Public Limited companies, self-certified documents from any one out of CEO or CFO or Company Secretary of the bidder along with the filled-in Self-Certification form (Annexure-I to SCC). <p>Proof of ATO shall be submitted in the form of Audited Balance Sheet and profit & loss account, signed and stamped by the chartered Account and by the owner of the firm. The balance sheet should have the membership No of CA. As per ICAI direction, all Certificates/Audited Account signed by a Chartered Accountant must have UDIN as per details below:</p> <ol style="list-style-type: none"> All Certificates with effect from 1st February, 2019 GST and Income Tax Audit with effect from 1st April, 2019 All Audit and Assurance Functions with effect from 1st July, 2019 <p>Any audited account signed by Chartered Accountant on or after such date without UDIN will not be acceptable.</p>
10.2	<p>Value of Work executed by the bidder as main contractor or sub contractor for 'Similar nature of work' (during any of the last five years ending on last day of the month immediately previous to the month in which last date of bid submission falls). The completion date should fall within the qualifying period.</p>	<p>One completed work of value not less than Rs. 152.11 Lakhs</p> <p>OR</p> <p>Two completed works, each of value not less than Rs. 121.69 Lakhs</p> <p>OR</p> <p>Three completed works, each of value not less than Rs. 91.26 Lakhs</p> <p>(The above values of completed works are exclusive of Goods & Service Tax/service tax).</p> <p>However in case the value of completed job indicated in the completion certificates submitted by prospective bidders do not have clarity with regard to inclusion/exclusion of Service tax, following may be considered:</p> <ol style="list-style-type: none"> The completion certificate, submitted by the bidder shall separately indicate the service tax amount included in the value of completed job OR a separate certificate from the respective client mentioning the service tax amount, if any, included in the value of completed job under consideration should be submitted. In case Service Tax amount/component is not specified in the submitted completion certificate, then the amount equivalent to the rate of applicable service tax for the subject tender shall be deducted from the value of

		<p>completed job mentioned in the completion certificate to arrive at the value of completed job without service tax.</p> <p><i>Detail work order [similar in nature as described below] including covering letter and schedule of rates and completion & commissioning certificate containing executed value of work shall be required. Completed value of work as mentioned in the completion certificate shall be considered for evaluation against single/ multiple work order value required under PQ, however where the executed value is not mentioned in the completion certificate, the copy of certified bill shall also be acceptable for determining value if submitted along with completion certificate.</i></p>
10.3	'Similar nature of work' shall be defined as	Civil & RCC structural works.
10.4	Additional Technical Requirement (if any)	<p>Bidder shall have relevant experience in similar nature of works as defined above.</p> <p>The bidders shall submit details of similar jobs executed by him in the preceding 5 years as above.</p> <p>The bidders shall also submit the copy of the completion details for the similar works, certified by the owners/clients.</p>
11	Mode of submission	<p>Offer must be uploaded on e-tender website https://iocletenders.nic.in before the last date & time of submission of tender.</p> <p>Offer submitted using any other mode will not be accepted.</p> <p>All documents furnished by the bidder in support of meeting the Technical, Commercial and Financial Criteria of PQC shall be:</p> <ul style="list-style-type: none"> Submitted duly certified by Statutory Auditor of the bidder or a practicing Chartered Accountant (not being an employee or a Director and not having any interest in the bidder's company) where audited accounts are not mandatory as per law. <p>OR</p> <ul style="list-style-type: none"> Submitted duly notarized by any notary public in the bidder's country or certified true copies duly signed, dated and stamped by an official authorized for this purpose in Indian Embassy/ High Commission in Bidder's country. <p>OR</p> <ul style="list-style-type: none"> Submitted self-certified documents from any one out of CEO or CFO or Company Secretary of the bidder (Limited company only) along with Self-Certification. This option shall not be applicable to Proprietorship/ Partnership firms. <p>A Company (Bidder) shall not be allowed to use the credentials of its parent or any group company to meet</p>

		<p>the Experience Criteria.</p> <p>The bidders must submit complete and unambiguous documents pertaining to PQC in the first instance itself along with the offer. CONSULTANT/IOCL may not offer any opportunity to the bidder to provide complete or unambiguous documents and reserve the right to proceed on the basis of documents received along with the offer and in case of non-submission of some documents or submission of incomplete or ambiguous documents, the bid may be rejected.</p>
12.	Other requirements	<ol style="list-style-type: none"> 1. PF Code allotment letter / PF registration. 2. Independent ESI Code or undertaking for Independent ESI code in the Format given as Annexure-4 of SCC. 3. Unique GeM seller ID / अद्वितीय GeM विक्रेता आईडी (Refer/ उल्लेख 15.xxxiii) 4. Assessment Order or copy of Income Tax Returns (duly acknowledged by Income Tax Department) for last 3 (three) financial years. 5. Power of Attorney in favour of person authorized to submit the bid. 6. Copy of PAN card. 7. Certificate of Incorporation / Partnership deed / Proprietorship affidavit. 8. GST Registration certificate. 9. Self-certification stating that the bidder is not under liquidation, court receivership or similar proceedings and failure to do so or if the bidder is under, court receivership or similar proceedings, their bids shall not be considered. 10. Bid Security Declaration in lieu of EMD as per enclosed format – Annexure-M. <p>Bidders to note that non-submission of above documents may make their bid liable for rejection.</p>
13.	Tender Inviting Authority	<p>Angshuman Basu, Chief Engineer, M. N. Dastur and Company (P) Ltd., P-17, Mission Row Extension, Kolkata-700013 (On behalf of Indian Oil Corporation Ltd., Mathura Refinery, Mathura-281005 (U.P.) – India)</p> <p>E-mail – Angshuman.B@dastur.com Telephone No.- +91-33-2225 5420, Extn-421</p>
14.	Integrity Pact Agreement	Not applicable for this tender.
15.	Consultant are not eligible to quote	CONSULTANT of this Project or their subsidiary company or companies under the management of CONSULTANT, are not eligible to quote for this tender.
16.	Reverse Auction	Reverse Auction will be applicable for this tender. Please refer the 'Reverse Auction Guidelines' attached to the tender document.
17.	<p>General Bidder to note the following before bidding:</p> <p>i) Offer from following types of bidder will not be accepted:-</p> <p>a) Who are in the Holiday / Negative list of IOCL or its Administrative Ministry,</p>	



HINDUSTAN PETROLEUM CORPORATION LIMITED

**DIRECT SALES DEPARTMENT, 2nd FLOOR,
HINDUSTAN BHAVAN
8,SHOORJI VALLABHDAS MARG
BALLARD ESTATE ,MUMBAI - 400 001
TEL No : 22637280/22637217
FAX No :22671077 / 22637283
Email : maureenm@[hpcl.co.in](mailto:maureenm@hpcl.co.in)**

TENDER No : 11000061-HD-14001

TENDER DOCUMENT

FOR

**PROCESSING AND SUPPLYING OF AUTOMOTIVE AND
INDUSTRIAL GREASES IN PACKAGE SIZES OF 182 KGS
EACH AT HPCL'S MEGA WAREHOUSE AT VASHI AND
COD AT BHIWANDI.**

Browser Version:

: Internet Explorer Versions 6.0 and above.

JAVA Component

: Runtime Environment

MINIMUM QUALIFYING CRITERIA / PRE – QUALIFICATION CRITERIA:

Tenderer who fulfil the following **Minimum Qualifying Criteria** may submit their documents against this tender Documents supporting the following criteria has along with the Un-Priced Bid. :

1. **Average Annual Financial Turnover** of the previous 3 financial years viz. 2007-2008, 2008-2009 & 2009-2010 should not be less than Rs. 360 Lakhs. Please submit audited Profit & Loss Statement / Certification from Chartered Accountant for the last 3 years viz. 2007-2008, 2008-2009 & 2009-2010.

2. **Technical:** The tenderer should have the experience of having successfully manufactured and supplied Litium/Calcium / Sodium based Greases during the last 7 years, period ending 30th June, 2011, as follows :

- 3 orders worth Rs. 50 Lakhs each or
- 2 orders worth Rs. 63 Lakhs each or
- 1 order worth Rs. 100 Lakhs.

Please submit copy of Purchase Orders or Work Order or Certificate/Letter from end user stating that the PO/ Work Order has been completed satisfactorily.

3. EMD : 15.0 Lakhs

Contractor shall submit an Earnest Money Depot (EMD) of Rs.15,00,000/- (Rupees Fifteen Lakhs only) by Crossed demand draft drawn in favour of Hindustan Petroleum Corporation Ltd. payable at Mumbai – DD to be drawn on Nationalised Bank / Scheduled Bank (other than Co-operative Bank) **OR** by Original Bank Guarantee from Nationalised Bank/ Scheduled Bank (other than Co-operative Bank), valid for six months from the due date / extended due date of the tender.

4. Affiliates : Only one affiliate should apply.

Parties who are affiliates of one another can decide which Affiliate will make a bid. Only one affiliate may submit a bid. Two or more affiliates are not permitted to make separate bids directly or indirectly. If 2 or more affiliates submit a bid, then any one or all of them are

liable for disqualification. However upto 3 affiliates may make a joint bid as a consortium, and in which case the conditions applicable to a consortium shall apply to them.

“Affiliate” of a Party shall mean any company or legal entity which:

- (a) controls either directly or indirectly a Party, or
- (b) which is controlled directly or indirectly by a Party; or
- (c) is directly or indirectly controlled by a company, legal entity or partnership which directly or indirectly controls a Party.

“Control” means actual control or ownership of at least a 50% voting or other controlling interest that gives the power to direct, or cause the direction of, the management and material business decisions of the controlled entity.

Bids may be submitted by:

- a) a single person/ entity (called sole bidder);
- b) a newly formed incorporated joint venture (JV) which has not completed 3 financial years from the date of commencement of business;
- c) a consortium (including an unincorporated JV) having a maximum of 3 (three) members;
- d) an Indian arm of a foreign company.

Fulfilment of Eligibility criteria and certain additional conditions in respect of each of the above 4 types of bidders is stated below, respectively:

- a) The sole bidder (including an incorporated JV which has completed 3 financial years after date of commencement of business) shall fulfil each eligibility criteria.
- b) In case the bidder is a newly formed and incorporated joint venture and which has not completed three financial years from the date of commencement of business, then either the said JV shall fulfil each eligibility criteria or any one constituent member/ promoter of such a JV shall fulfil each eligibility criteria. If the bid is received with the proposal that one constituent member/ promoter fulfils each eligibility criteria, then this member/promoter shall be clearly identified and he/it shall assume all obligations under the contract and provide such comfort letter/guarantees as may be required by Owner. The guarantees shall cover inter alia the commitment of the member/ promoter to complete the entire work in all respects and in a timely fashion, being bound by all the obligations under the contract, an undertaking to provide all necessary technical and financial support to the JV to ensure completion of the contract when awarded, an undertaking not to withdraw from the JV till completion of the work, etc.
- c) In case the bidder(s) is/are a consortium (including an unincorporated JV), then the following conditions shall apply:
 - 1) Each member in a consortium may only be a legal entity and not an individual person;
 - 2) the Bid shall specifically identify and describe each member of the consortium;
 - 3) the consortium member descriptions shall indicate what type of legal entity the member is and its jurisdiction of incorporation (or of establishment as a legal entity other than as a corporation) and provide evidence by a copy of the articles of incorporation (or equivalent documents);

- 4) One participant member of the consortium shall be identified as the “ member” and contracting entity for the consortium;
- 5) this prime member shall be solely responsible for all aspects of the Bid/Proposal including the execution of all tasks and performance of all consortium obligations;
- 6) the prime member shall fulfil each eligibility criteria;
- 7) a commitment shall be given from each of the consortium members in the form of a letter signed by a duly authorized officer clearly identifying the role of the member in the Bid and the member’ commitment to perform all relevant tasks and obligations in support of the Prime/lead member of the Consortium and a commitment not to withdraw from the Consortium;
- 8) No change shall be permitted in the number, nature or share holding pattern of the Consortium members after pre-qualification, without the prior written permission of HPCL.
- 9) No change in project plans, timetables or pricing will be permitted as a consequence of any withdrawal or failure to perform by a consortium member;
- 10) No consortium member shall hold less than 25% stake in a consortium;
- 11) Entities which are affiliates of one another are allowed to bid either as a sole bidder or as a consortium only;
- 12) Any person or entity can bid either singly or as a member of only one consortium.

d) In case the bidder is an Indian arm (subsidiary, authorized agent, branch office or affiliate) of a foreign bidder, then the foreign bidder shall have to fulfill each eligibility criteria. If such foreign company desires that the contract be entered into with the Indian arm, then a proper back to back continuing (parent company) guarantee shall be provided by the foreign company clearly stating that in case of any failure of any supply or performance of the equipment, machinery, material or plant or completion of the work in all respects and as per the warranties/ guarantees that may have been given, then the foreign company shall assume all obligations under the contract. Towards this purpose, it shall provide such comfort letter/guarantees as may be required by Owner. The guarantees shall cover inter alia the commitment of the foreign company to complete the entire work in all respects and in a timely fashion, being bound by all the obligations under the contract, an undertaking to provide all necessary technical and financial support to the Indian arm or to render the same themselves so as to ensure completion of the contract when awarded, an undertaking not to withdraw from the contract till completion of the work, etc.

HPCL reserves the right to accept or reject any document at its discretion.

Bids not meeting the above Pre-Qualification Criteria will be rejected.

Tenderer should submit an undertaking for fulfillment of the following Criteria against the above tender :

- 1) Vendor should be a manufacturer of Lithium , Calcium & Sodium based Greases in-house & packing in all size of packs in-house.

PRE-QUALIFICATION DATA BOOKLET

BBBR

FOR LSTK – PACKAGE

PROJECT NAME: BIO REFINERY PROJECT

**DOCUMENT REFERENCE: E-TENDER 33673/
6370-BBBR/LSTK/PQB-001**



OWNER: BHARAT PETROLEUM CORPORATION LIMITED.



PMC : TOYO ENGINEERING INDIA PRIVATE LIMITED.

2.0 ANNUAL TURNOVER

(1) 2016 - 2017 INR _____ Crores / US \$ _____ million

(2) 2015 -2016 INR _____ Crores / US \$ _____ million

(3) 2014 -2015 INR _____ Crores / US \$ _____ million

or

(1) 31.12.16 US \$ _____ million

(2) 31.12.15 US \$ _____ million

(3) 31.12.14 US \$ _____ million

Whether copies of balance sheet and annual turnover statements for the above three financial years submitted - YES / NO

Note 1 : Bidder shall furnish the experience details as above of Projects which they consider suitable for their pre-qualification. OWNER / PMC reserve the right not to evaluate any other Project details.

2 : Bidder to note that BQC form shall be filled as per the Proformas as stated, along with copies of work order and completion certificates.

3 : Bidder to note that non-submission of relevant supporting documents may lead to rejection of their PQ bid. It is to be ensured that all relevant supporting documents shall be submitted along with the PQ bid in the first instance itself. Pre-qualification may be completed based on the details so furnished without seeking any subsequent additional information.

FINANCIAL DETAILS**A. AUDITED ANNUAL TURNOVER REPORTS FOR LAST 3 YEARS**

	Gross Turnover INR OR US\$ OR (US\$) equivalent	Gross Profit INR OR US \$ OR (US\$) equivalent	Net Profit after tax, interest & Depreciation INR OR US\$ OR (US\$) equivalent	Exchange rate considered (if any currency other than US\$)
i.) 2016-2017 ii.) 2015-2016 iii.) 2014-2015 i)31.12.2016 ii)31.12.2015 iii)31.12.2014				

B. DETAILS OF BANKERS :

MAIN BANKERS NAME
 ADDRESS
 PHONE / FAX

C. ENCLOSE AUDITED REPORT OF PROFIT & LOSS STATEMENT FOR THE PRECEDING THREE ACCOUNTING YEARS

2016-2017
2015-2016
2014-2015
OR
31.12.2016
31.12.2015
31.12.2014

D. PROJECTED ANNUAL TURNOVER – INR OR US\$ OR US\$ EQUIVALENT**D.1 CURRENT ACCOUNT YEAR**

- COMPANY INR OR US\$ OR US\$ EQUIVALENT PARENT COMPANY INR OR
US\$ OR US\$ EQUIVALENT

D.1 NEXT ACCOUNT YEAR


COMPANY INR OR US\$ OR US\$ EQUIVALENT PARENT COMPANY INR OR
US\$ OR US\$ EQUIVALENT

E. CREDIT FACILITIES AVAILABLE WITH COMPANY -----
(Banker's letter may be enclosed)

G. THE BIDDER SHALL ATTACH FRESH SOLVENCY CERTIFICATE ISSUED BY HIS
MAIN BANKER

SUBMITTED	Yes	<input type="checkbox"/>
	No	<input type="checkbox"/>

H. ENCLOSE LETTER FROM YOUR BANKER/SELF THAT THE AGENCY IS NOT
UNDER LIQUIDATION, COURT RECEIVERSHIP OR SIMILAR PROCEEDINGS.

	PE&SD, BHEL.R.C. Puram, Hyderabad	Dt: 25.01.2021
PE&SD	NIT no.: T0AUX00006, NIT_56785 in (www.bhel.com), dated 20.01.2021 Tender id in www.eprocure.gov.in : 2021_BHEL_1520_1	Rev 00 Page 1 of 1

Corrigendum 01

Name of the Work: "Site Barricading works" in IOCL Paradip-Standby SRU (525TPD) Project, Odisha..

Tender No.: T0AUX00006, NIT_56785 in (www.bhel.com), dated 20.01.2021

With reference to above tender, following corrigendum –1 is released.

Sl. No.	Document No./Title/ Reference	As Published	Should be read as/Amended to
2.	Annexure-1 i.e PQR of tender	Annexure-1 dated:20.01.2021 i.e Pre-qualification requirement. This document stands null and void	PQR stand revised as per Annexure-1 i.e PQR dated:25.01.2021 shall be applicable. Bidders are required to fill Form F-09 "CAPACITY EVALUATION OF BIDDERS FOR "CONCURRENT COMMITMENTS" FOR PQR CRITERIA 'D'"
3.	NIT- Sl.No.1(V) DUE DATE & TIME OF OFFER SUBMISSION	<i>Date : 30.01.2021 , Time :16:00Hrs</i>	<i>Date : 02.02.2021 , Time :16:00Hrs</i>
4	NIT- Sl.No.1(VI) OPENING OF TENDER	<i>Date : 01.02.2021 , Time :15.00Hrs</i>	<i>Date : 03.02.2021 , Time :15.00Hrs</i>

Note: 1.All other terms & conditions of the tender will remain unchanged.

2.Bidders are requested to submit a copy of this corrigendum (as part of technical bid) duly signed by the authorized signatory & stamped with official seal as a token of Bidder's unqualified acceptance to this corrigendum.

Sd/-

Manoj Kumar, DGM,
PE & SD, BHEL, R.C. PURAM
HYDERABAD- 502 032
Ph. 040-23185003/4915,
E-mail: kumarmanoj@bhel.in

Annexure – I

PRE QUALIFYING REQUIREMENTS

JOB	"Site Barricading works" in IOCL Paradip-Standby SRU (525TPD) Project, Odisha.
Tender/Enquiry Ref No:	T0AUX00006

BIDDER SHALL SUBMIT BELOW PRE-QUALIFICATION REQUIREMENTS FORMAT, DULY FILLED-IN, SPECIFYING RESPECTIVE ANNEXURE NUMBER AGAINST EACH CRITERIA AND FURNISH RELEVANT DOCUMENT IN THE RESPECTIVE ANNEXURES IN THEIR OFFER.

SL NO	PRE-QUALIFICATION REQUIREMENTS	Bidders claim in respect of fulfilling the PQR Criteria	
		Name and Description of qualifying requirements	Page no of supporting document
A	Submission of Integrity Pact duly signed, if offer value is Rs 2 Cr [excluding taxes and duties] or more, if applicable. (Note: To be submitted by Prime Bidder & Consortium/Technical Tie up partner jointly in case Consortium bidding is permitted, otherwise by the sole bidder)		Applicable
B	<u>Technical Criteria:</u> Bidders must have achieved the following criteria (PQR) of (B1 AND B2), during last 7 years. B1.1 Successfully completed one similar work of value not less than Rs. 98.50 Lakhs OR B1.2. Successfully completed Two similar works each of value not less than Rs. 61.50 Lakhs OR B1.3. Successfully completed Three similar works each of value not less than Rs. 50.50 Lakhs		
C	Financial Criteria (For criteria C1, C2 & C3, in case of consortium bidding, either Prime Bidder or Consortium Partner or both	T/O value: FY 2017-18: Rs. _____ Lacs	

1	<p>individually shall meet the respective requirements of PQR):</p> <p>Turnover:</p> <p>Bidders must have achieved an average annual financial turnover (Audited) of Rs. 37.00 Lacs or more over last three completed Financial Years (FY) i.e. 2017-18, 2018-19 & 2019-20.</p>	<p>FY 2018-19: Rs. _____ Lacs</p> <p>FY 2019-20: Rs. _____ Lacs</p>	
2	<p>Net worth:</p> <p>Net worth of the Bidder based on the latest Audited Accounts as furnished for 'C1' above should be positive.</p> <p>Net worth = Paid up share capital* + Reserves. (*Share Capital OR Partnership Capital OR Proprietor Capital as the case may be)</p>		
3	<p>Cash Profit:</p> <p>Bidder must have earned cash profit in any one of the three Financial Years as applicable in the last three years defined in 'C1' above based on latest Audited Accounts. NET cash profit=(PAT + Non cash expenditure viz depreciation)</p>		
D	<p>Capacity Evaluation of Bidder:</p> <p>Concurrent commitments of the bidder shall not be greater than or equal to double the average financial turnover of last three completed Financial years i.e. for FY's 2017-18, 2018-19 & 2019-20</p>		
E	<p>Approval of Customer:</p> <p>Note: Name of L-1 Bidder along with the credentials will be sent to end customer (IOCL Paradip) for approval.</p>		Applicable
F	<p>Price Bid opening.</p> <p>Note: Price Bids of only those bidders shall be opened through conventional method (Without conducting Reverse auction) who stand qualified after compliance of criteria A to D.</p>		By BHEL
	<ol style="list-style-type: none"> 1. Explanatory Notes for the PQR (unless otherwise specified in the PQR): 2. Bidder to submit Audited Balance Sheet and Profit and Loss Account for the respective years as indicated against C-1 above along with all annexures. 3. Audited financial statement have to be submitted for all the three years as indicated against C-1 above. If financial statements are not required to be audited statutorily, then instead of audited financial statements, financial statements are required to be certified by chartered accountant. 4. The bidder can be a company under Companies Act, 1956 or Partnership firm or Proprietor firm. Bidder to submit the document for same. 5. Time period for achievement of the 'Technical' criteria of PQR (as in 'B' above) will be the last 7 years ending on the 'latest date' of Bid submission. If the Qualifying work is 		

	<p>executed in the last seven years period, as specified above, even if it has been started earlier, the same will also be considered meeting the qualifying requirements.</p> <p>6. 'Successfully completed'/'Executed' means the bidder should have achieved the criteria specified in the Technical criteria of PQR (as in 'B' above) even if the Contract has not been completed or closed. The bidders will be required to submit successful completion of work completed (completion of entire work with closing of contract or part successful completion certificate upto a minimum level specified in the criteria B above).</p> <p>7. For PQR 'B' value of work is to be updated as per the PVC formula of GCC with Indices for "All India Avg. Consumer Price Index for Industrial Workers" with base month as date of execution and indexed up to two months prior to the bid opening month. This condition will be applicable only for the completed jobs and not for the jobs in progress as on date of technical bid opening.</p> <p>8. 'Similar Work' means any Civil or Structure or 'Civil and Structures' or Chimney or Cooling Tower in Hydrocarbon sector (Refineries/ Petrochemical Plant/ Onshore Oil or Gas processing Facility/ Offshore Oil or Gas Processing Facility/ LNG facility/ Fertilizer Plant/ Chemical Plant /Metallurgy (Ferrous) Plant/Power plant(excluding solar/wind)).</p> <p>9. Bidders are required to declare the current commitments in the attached format, Form F 09, for the purpose of determining Concurrent commitments.</p> <p>10. Bidder who have participated in the customer tender along with BHEL as competitor and have techno-commercially qualified and not become L-1 in IOCL –Paradip "Bidding document ref: 080557C/T/SRU/LSTK-1" are not eligible to participate in this tender.</p> <p>11. Bidder to submit completion certificate and its Work order for documentary evidence as indicated against criteria B above. Duly certified Payment invoice from the customer organization can be accepted as completion certificate.</p>
--	------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------



NATIONAL ALUMINIUM COMPANY LIMITED
(A Government of India Enterprise)
(A NAVRATNA COMPANY)
Mines Division, Damanjodi-763008.
(T & C DEPARTMENT)

TENDER DOCUMENT COVERING LETTER

Tender Ref. No: T&C/MINES/CIVIL/R-1440

Dt: 15.02.2023

Name of the Work: Specialized civil anchoring & grouting jobs of Gear Box foundation required during Gear Box replacement at Nalco Mines, Damanjodi.

Dear Sirs,

With reference to above, you are requested to submit your best competitive offer for above referred work as specified in the enclosed documents, considering all the terms, conditions and specifications etc. in **online mode/e-mode** at the tendering portal (indicated in salient points of the tender).

The Bidders shall have to upload the scan copy of **Bank Guarantee (only if BID SECURITY amount >or = Rs. 1,00,000.00) or receipt for payment by electronic mode** towards Bid Security/Tender fee amount along with the **Online** offer. Payment for BID SECURITY and Tender fee shall be separately submitted and these two shall not be clubbed in any case.

The copy of receipt for payment against BID SECURITY & tender fee by electronic mode or Original copy of Bank Guarantee shall have to be submitted /sent beforehand so as to reach the office of tender inviting authority on or before the bid submission due date & time or extended bid due date & time of the tender. **In case you are claiming exemption from payment of tender fee/BID SECURITY, the valid attested/notarized supporting documents for claiming the exemption (Ref clause no:5.0 & 6.0 of Annexure-AA) must be uploaded along with the Online offer, failing which the offer will be liable for rejection.**

For this tender- regarding payment of tender fee refer to Sl no. 8 of contract details.

The bidder must be a registered vendor under GST and must possess valid GSTIN.

- a) In case of **SINGLE PART BID TENDER**, the tender document, duly filled in & signed, on each page digitally, along with the required documents in support of terms and conditions as per the NIT/GCC etc are to be submitted in **online mode** along with the requisite BID SECURITY, as per details, indicated at clause no:25.0 of Annexure-AA.
- b) In case of **TWO PART BID TENDER**, the tender document, duly filled in & signed, on each page digitally along with the requisite BID SECURITY, required documents in support of qualifying criteria & other conditions of NIT/ GCC (Part-I: Techno-commercial bid) and the Price Bid (Part-II: Price bid) are to be submitted in online mode as per the details indicated at clause no: 25.0 of Annexure-AA.

NALCO reserves the right to reject any or all offers without assigning any reason thereof.

You are requested to refer to clause 25.0 of Instructions to bidders (Annexure-AA) for details regarding mode, submission, receipt and opening of tender.

Important Note:

- (i) Bidders are requested to quote online well ahead of the schedule tender submission date and time to avoid unforeseen problem like last hour congestion, internet failure etc.
- (ii) Bidders are requested to visit the tendering portal for online participation, downloading the tender documents and submit the offer only in e-tendering mode as per the tender schedule. **Bids submitted in any other mode shall not be considered.**

Thanking you,

Your's faithfully,
For and on behalf of
NATIONAL ALUMINIUM COMPANY LIMITED

Dy. General Manager (Elect)- T&C, (Tender Inviting Authority)

PRE-QUALIFYING CRITERIA NOT APPLICABLE**A) TECHNICAL**

Eligibility Criteria	Documentary proof
<p>The bidder should have experience of having successfully completed “Similar Work” during the last seven years ending on last day of the month previous to the one in which the NITs are invited, should be either of the following;</p> <p>(i) Three similar completed works each (with above criteria) having executed value not less than Rs. NA (Rupees NA only)</p> <p style="text-align: center;">OR</p> <p>(ii) Two similar completed works each (with above criteria) having executed value not less than Rs. NA (Rupees NA only)</p> <p style="text-align: center;">OR</p> <p>(iii) One similar completed works each (with above criteria) having executed value not less than Rs. NA (Rupees NA only)</p> <p>Evaluation criteria: Cost of the completed works by the bidder shall be escalated @ 10% per annum (simple rate) to bring them at the current price level.</p> <p>(The cost of work completed within one year prior to original date of bid opening shall not be considered for any weightage. The weightage shall only be considered for work completed prior to one year of original date of bid opening on annual basis and no weightage shall be given for part of the year)</p> <p>“Similar Work” means NA</p>	<p>The work experience should be of “Working directly” and possess relevant experience as per the details given under experience criteria. “Working directly” implies, working as a Contractor or Sub Contractor under above authorities who is the Principal Owner of the work.</p> <p>The bidder should submit Work order copies showing Order value, Scope of Work & Bill of quantity for assessment of Experience Criteria.</p> <p>Satisfactory Completion Certificate indicating the value of work executed & period of contract should be obtained from Principal Owner of the work for whom the work has been executed.</p> <p>The Experience/ Completion certificate shall mandatorily bear the name and designation of the Issuing Authority in case the same is issued after 30.06.2022.</p> <p>In case of past experience criteria, the experience as a sub-contractor to a main agency in a project awarded by any principal / project authorities shall be considered subject to following:</p> <ol style="list-style-type: none"> Bidder to submit detailed work order / PO/ Agreement from the main agency. Completion certificate issued by main agency. Copy of completion certificate issued by the Principal / project authorities in favour of the main agency showing due completion of the package.
Partially completed work in progress (not abandoned) shall be considered and the part completion certificate submitted by the bidder should clearly indicate the value of work completed up to last day of the month previous one in which the NIT is invited along with completed portion of the work (which should satisfy similar work) and the performance / progress of the bidder should be satisfactory.	

B) FINANCIAL

Eligibility criteria	Documentary proof
<p>1) The average annual turnover of the vendor for last three financial years should be minimum Rs. NA (Rupees NA only)</p> <p>(Turn over shall be escalated @10% per annum (simple rate) to bring them at the current price level. The turnover of the latest previous year shall not be considered for any weightage)</p> <p>2) Net worth of the bidder during the latest financial year shall be positive as per audited balance sheet.</p>	<p>The bidders have to submit the copies of Audited Financial Statements, Profit & Loss accounts and Balance Sheet of the relevant years in support of both the qualifying criteria along with the bid.</p> <p>(For bids received prior to 30th June of any year, the financial figure for the previous to previous year may also be considered for evaluation. Whereas for bids submitted after 30th June, the bidder may also submit financial statement for the previous year certified by Chartered Accountant/Auditor for consideration of their bid.)</p>

MORMUGAO PORT TRUST

MARINE DEPARTMENT

e-TENDER No. DC/O(17)/2017/3



**An ISO 9001 : 2008 Port
ISPS CODE Compliant**

e-Tender Document

for

“Supply, Manning, Operation and Maintenance of One Number Pilot Launch

with Steel / FRP Hull on Hire Basis to Mormugao Port Trust”

THROUGH E -TENDER ON WEB SITE

www.tenderwizard.com/MPT

Due at 1030 hrs on 18.04.2017

		<p>2. Internet Payment Gateway (Debit/ Credit Card of type VISA, MASTERCARD or RuPay.</p> <p>3.Net Banking: Payment can be made through the Internet Banking of Any Bank.</p> <p><i>Note: Any Payments made through NEFT/RTGS will take 24 hours for its reconciliation. Hence the payments through NEFT/RTGS should be made at least TWO BANK WORKING DAYS in advance before any due date and upload the scanned copy of challans in the e-Tender website as a token of payment.</i></p>
1.12	Security Deposit	10 % of the contract value in the form Bank Guarantee from any Nationalised / Scheduled Bank, having its branch at Goa
1.13	Commencement Period	<p>1.For newly constructed Boat: Within 15 (fifteen) months from the date of issuance of Letter of Acceptance (LOA) by the Employer.</p> <p>2. For readily available Boat not more than three years old: Within 6 (six) months from the date of issuance of Letter of Acceptance (LOA) by the Employer.</p>
1.14	Period of Contract	The contract shall remain valid for a period of Seven years from the date of commencement of service.
1.15	Qualifying Criteria :	<p>PRE-QUALIFICATION CRITERIA / BIDDING CONDITION</p> <p>1. The bidder or his parent company or joint venture or partnership should having Average Annual Financial Turnover during the last Three (3) years ending 31st March 2016 should be at least Rs. 2,20,00,000/- Auditors report in original certified by CA or statutory auditors, for the years 2013-14, 2014-15 and 2015-16 including relevant P/L a/c and balance sheet.</p> <p>2. The Bidder or his parent company or Joint Venture or partnership should have experience in similar work of operation and maintenance of Floating Crafts/Pilot Boats on hire/time charter for a minimum period of 2 years during the last seven years as on 30-11-2016 in Major Ports/Govt. Organisations/Reputed Private Sector Organisations. Tenderer should submit copy of Work Order and satisfactory Completion Certificate from the Client as proof.</p> <p>3. The Bidder must be an Indian Registered firm (Furnish copy of Registration Certificate).</p> <p>4. The Bidder must be an ISO Certified firm and should possess a valid ISO 9001:2008 Certificate as on 01-12-2016 issued by any member of IACS or Reputed Certification Bodies who have accreditation with NABCB, India or any other Accreditation Bodies. (Furnish copy of ISO 9001:2008 Certificate issued by the Certification Body).</p>

		<p>5. All the crew & staff engaged for Manning & Operation should be of Indian Nationality.</p> <p>'SIMILAR' Works – means “operation and maintenance of floating crafts/Pilot Boats on hire/time charter”.</p> <p>Please Note: The Tenderers shall enclose the copy of Annual Financial Turnover for the year 2013-14, 2014-15 and 2015-16 (original copy certified by Chartered Accountant/ Statutory Auditor with Profit /Loss Account and balance sheet).The work order copies for similar works where experience is being claimed, successful completion certificates with performance certificate from clients indicating the date of completion, value of work done is required for the technical evaluation without which the technical scrutiny cannot be carried out and bid will be outright rejected without giving any clarification to the tenderers.</p>
1.16	Date & Place of Pre Bid Meeting	30/03/2017 @ 11:00 Hrs. Conference Room, Office of the Deputy Conservator, Mormugao Port Trust, First Floor, A.O. Bldg., Headland Sada, Goa - 403 804. A training session for the Tenderers on e-tender is arranged on 08/03/2017 immediately after the pre-bid meeting.
1.17	Last Date & Time for Receipt of Bids	18/04/2017 @ 10:30 Hrs.
1.18	Bid Opening Date	Techno-commercial Bid (Cover-I) will be opened on 18/04/2017 @ 1100 Hrs. Date of opening of price bid shall be notified after scrutiny and evaluation of Techno-commercial Bid.
1.19	Bid Validity	180 days from the last date fixed for receiving the tender.
1.20	Online Documents required to be submitted by scanning	<p>a. EMD in the form of DD or Bank Guarantee or online through e-payment.</p> <p>b. Copy of documents viz. Work Order, Completion certificate with performance, Financial Turnover, Auditor's report, Balance sheet, P/L account statement etc. Financial Turnover Certificate as at Appendix-II.</p> <p>c. Entire Tender document, each page and form duly signed and filled in</p>
1.21	Address for communication:	Deputy Conservator , Office of Deputy Conservator, Marine Dept., Mormugao Port Trust, First Floor, A.O. Bldg, Headland Sada, Mormugao, Goa – 403804.

REQUEST FOR PROPOSAL

FOR SUPPLYING OF

**STANDARD & PROFESSIONAL SURVEY GRADE UNMANNED AERIAL VEHICLE/
DRONE FOR LARGE SCALE MAPPING AND SURVEILLANCE**

**Forest Department,
Government of Manipur,
Forest Headquarters, Sanjenthong,
Imphal – 795001.
Manipur. India**

Bid Document/ बिड दस्तावेज

Bid Details/बिड विवरण	
Bid End Date/Time/बिड बंद होने की तारीख/समय	17-03-2023 15:00:00
Bid Opening Date/Time/बिड खुलने की तारीख/समय	17-03-2023 15:30:00
Bid Offer Validity (From End Date)/बिड पेशकश वैधता (बंद होने की तारीख से)	30 (Days)
Ministry/State Name/मंत्रालय/राज्य का नाम	Manipur
Department Name/विभाग का नाम	Environment And Forest Department Manipur
Organisation Name/संगठन का नाम	Environment And Ecology Wing
Office Name/कार्यालय का नाम	Forest Head Office Sanjenthong
Total Quantity/कुल मात्रा	10015
Item Category/मद कैटेगरी	Fixed Wing UAV , Multi Rotor UAV , Accessory- LIDAR Unit , Accessory- Multi spectral Sensor Unit Fixed Wing , Accessory- Multi spectral Sensor Unit Multi rotor , Software , Sprayer Drone UAV
BOQ Title/बीओक्यू शीर्षक	UAV AND ACCESSORIES FOR FORESTRY ACTIVITIES
Minimum Average Annual Turnover of the bidder (For 3 Years)/बिडर का न्यूनतम औसत वार्षिक टर्नओवर (3 वर्षों का)	400 Lakh (s)
OEM Average Turnover (Last 3 Years)/मूल उपकरण निर्माता का औसत टर्नओवर (गत 3 वर्षों का)	400 Lakh (s)
Years of Past Experience Required for same/similar service/उन्हीं/समान सेवाओं के लिए अपेक्षित विगत अनुभव के वर्ष	3 Year (s)
MSE Exemption for Years Of Experience/अनुभव के वर्षों से एमएसई छूट/	Yes
Startup Exemption for Years of Experience/अनुभव के वर्षों से स्टार्टअप छूट/ and Turnover	No

[illegible]

MEHARIA & COMPANY[®]
SOLICITORS & ADVOCATES

MCOAPP[®]
Technology brings Transparency

KNOWLEDGE BANK[™]
Always stay curious

Ahmedabad | Chandigarh | Delhi | Kolkata | Kuala Lumpur | London | Mumbai | Singapore