

STANDARD OPERATING PROCEDURE FOR IMPLEMENTATION OF RISK & COST OPTION ON NON-PERFORMING and/or DEFAULTING CONTRACTORS/ SUPPLIERS

Date: 10th OCT
2017

OBJECTIVE:

- Timely Identification & replacement of Non-performing and/or defaulting contractor/ supplier.
- Execution of risk & cost action in a systematic manner
- Maintaining transparency & rationality in execution of risk & cost to minimize the disputes with contractor/supplier
- To protect BHEL's interest, in case of litigation or otherwise.

SCOPE:

Contracts/ Purchase Orders (PO)/Work Orders (WO) (together referred to as "Contract") covered under Works Policy/ Purchase Policy.

PROCEDURE:

- 1.1 Risk & Cost Clause, in line with Conditions of Contract may be invoked in any of the following cases:
- Contractor/ supplier's poor progress of the work vis-à-vis execution timeline as stipulated in the Contract, backlog attributable to contractor/ supplier including unexecuted portion of work/ supply does not appear to be executable within balance available period (#) considering its performance of execution.
 - Withdrawal from or abandonment of the work by contractor before completion of the work as per contract.
 - Non completion of work/ Non-supply by the Contractor/ supplier within scheduled completion/delivery period as per Contract or as extended from time to time, for the reasons attributable to the contractor/ supplier.
 - Termination of Contract on account of any other reason (s) attributable to Contractor/ Supplier.
 - Assignment, transfer, subletting of Contract without BHEL's written permission resulting in termination of Contract or part thereof by BHEL.
 - Non-compliance to any contractual condition or any other default attributable to Contractor/ Supplier.

#In-case inputs from BHEL/Customer are likely to be delayed or are actually delayed, this delay may also be taken into account while considering balance period available for execution of Contract

1.2	Records/Documents: In order to establish the Risk & Cost case, Execution Group should maintain proper records right from the scheduled/actual date of start of Contract, whichever is earlier. Following records, as applicable w.r.t. above cases, may be referred for taking decision: i) Monthly Plan & Review Record ii) Delay analysis (necessary in case Risk & Cost is being imposed on account of delays attributable to contractor/ supplier) iii) Supporting Correspondence with Contractor/ Supplier bringing on record delay/non-performance/withdrawal from work/non-compliance with contractual conditions etc. iv) Minutes of Meetings held with Contractor/ Supplier v) Any other documents establishing the applicability of relevant sub-clause(s) of clause 1.1 for the invocation of risk & cost action.
1.3	Contractual Letter to Contractor/ Supplier: Department responsible for Subcontracting/ Purchase shall call Contractor/ Supplier for a meeting with all concerned groups (Execution group, PMX/ Indenting group, Region HQ/Unit Finance) in case non-performance/default etc. of Contractor/ Supplier as stated in sub-clause 1.1 is reported by the Execution group/indenter. In case of contracts awarded by Sites, the activities/roles defined in these guidelines shall be carried out by departments/groups at site responsible for carrying out the relevant activities. In this meeting, case(s) reported by Execution group shall be discussed in detail. Contractor/ Supplier will be asked to take corrective measures within stipulated timelines failing which contractual provision for withdrawal of portion of balance work/ supply or termination of Contract at the Risk & Cost of Contractor/ Supplier may be invoked. MOM of above meeting, duly signed by BHEL and the Contractor/Supplier shall be kept as a record. A Contractual Letter duly vetted by Unit/Region Law shall be issued to Contractor/ Supplier forthwith bringing out the proceedings in the meeting as per the MOM. In the event Contractor/ Supplier does not report for the meeting or refuses to sign the MOM, this fact should be recorded in the Contractual Letter. 'Contractual letter' shall be issued by department responsible for Subcontracting/ Purchase to the Contractor/ Supplier, indicating the deficiencies observed, the corrective actions required, time frame for the corrective actions and rights of BHEL to terminate the Contract or withdrawal of portion of balance work/ supply at the Risk & Cost of Contractor/ Supplier as per provision of Contract. Note: In case a contractor/supplier is put under 'Banning across BHEL' as per Guidelines for Suspension of Business Dealings, the need for issuing Contractual Letter and Notice (as per clause 3.1) is

	eliminated. In this case, Contract may be terminated by issuing Termination Letter with the approval of Competent Authority, unless approval for continuance of existing contract is taken in line with Clause 5.2.1 of the Guidelines for Suspension of Business Dealings. Further process of retendering at Risk & Cost shall be followed.
1.4.	Performance Monitoring: Post issue of contractual letter/Signed MOM, performance of the Contractor/ Supplier shall be monitored and record shall be maintained by execution group in-line with Contractual Letter to check whether adequate and effective corrective measures have been taken by the Contractor/ Supplier. Department responsible for Subcontracting/ Purchase shall be informed regarding performance of contractor/ supplier during this period by the execution group/indenter.
1.5.	Immediately after issue of Contractual Letter/signed MOM under clause 1.3, after considering all the aspects, on a case to case basis, process of Tendering for balance work and Termination of existing contract or withdrawal of portion of balance work, should be initiated in parallel, in order to save time in case performance of Contractor/ Supplier does not improve to required level and termination of contract or withdrawal of portion of balance work/ supply becomes necessary.
2.	TENDERING FOR BALANCE WORK
2.1.	Administrative Approval: a) Based on the above records, "NOTE" will be initiated by concerned Execution Group or PMX/ Indenting Group for approval of Competent Authority for - i). Issue of 14 days Notice (as per clause 3.1) to the Contractor/ Supplier in line with contractual provisions. However, in case of urgency or otherwise this period can be reduced or increased for recorded reasons with the approval of Competent Authority, given in sub-clause (c) below. - and - ii). Inviting new tender for balance work in parallel to keep alternate Contractor/ Supplier ready on 'Risk & Cost' basis of the existing Contractor/ Supplier. The Note shall be initiated /routed through Execution Group, PMX/ Indenting Group & Subcontracting/ Purchase/ MM Department. b) Apart from normal requirements for such administrative approvals, the note to include following additional aspects: - i). List of balance work/ supply - ii). <u>Value of balance work/ supply</u>: Value of balance work/ supply shall be calculated as per the latest rates which were being paid to the contractor/ supplier at the time of

	termination of contract i.e. inclusive of PVC & ORC, as applicable & payable as per contractual provisions. iii). Tentative estimate for balance work/ supply. c) Competent authority for approval of such note shall be “one level higher than the authority who approved the Contract including amendments thereto, against which risk & cost is being proposed” or “authority competent for administrative & technical approval for new tender” as per applicable Works/Purchase Policy, whichever is higher, limited to Unit Head.
2.2.	New Indent on account of risk & cost: After the above administrative approval, New Indent shall be raised by PMX/ indenting group for balance work and additional quantities. Additional quantities shall comprise quantities which are not part of balance scope of work and quantities due to additional scope, if any. These additional quantities should also be shown separately in the indent to have clarity while calculating differential cost on account of risk & cost.
2.3.	New Tender: Activities of ‘new tender’ may include: a) Preparation of New Tender shall be done by department responsible for Subcontracting/ Purchase, based on the indent raised by PMX/ indenting group. b) The tender document shall contain “status of the work/ supply (i.e. already completed and the balance to be completed) and other specific clauses related to guarantee, statutory compliance etc. Guarantee/Warranty for the work/ supply already completed, shall also be the responsibility of the new contractor/ supplier. (Terms of the new tender shall be made accordingly.) Thus, Guarantee/ Warranty of entire package/ job shall become the responsibility of new contractor/ supplier. However, in case executed work/ supply is independent of balance work/ supply, Guarantee/Warranty for executed work/ supply shall remain with the existing contractor/supplier and for balance work/ supply shall be with new contractor/ supplier. c) The new tender document shall, as far as practicable, contain clauses (especially those which might have bearing on prices/rates) similar to existing contract so that the scopes/terms may be easily compared for better understanding and facilitate substantiation of recoveries, in case required even in any subsequent legal proceedings. d) ‘New Tender’ shall include suitable clause to address that existing contractor/ supplier (*) whose ‘balance work’ is being withdrawn/terminated, shall not be eligible to quote in this tender. * Existing Contractor/Supplier will include:

	i). In case existing contractor/supplier is The Sole Proprietorship Firm, any Sole Proprietorship Firm owned by same Sole Proprietor. ii). In case existing contractor/supplier is The Partnership Firm, any firm comprising of same partners/ some of the same partners (but not including any new partner); or sole proprietorship firm owned by any partner(s) as a sole proprietor. e) Tendering Process including evaluation of new tender, obtaining customer approval (if required), Negotiation (if required) and bringing tender to awarding stage shall be in line with extant Works/Purchase Policy and applicable guidelines thereto. Note: i). Department responsible for Subcontracting/ Purchase should inform to existing contractor/ supplier through a letter regarding floating of 'new-tender'. ii). In case it is expected that existing contractor/ supplier may approach court for obtaining stay against floating New Tender, suitable Caveat may be filed in Court of competent jurisdiction before informing to the contractor/ supplier.
3.	TERMINATION OF CONTRACT OR WITHDRAWAL OF PORTION OF BALANCE WORK/ SUPPLY
3.1.	Notice: Based on the feedback from Execution group regarding performance of contractor/ supplier as per clause 1.4, Notice duly vetted by Unit/Region Law may be issued by department responsible for Subcontracting/ Purchase to non-performing contractor/ supplier in-line with contractual clause. The Notice shall contain specified time {as per administrative approval in line with clause 2.1 a) i)} for taking corrective measures including but not limited to completion of specified work/supply and further state that if work/supply is not completed and/or specified corrective measures are not taken within the said time, BHEL shall terminate the Contract or withdraw portion of balance work/ supply in line with contractual provisions. The Notice shall be served on the contractor/ supplier through email and also by registered post/ speed post. Copy of Notice shall be sent to all concerned like Execution group, PMX/Indenting group, Region HQ/Unit Finance, Unit/ Region Law etc. Note: i). Notice period mentioned in Notice issued to contractor/supplier cannot be extended as time is the essence of the contract for the purpose of risk & cost action. Extension of Notice shall be deemed as withdrawal of notice.

	ii). Timing for issue of Notice should be such that by the time such notice period ends, tender process for balance work/ supply also gets finalized up to awarding stage. iii). In case it is expected that existing contractor/ supplier may approach court for obtaining stay against Notice, a Caveat may be filed in Court of competent jurisdiction before issuance of notice to the contractor/ supplier.
3.2.	Performance Monitoring during Notice Period: Performance of the Contractor/ Supplier shall be closely monitored and recorded by Execution group during above mentioned 'Notice Period' as given in the aforementioned Notice.
3.3.	Approval for Termination of Contract or Withdrawal of portion of balance work/ supply: If the contractor/ supplier does not complete the specified work/supply within the Notice Period, Execution group shall initiate 'NOTE', seeking approval for withdrawal of portion of balance work/ supply or termination of Contract and engaging new contractor/ supplier at 'Risk & Cost' of the existing contractor/ supplier. The "NOTE" shall be routed through Execution group, PMX/ Indenting Group, Subcontracting/ Purchase/ MM department and Finance before putting to Competent Authority for approval. Competent authority for approval of such note shall be as per clause 2.1 (c). The note may, inter-alia include following details: i) Tentative value of balance work/ supply in line with clause 5.1 ii) Tentative Risk & Cost amount as per clause 5.1 considering estimated rates for new Contract iii) Other tentative recoveries (e.g. Amount of unadjusted advance, recoveries towards material/T&P or any other recovery, wage & other statutory payments to contractor's workers already made/to be made by BHEL etc.) iv) Dues of contractor/ supplier, if any available with BHEL (e.g. SD, retention amount, other BGs, payments due but not paid etc.) v) Tentative Recovery plan for Risk & Cost amount and other liabilities, after adjusting the dues.
3.4.	Issue of Letter for Termination of Contract or Withdrawal of portion of balance work/ supply: On approval of NOTE as per 3.3 above, letter for 'Withdrawal of portion of balance work/ supply' or 'Termination of Contract' shall be issued to contractor/ supplier by department responsible for Subcontracting/ Purchase through email and also by registered post/speed post, clearly stating that: i) Balance work/ supply shall be got done at their risk and cost, which shall be recovered from them out of dues of this contract, any other contract with BHEL and balance amount, if any shall be required to be deposited by them. ii) Contractor/ Supplier is required to jointly measure with BHEL, the quantum of work/ supply executed till date to calculate the balance work/ supply yet to be executed and reconcile

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	issued material within 15 days. In case Contractor/ Supplier fails to do so or does not turn up for the measurement, BHEL shall finalise the same and will inform the Contractor/ Supplier. iii) In case of termination of contract, it is the responsibility of the Contractor/ Supplier to submit final bill along with all required supporting documents. iv) Risk& Cost amount including other recoveries shall be finalized and informed after award of contract to new contractor/ supplier. Note: The acknowledgement receipt/ proof of dispatch is to be kept as record.
3.5.	In case of termination of contract, any payment due to the contractor/ supplier against concerned contract shall be withheld pending finalization of the recoveries from the contractor/ supplier. Subsequent to finalization of recoveries from contractor/ supplier action shall be taken for recovery in line with clause 6.
4.	AWARDING OF CONTRACT FOR BALANCE WORK/SUPPLY ON RISK & COST BASIS
4.1.	Awarding of new Contract for balance work/supply shall be done only after Withdrawal of portion of balance work/ supply or Termination of existing Contract as the case may be. Where Risk & Cost option is exercised by withdrawing only a portion of balance work/ supply, necessary amendment to old Contract shall be issued immediately after award of new Contract and recoveries effected from contractor/supplier. After award of new Contract, the Contractor/Supplier should be informed in parallel that a new Contract has been awarded. In case the risk and cost amount recoverable is known, at that time, the same should necessarily be informed to the Contractor/Supplier. In any case, whenever the amounts are crystallized, the said recoverable amounts should be informed to the Contractor/Supplier at the earliest and without inordinate delay.

5.	RISK & COST
5.1.	Risk and Cost against Balance Work: Risk & Cost Amount= $[(A-B) + (A \times H/100)]$ Where, A= Value of Balance scope of Work/ Supply (*) as per rates of new contract B= Value of Balance scope of Work/ Supply (*) as per rates of old contract being paid to the contractor/ supplier at the time of termination of contract i.e. inclusive of PVC & ORC, if any. H = Overhead Factor to be taken as 5 In case (A-B) is less than 0 (zero), value of (A-B) shall be taken as 0 (zero). *(Balance scope of work/ supply) Difference of Contract Quantities and Executed Quantities as on the date of issue of Letter for 'Termination of Contract', shall be taken as balance scope of Work/ Supply for calculating risk & cost amount. Contract quantities are the quantities as per original contract. If, Contract has been amended, quantities as per amended Contract shall be considered as Contract Quantities. Items for which total quantities to be executed have exceeded the Contract Quantities based on drawings issued to contractor from time to time till issue of Termination letter; then for these items total Quantities as per issued drawings would be deemed to be contract quantities. Substitute/ extra items whose rates have already been approved would form part of contract quantities for this purpose. Substitute/ extra items which have been executed but rates have not been approved, would also form part of contract quantities for this purpose and rates of such items shall be determined in line with contractual provisions. However, increase in quantities on account of additional scope in new tender shall not be considered for this purpose. NOTE: In case portion of work is being withdrawn, contract quantities pertaining to portion of work withdrawn shall be considered as 'Balance scope of work/supply' for calculating Risk & Cost amount.
5.2.	LD against delay in executed work/supply in case of Termination of Contract

	LD against delay in executed work/supply shall be calculated in line with LD clause of the contract for the delay attributable to contractor/ supplier. For this purpose, contract value shall be taken as Executed Value of work/supply for the purpose of limiting maximum LD value. Method for calculation of “LD against delay in executed work/supply” is given below. i) Let the time period from scheduled date of start of work till termination of contract excluding the period of Hold (if any) not attributable to contractor/ supplier= T1 ii) Let the value of executed work/supply till the time of termination of contract= X iii) Let the Total Executable Value of work/supply for which inputs/fronts were made available to contractor/ supplier and were planned for execution till termination of contract = Y iv) Delay in executed work/supply attributable to contractor/supplier i.e. $T2 = (1 - \frac{X}{Y}) \times T1$ v) LD shall be calculated in line with LD clause of the Contract for the delay attributable to contractor/ supplier taking “X” as Contract Value and “T2” as delay attributable to contractor/ supplier. Note: Incase portion of work/supply is withdrawn, no LD shall be applicable for portion of work/supply withdrawn.
6.	PROCESS FOR RECOVERIES
6.1.	The following sequence shall be applicable for recoveries from contractor/ supplier on whom risk & cost has been invoked, after informing the Contractor/Supplier of the total proposed recovery: a) Dues available in the form of Bills payable to contractor/ supplier, SD, BGs against the same contract. b) Demand notice for deposit of balance recovery amount to be sent to contractor/ supplier, if funds are insufficient to effect complete recovery against dues indicated in (a) above. In case it is expected that contractor/ supplier may approach court for obtaining stay against recovery of Risk & Cost, Caveat before Court of competent jurisdiction may be filed. c) If contractor/ supplier fails to deposit the balance Risk & Cost amount as per (b) above within the period as prescribed in demand notice, following action shall be taken for balance recovery: - i). Dues payable to contractor/ supplier against other contracts in the same Region/Unit shall be considered for recovery. The respective contractual conditions must contain a clause giving BHEL the right to set off amounts due under the respective contracts from payments outstanding from the other contract. It may be noted that payment against running bills for such other Contracts shall be released only against the specific approval of Unit Head with

	recorded reasons in the interest of project and after recording alternate effective and implementable means of recovery. However, no deferment of recovery shall be permitted against Final Bills/ SD/ BGs due for payment/ release to Contractor/ Supplier. ii). If recovery cannot be made out of dues payable to the contractor/ supplier as above, balance amount to be recovered, shall be informed to other Regions/Units for making recovery from the Unpaid Bills/Running Bills/SD/BGs/Final Bills of contractor/ supplier. The respective contractual conditions must contain a clause giving BHEL the right to set off amounts due under the respective contracts from payments outstanding from the other contract. It may be noted that payment against Unpaid Bills/ Running Bills shall be released by other Unit/ Region only against the specific approval of Unit Head with recorded reasons in the interest of project/ work and after recording alternate effective and implementable means of recovery. However, no deferment of recovery shall be permitted against Final Bills/ SD/ BGs due for payment/ release to Contractor/ Supplier. iii). In-case recoveries are not possible with any of the above available options, Legal action shall be initiated for recovery against contractor/supplier. Note: While taking decision for effecting or deferment of the recovery, concerned Unit/ Region to take into account the limitation period prescribed in the law of limitation. It shall be ensured in consultation with Unit/ Region Law that the claim does not get time barred.
6.2.	Subcontracting/ Purchase Group of Region/Unit shall also share information in details with Subcontracting-Heads/ MM-Heads of all Regions/ Units with regard to invoking Risk & Cost clause for the particular contractor/ supplier.

Risk and Cost Clause of General Conditions of Contract (GCC) shall be suitably revised/reframed in line with this SOP.