

CHAPTER 14

PENAL ACTION

14.1. Penal action is taken against the firms for committing breach of the terms of the contract and indulging in mal-practices, bribery, fraud, mis-representation, unbusiness like dealings, etc. Though there is no provision in the Stores Purchase Rules to this effect, Clause 17 of Schedule 'B' (conditions of contract), reproduced below, covers this aspects :—

“In the event of the contractor failing duly and properly to fulfil, or committing breach of any of, the terms and conditions of this contract or repeatedly supplying goods liable to rejection here such or failing, declining, neglecting or delaying to comply with any demand or requisition, or otherwise not executing the same in accordance with the terms of contract, or if the contractor or his agents or servants being guilty of fraud in respect of this contract or any other contract entered into by the contractor, or any of his partners or representatives thereof with Government, directing, giving, promising or offering any bribes, gratuity, gift, loan, perquisite reward, or advantage pecuniary or otherwise, to any person in the employment of Government in any way relating to such officers or person or persons, office or employment or if the contractor or any of his partners become insolvent or apply for relief as insolvent debtor or commence any insolvency proceedings or make any composition with his/their creditors or attempts to do so then without prejudice to Government's right and remedies otherwise, Govt. shall be entitled to terminate this contract forthwith and to blacklist the contractor and purchase or procure or arrange from Government's stock or otherwise at the contractor's risk and at the absolute discretion of the Director Supplies & Disposals Haryana, as regards the manner, place or time of such purchases, such supplies have not been supplied or have been rejected under this agreement or are required subsequently by Government thereunder and in cases where issues in replacement are made from Government's stock or supplies, the cost or value of such stocks or supplies together with all incidental charges or expenses, shall be recoverable from the contractor on demand and the contractor shall not be entitled to benefit from any profit which may thus accrue to Government”.

14.2. Following are the different types of penal action which may be taken against the erring contractor for various defaults depending upon their gravity :—

- (a) Removal of the name from the list of approved contractors.
- (b) Forfeiture of Permanent Security.
- (c) Effecting Risk purchase at the cost of the contractor.
- (d) Forfeiture of earnest money/Security.
- (e) Suspension.
- (f) Debarring/Banning.

14.3. As regards penal action referred at (a) to (c) above, the detailed procedure has already been spelt out in the relevant chapters of this manual.

14.4. As regards the rest, the same are dealt with here in detail.

(i) *Forfeiture of Earnest Money*

Clause 7 of the instructions to the tenderers in the tender form provides that the Earnest money will be regarded as forfeitable to Government if the successful tenderer fails, within the time fixed by the Director Supplies & Disposals, Haryana, either to sign the contract on terms contained in the invitation for tender, its tender form and quotation form and conditions of contract referred to in the invitation of tenders, or to deposit security.

14.5. The stipulation is also inserted in the NIT/NIQ, as— under :—

“In case offer is withdrawn during the period of validity of rates, the earnest money shall stand forfeited and action for unbusiness like dealings is liable to be taken”.

14.6. The cause of action for the forfeiture of earnest money arises only after the firm fails to deposit the security and/or complete the contract documents after the communication of the acceptance of their offer within a specified time. On the expiry of the specified period a registered notice is issued to the firm in form given in Annexure 1, giving them another opportunity to deposit the security and complete the contract documents failing which they would render themselves liable to forfeiture of earnest money and other penal action in accordance with the instructions to the tenderers and also stipulation in the NIT.

14.7. On receipt of a reply from the firm, if any, or otherwise after the expiry of the notice period, the case is put up to the Director of Supplies & Disposals for his orders.

14.8. Unless cogent reasons are shown by the firm for not depositing the security or completing the contract documents, the earnest money of the firm is forfeited and/or a case is sent to the Government for debarring the firm from transacting business with the Government for a certain period in the manner mentioned in para 14.9 of this Chapter.

14.9. L.R. has, however, advised that under Section 5 of the Indian Contract Act, the firm can revoke its offer at any time before the communication of its acceptance is complete as against the firm not with standing whether the firm was required to keep its offer open much afterwards, vide their advice conveyed in U.O. No. 375, dated 13-4-78, in case No. GL RC/415/77-78. Thus the action for the forfeiture of Earnest money cannot be taken in case where the firm withdraws its offer within the period of validity of their offer but before the actual date of issue of the acceptance by the Director Supplies & Disposals. For instance, a firm was required to keep the offer open upto 3-4-75 and the telegraphic acceptance was issued to them on 14-3-75 whereas the firm withdrew its offer vide their letter dated 6-3-75 (received in this office on 12-3-75). Revocation of the offer is lawful because it was made well before the date of the communication of the acceptance. Even if the firm had issued a letter of revocation on 14-3-75, the revocation would have been in order and the forfeiture of Earnest money could not have been made.

14.10. But if the firm withdraws the offer after the issue of the acceptance letter, in the above said instance case on 15-3-75, the revocation could not have been tenable in law and the firm would have rendered itself liable to the forfeiture of earnest money.

14.11. The earnest money can also not be forfeited if the acceptance is conditional. In other words while communicating the offer, it has been mentioned that this offer was subject to the fulfilment of the conditions e.g. deposit of security, signing of documents, supply or furnishing of counter sample and so on. The acceptance should not be in the form of a counter offer but in the form of absolute acceptance of the offer of the firm. In case the acceptance is absolute and the firm does not come forward to deposit the security or complete contract documents, it renders itself liable to forfeiture of earnest money.

14.12. Forfeiture of Security :

Security can be forfeited and adjusted towards the recovery of penalty leviable on the firm for delay in supply or for recovering the excess cost incurred by the Govt. in effecting risk purchase against the firm. The relevant provisions in the Stores Purchase Rules to this effect are contained in Rule 25 which reads as under :—

“The penalty so imposed will be recoverable from the security of the contractor deposited with the Haryana Stores Department, or their pending bills, or both”.

14.13. This very point is also covered in the Clause 14 of the conditions of the contract (Schedule 'B') in which it is laid down that if the penalty for delayed supplies is not paid by the contractor, the same can be recovered from his bill or amount of earnest money/security. Again in clause 14(c) of Schedule 'B', relating to risk purchase, it is provided as under :—

“The difference of excess cost thus incurred will be recovered from the supplier from his pending bills, earnest money or security whichever is available”.

14.14. It has been advised by L.R. in a number of cases that the security can be forfeited only when it has been established that some loss has been sustained by the Govt. in arranging supplies at the risk and cost of the contractor for his failure to complete the supplies within the delivery period originally stipulated or extended.

14.15) (a) The Security can, however, not be forfeited if no binding contract has come into being between the firm and Government: for instance, in the following case no binding contract can be said to have been completed and as such the security of the firm could not be forfeited.

- (i) The supply order has not been placed.
- (ii) The supply order contained any stipulation which is in the form of counter offer and is not fully in accordance with the original offer of the party.
- (iii) The party has not signed the conditions of the contract or completed the contract documents.

(b) the advices of L.R. are reproduced in Annexure II to this chapter.

14.16. The firm can also not be penalised by way of forfeiture of security if it is established that the fault lay with the Incenting Department in sticking to certain schedule e.g. supply of drawings, completion of Civil work or issue of despatch instructions, delay in inspection etc. etc.

14.17. Suspension

Pending full enquiry into the allegation levelled against the firm, the State Government may order suspension of business, if it considers desirable that the business with the Government should not continue for the time being. The orders of suspension may be passed in the following contingencies :—

- (i) The firm is suspected to be of doubtful loyalty to India.
- (ii) If the Central Bureau of Investigation or any other investigating agency recommends such a course in respect of a case under investigation; and
- (iii) If the Govt. prima facie is of the view on the basis of some evidence that the firm is guilty of offence involving moral turpitude, in relation to business dealing, which if established, would result in business dealings being banned.

Such an order shall also be extended to all allied firms and shall be applicable to all Government Departments.

14.18. A show cause notice has to be issued by the Government to the firm explaining the nature of allegations and on receipt of reply within a specified period or otherwise the Government may pass such orders as it thinks fit.

14.19. Debarring/Banning

An order for debarring/banning business dealing with the firm may be issued on the following grounds :

- (i) If the security consideration including the question of loyalty to India so warrants.
- (ii) If 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.
- (iii) If the firm has been found guilty of mal-practices e.g. bribery, corruption, fraud, mis-representation, substitution of tenders, interpolation, evasion or habitual default in payment of any tax levied by law.
- (iv) If the firm refuses to return or pay Government dues without showing adequate cause.
- (v) If the firm employs a Govt. Servant, dismissed/removed on account of corruption, or employs a non-official convicted for an offence

involving corruption or abetment of such an offence, in a position where he could corrupt Govt. servants.

- (vi) If the firm repeatedly offers goods liable to rejection, or indulges in unbusiness like dealings.
- (vii) If the firm is declared insolvent/bankrupt by a Court of competent jurisdiction.

14.20. Before issuing such orders a show cause notice is to be issued by the Government to the firm giving them 15 days time to explain their position. After the receipt of the reply, if any, the case is dealt with on file. If considered necessary, comments of the Indenting Department are obtained before sending the recommendations to the Government. In the proposal to be sent to the Government, the period for which such banning/debarring should be ordered is also categorically mentioned.

14.21. After the receipt of the Government orders, a circular is issued to all Heads of the Departments in the State, Public Sector undertakings/Boards, the Commissioners of Divisions and Registrar, Punjab & Haryana High Court and other State Governments and Union Territories and also to Government of India. These orders are also conveyed to all purchase sections of this office.

14.22. The effect of this order passed by the Government is that no Government Department/Public Sector Undertaking/Boards etc. can transact any business with such a firm during the specified period.

14.23. A register is maintained in the office (Statistical section) in Form S.P. 32 wherein names of such firms are entered in alphabetical order. These entries are authenticated by Branch Officer concerned.

14.24. The Purchase section concerned takes careful note of the orders so passed by the Government and at the time of scrutiny of the tenders brings the matter to the notice of competent authorities finalising the purchase so that the offers of this firm are straight away rejected on this ground.

14.25. Such an order shall have no effect on the pending contract which had been concluded before the issue of such orders.

14.26. No contract of any kind what-so-ever shall be placed with the banned firm including its allied firms after the issue of debarring/banning order.

14.27. Particular care should be taken to see that the same firm does not appear under the different names to transact business with the Government. Even in case of risk purchase, no order should be placed on a banned firm.

14.28. Orders passed by the Government for suspension/debarring or banning should be communicated to the firm.

14.29. Revocation of the Order :

An order for banning/suspension passed for a certain specified period shall

be deemed to have been automatically revoked on the expiry of that specified period and it will not be necessary to issue a specified 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 it is specifically revoked.

14.30. The advices of L.R. sought from time to time in various cases are reproduced in Annexure III to this Chapter.

ANNEXURE I

(referred to in para 14.18 & 14.20)

From

The Director,
Supplies & Disposals, Haryana,
Chandigarh,

To

M/S, _____

Memo No. _____
Dated Chandigarh the :—

Sub:—Tender Notice No. _____
Superscribed No. _____
for the supply of _____

Opened On _____

Dear Sirs,

This is in continuation of this office acceptance letter No. _____ dated. _____ wherein you were requested to remit security of Rs. _____ it is regretted that you have failed to remit the security and this has resulted in delay in the issue of detailed supply order. You are again advised to remit security of Rs. _____ so as to reach this office within 10 days positively. Please note that old deposit cannot be adjusted in this case.

You are also requested to explain as to why penal action such as debarring your firm from doing business with Haryana Govt. may not be taken for your un-businesslike behaviour i.e. not complying with the terms and conditions of tender schedule 'B'.

Please note that no further opportunity shall be given in this case and action as deemed fit shall be taken under the rules.

Yours faithfully,

for Director Supplies & Disp. Haryana.

ANNEXURE II

(referred to in para 14.30)

I. FORFEITURE OF SECURITY :

- (1) Security or earnest money can not be forfeited merely on the ground that the contractor failed to complete supply within the delivery period as it would amount to penalty within the meaning of Section 73 & 74 of Indian Contract Act. Forfeiture can be made only against loss occasioned to Govt. in making risk purchase. Firm can be debarred for breach of terms of contract after issuing notice.

Tenders were invited for the supply of Deodar Wood Sleepers and Kail Wood Sleepers. It was decided to place order on M/S. Seth Supply Co ; Jullundur on 31-3-80. The delivery period was stipulated as 30 to 70 days which expired on 8-6-1980. The firm supplied Deodar Wood Sleepers within delivery period but did not complete supply of Kail Wood Sleepers within time. Show cause notice was issued to the firm on 2-4-81 to complete the supply otherwise risk purchase will be effected and security will be forfeited and action for debarring will be taken. The risk purchase action was initiated but I.O. vide letter dated 8.5.81 informed that they do not require Kail Wood Sleepers and their demand may be considered as dropped.

Advice of L.R. was sought on two points vide this department U.O. No. 38 dated 9-6-81.

(1) Whether earnest money/security of the firm can be forfeited for non supply of Kail Wood ?

(2) Can action for debarring be taken against the firm ?

L.R. tendered the following advice vide U.O. No. 9634. C(i) OP/81/1731 dated 1-7-81.

"The first question on which opinion of this department has been sought is whether the Government can forfeit the security and the earnest money of the contractor who failed to supply the contracted goods within the time agreed upon and even after the delivery period had been extended? This is not permissible in law. Forfeiture of security and earnest money would amount to a penalty within the meaning of section 73 & 74 of the Contract Act. Reference in this connection may be made to Union of India V/S K.H. Rao, A.I.R. 1976, S.C. 626. What the department can do is that it may purchase contracted goods from some other persons and if any loss is occasioned to the Government, the recovery can be made from the contractor.

The second question on which the opinion has been sought is whether the contractor can be black listed from future dealings with the Government. This can be done after notice to the contractor.

2. Forfeiture of Security or Earnest money is not permissible as it amounts to penalty within the meaning of Section 73 & 74 of the Indian Contract Act.

This Department entered into an annual rate contract valid upto 31-3-1980 with M/S. Chandigarh Spun pipes, Chandigarh for the supply of R.C.C. Pipes and Collars worth Rs. One Lakh per month, to Govt. Departments. The firm deposited a security/earnest money. After the expiry of the rate contract, the firm sent an affidavit that they had completed full supply and requested for the release of their security/earnest money. Meanwhile a reference was received from the Indenting Department that the firm may be asked to complete supply against supply order No. 3495 dated 7-7-79. Accordingly, the firm was served with a registered notice. It was pointed out that they had got goods inspected against the supply order and they should have despatched the same. The firm took the plea that they had supplied goods worth Rs. 19,86,259.59 against the target of Rs. 12 lacs and, therefore, they could not be bound to effect the supply against this order.

The advice of L.R. was sought on the point whether the security and earnest money of the firm may be released or any other action of effecting risk purchase, forfeiture of security is possible vide U.O. No. 52 dated 24-6-1981.

The advice was received as under vide U.O.No. 10592-C (I) OP-81/1849 dated 17-7-1981.

"The forfeiture of security and earnest money is not permissible as it would amount to penalty under sections 73 and 74 of the Contract Act as laid down in Union of India V/S. K.H. Rao 1976, S.C. 626. With regard to the risk purchase, the department admits that they received goods in excess of the contracted quantity and the risk purchase clause is not attracted".

(File No. Cont./HR/4-E/78-79)

(3) Forfeiture of Security not permissible for breach of contract unless actual loss is occasioned nor can any such provision be inserted in the contract.

This office had received advice from the L.R. in some cases vide U.O. Nos. 9634-C(i) OP/81/1731 dated 1-7-1981 and No. 10592-C(I) OP-81/1849 dated 17-7-81 that earnest money and security can not be forfeited in the event of breach of terms of contract unless any loss is occasioned to Govt. as a result of risk purchase. It was considered to be contrary to the advice received earlier from the L.R. that the Earnest money and security can be forfeited where there is breach of contract. Whether or not any loss has been sustained by Govt. or any risk purchase action has been taken against the firm. The matter was, therefore, referred again to L.R. vide U.O. No. 156 dated 24-11-1981 for advice on the following points :

- (i) Whether security of a firm can be forfeited where it commits breach of contract ?
- (ii) Can a forfeiture clause be added in the terms of the contract,

- (iii) In case the advice is in the negative for (i) & (ii) above, it may be advised what other method can be prescribed in the tender form to protect and safeguard interest of the Government against defaulting suppliers and insincere tenderers.
- (iv) It may be advised whether there are any circumstances in which earnest money of a defaulting firm can be forfeited.

L.R. advised as under vide U.O. No. 20849.(1) OP-81-2903 dated 24-12-1981:

- (i) This department reiterates its advice dated 1-7-81 and 17-7-81.
- (ii) The reply is in the negative.
- (iii) The provision of risk purchase is already there to safeguard such interest.
- (iv) It is an abstract question.

(File No. E/15/18)

ANNEXURE III

(refer to para 14.30)

1. Action for debarring a firm is administrative in nature but it can have legal consequences.

A case relating to the supply of Barbed Wire was sent to the L.R. for opinion on the point whether action of debarring a firm is administrative one or not vide U.O. No. _____, dated _____.

The following advice was received from L.R. vide U.O. No. 1044-C (i)-Og-81/260, dated 28-1-1980 :-

"The action for debarring a firm is an administrative one but it can certainly have legal consequences as the party can challenge the order in a Court of Law".

2. Notices for blacklisting/debarring a firm from doing business with the Haryana Government must make specific reference to the lapses on the part of the firm and should not indicate any pre determination, of any decision.

A reference was made to the L.R. on the question of the blacklisting/debarring of the firm for doing business with the Haryana Government where upon the following advice was received from L.R. on 24-10-1977.

"Whether the firm is to be blacklisted or not is an issue to be decided by the Administrative Department, themselves.

The letter dated 29-7-1977 at page 70 of Controller of Stores file does not itself serve the purpose of the required notice. The firm should be asked to explain why it should not be blacklisted/debarred from doing business with the Haryana Government. It may contain specific reference of the issues on the part of the firm. The notice should not indicate the pre-determination of any decision.

3. Firm cannot be debarred from transacting business with Government unless it has executed all the requisite tender documents e.g. Schedule 'B' and the offer had been accepted and the security deposited.

Tender for the supply of long Cloth were invited by the department. Offer of M/S. Adarsh Dyeing and Proofing Works, Ambala Cantt. was received alongwith other offers for A.S. 48 and A.S. 54 brand of Bleached Long Cloth of M/S. Birla Mills, Delhi. After opening of tenders, M/S. Sandeep Traders, Delhi made a representation to the effect that M/S. Birla Mills, Delhi had neither manufactured the Long Cloth of the above specifications nor they were manufacturing the same. The firm sent a letter dated 26-7-79 written by M/S. Birla Mills to this effect. A show cause notice was served upon the firm as to why their firm may not be debarred. The firm informed that generally the Mills manufacture the cloth according to specifications but M/S. Birla Mills, informed that they never manufactured cloth of this specifications.

Advice of L.R. was sought whether debarring action against the firm can legally be taken, vide U.O. No. 283, dated 16-1-81.

L.R. advised as under, vide U.O. No. 1046-C (I)-OP-81/303 dated 31-1-81.

Presuming that the firm had not deposited the required earnest money/security and in view of the fact that Schedule 'B' was not signed, and so much so that the offer was also not even accepted, no action to debar the firm may be possible. As a matter of fact, the Department should not at all consider the incomplete offers and, thus, avoid unnecessary correspondence.

(File No. GL/Misc./992/78-79/Part-II).

4. Notice for debarring a firm can be issued only by Government and must specify the period for which the debarring is proposed to remain in force.

Two acceptance letters were issued on 12-4-1979 to two parties i.e. Shri Iqbal Marwah, New Delhi and Shri Rajinder Singh, New Delhi. They were required to deposit earnest money within 10 days. The parties refused to deposit the earnest money on the ground that the Vehicles were not in the State in which they were originally seen by them. A meeting of Condemnation Board was reconvened and it was found that there was no change in the Vehicles. A registered notice dated 17-1-1980 was sent to the above two parties but even then they failed to deposit the earnest money. Proposal was sent to the Government for debarring the firm from doing business with Government Departments, vide U.O. No. 39, dated 12-5-1980.

Government sought L.R.'s advice which was conveyed vide memo No. 12(1) (21)-4/B-II-78 dated 27-3-81, as under :—

"In the opinion of this Department, the notices for debarring the firms from doing business with the Government should be issued by the Govt. as the Government is the competent authority to order debarring the firms. Moreover, the period for which the firms are to be debarred has not been mentioned in the previous notices issued by the Controller of Stores. The notices should contain specific period for which the firms are to be debarred.

(File No. COS/Disp.190/78-79 Part-II).

5. Firm failing to deposit security in response to a Counter offer made by the Government cannot be debarred, as no binding contract had come into existence between the firm and the Government.

Tenders for the supply of C.I.D. Joints were invited which were opened on 23-4-1979. Offer of M/S. Mech. Industries, Delhi was accepted vide letter dated 16-5-1979. The firm was advised to withdraw price variation clause and to accept modified payment terms. They were also requested to send security amounting to Rs. 2920/—. The firm acknowledged this acceptance letter and sought some clarifications which were given to them. They were again requested to send the security but they did not deposit the same.

The case was sent to the Government for debarring them for their unbusiness like conduct, vide U.O. No. 160, dated 9-8-80. Government sought L.R's advice which was conveyed to this Deptt. vide U.O. No. 11/2/8-5/B-11-80, dated 17-11-80.

From the note of Controller of Stores dated 9-9-80 it is revealed that a counter offer was made to the firm by asking it to withdraw the Price Variation clause and acceptance of 95 % payment. The firm sought certain information from the department and asked for a copy of Schedule 'B'. The firm did not deposit any security and earnest money.

From the above it is clear that no binding contract came into existence with the firm because the department made a counter offer, and the firm after having certain clarification from the Government kept mum.

In view of this position, the firm cannot be debarred from doing business with the Government due to its failure to deposit the amount of earnest money and security money.

(File No. 458/3-E-78-79).