

## LECTURE ELEVEN

### TENDER :

Tender is an offer in writing to execute some specified works within a fixed time under certain conditions of agreement between the contractor and owner.

### **Advantages**

- i) Lowest bids can be obtained due to competitions among the contractors.
  - ii) Suitable contractor can be selected based upon his previous experience in the particular field.
- The quantity and quality can be assured in the prescribed time.

### TENDER DOCUMENT:

Bids and quotations for any project work are invited in the form of a set of structured quasi-legal document/guidelines, commonly known as tender document. Tender document is a set of papers containing schedule of works, rates, requirement of goods or services, technical specifications, procedure and criteria as may be prescribed for evaluation and comparison of tenders and such other particulars as may be prescribed. The tender document essentially explains about the project and its requirements to the intending bidders. Tender documents should be prepared and approved by a competent authority, before the tender notice is issued. This document is to be made available to the contractors, on the payment of cash, at the time of inviting tenders.

Tender documents may be prepared for a range of contracts such as; equipment supply, the main construction contract (including design by the contractor), demolition, enabling works etc. Ideally, tender documents should be broken down into a series of packages each with its own design drawings and specifications suitable to be issued by the main contractor to potential sub-contractors. This makes the tender easier to price for the contractor and easier to compare with other tenderers for the client. It is important when this is done to ensure that the interfaces between packages are properly identified and clearly allocated to one package or another. Having too many packages increases the number of interfaces and so the potential problems. The cost plan (pre-tender estimate)

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should also be re-assembled package by package to allow easy appraisal of tenders received.

Typical contents of a tender document are as follows

1. Preamble – General information about the project in brief and the scope of work.
2. The notice inviting tender in standard form.
3. The tender form along with a set of conditions (both general and special).
4. Instructions to the bidders – Explains provisions and clauses.
5. Details of the documents required to be submitted along with the bid.
6. Draft of the agreement proposed to be signed with the bid.
7. The bill of quantities of work.
8. Schedule of materials, tools and plants, and quantities of work to be done, if any.
9. Specification of the work to be done including that for materials and workmanship.
10. List of materials proposed to be issued by the owner
11. Essential architectural drawings and adequate structural drawings for commencing the work

### **Tender Form:**

The application for the bidding by the contractors shall be made in the prescribed form. This printed standard form where the contractor can fill in the details relating to their offer is called as tender form. Tender form forms an important part of the tender document. The tender forms should contain the following elements

1. Approximate quantities of various items and spaces to enter the prices by the contractor
2. Amount of earnest money and security deposits to be made
3. Time limit for the completion the work
4. Tender validity period
5. Provisions for contractor's and witness's signatures

### **Bill of Quantity:**

It is a statement of the various items of work giving the description, quantities and unit of rates. It is prepared in a tabular form similar to the abstract estimate but the rate and amount columns are left blank. The bidders are required to quote their rates in these columns.

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Summing up of these amounts will give the total bid amount for the project. This is primarily meant for inviting the tender.

### **Acceptance of tender**

The Tender Accepting Authority will evaluate the contractors on the basis of experience, credibility, credentials etc. as specified in the tender document. Then the tenders of the contractors are evaluated taking into consideration the schedule of rates as mentioned in the tender document and the prevailing market rate for procurement, and comparison of the tenders in accordance with the procedure and criteria. After evaluation and comparison of tenders, the authority will generally accept the tender with lowest amount.

If for any reason the lowest tender is not accepted then the reasons should be noted confidentially. If the authority decides that the price of the lowest tender is higher with reference to the prevailing market rate or the schedule of rates, he may negotiate for a reduction of price with that contractor.

In case a contractor quotes abnormally low rates, analysis of rates may be asked from the contractor and thorough investigations are made. On unsatisfactory explanation, the lowest tender in such cases will be rejected and the tender of the second lower contractor may be accepted as such or with negotiations.

If at any time before the acceptance of tender, the authority receives information that a contractor who has submitted tender has been banned, he shall not accept the tender of that contractor even if it may be the lowest tender.

In case where two or more contractors quoted the same price, the authority shall split the procurement among such contractors taking into consideration the experience and credentials of such contractors. Where such splitting is not possible or could not be done equally, he shall record reasons for the same.

The tender may not be accepted for any of the following reasons

1. If the tender is informal.
2. If adequate competition and fair rates are not received.
3. If the rates quoted are abnormally low.
4. If exceed the sanctioned amount for the work.
5. If exceeds the amount up to which he is empowered to accept the tenders.

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### Modes of acceptance of tender in the eyes of law:

- (1) **Conduct of parties:** In some cases, the conduct of parties may be treated as proof of acceptance of tender. In such cases the owner permits the contractor to start the work before completing necessary formalities.
- (2) **Acceptance by telegram:** For treating the tender to be accepted by telegram as valid it should be conclusively proved beyond doubt that the telegram was executed by such person who was authorized to do so.
- (3) **Acceptance in writing:** When it is provided in the tender to have acceptance in a specified manner, verbal acceptance will not be sufficient and in such cases, the acceptance of tender in writing and in prescribed manner within a reasonable time becomes essential.
- (4) **Absolute acceptance:** An acceptance with variation is nothing more than a counter offer and must be accepted by the original promisor before a contract is made.

### COMPETITIVE TENDERING

Invites contractors to submit the lowest price for which they are willing to carry out a project. Relies on the information contained in drawings, specifications and bills of quantities prepared on behalf of the construction client.

#### TYPES OF TENDER:

- a. Open
- b. Selective
- c. Single Tender

#### **Open tendering**

Allows any contractor to submit a tender to an advertised project. Client advertises openly in the press or the trade publications inviting contractors to apply for the project. Contractor that is able to undertake the project would request a tender document. After receiving the tender from the architect, the contractor may be required to give a deposit and to ensure a bona fide tender. This is done to filter out the contractors who are not interested in submitting a tender.

#### Advantages:

- Maximum competition
- Lowest price obtained

#### Disadvantages:

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- Large waste of effort because too many contractors are tendering
- Contractor submitting lowest tender may not be properly equipped to undertake the contract
- Client may be inclined to accept lowest tender irrespective of reputation of contractor
- Poor quality building or bankruptcy may occur

### **Selective Tendering**

Where contractors of known reputation are selected to submit a tender. The cheapest among them is selected to deliver the project. Following are commonest method of awarding a tender Process.

- A design team select a number of contractors (normally 6) that are already known to them and invite them to tender for the project.
- Contractors' tenders are usually based on a completed design.
- Project is awarded to the contractor with the lowest tender.

#### Advantages

As tenders are known, selection of cheapest bid is not as high a risk as in an open tender

#### Disadvantages

Limiting the number of tenders may exclude new bidders who may offer more innovative ideas or solutions.

### **Two-stage Tendering**

Aim is to speed up the procurement process by getting the architect and the contractor to start the project as soon as possible.

In this approach the contractor will be able to start work (e.g. excavation, foundations) on site as soon as possible.

Improve build ability - utilizing skills of architect and contractor

Usually a contractor will be chosen through a form of selective competition with a simple bill of approximate quantities, these will be the preliminary items and Major items of measured work.

- Where contractors' tenders are based on a partially developed consultants design (Stage 1 tender). The contractor then assists with the final development of the design and tender documents, against which tenders for the construction works are

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prepared (Stage 2 tender). The first stage tender has the opportunity to tender or negotiate the second stage

- Specialist items used included as Prime Cost Sum, upon which contractors are given the opportunity to include sums for profit and attendance.
- The client will also ask the contractor to state their overheads and profits. These prices will determine the price agreement that will be negotiated with the successful contractor.

### Advantages:

- a. Allows contractor to have input into design and build ability and helps team-building, thereby helping avoid future adversarial attitudes
- b. Fast tendering
- c. Speed of construction (build-ability)
- d. Costs are known for quick negotiation

### Disadvantages:

- a. The architect and contractor might not agree on designs
- b. Due to problems with architect and contractor the project completing time could suffer.

### Negotiation Tender:

The process of negotiation tendering involves the client consulting chosen contractors to negotiate the contract and its terms. This process is adopted for special circumstances. For example, it is often used in emergency situations that require the completion of a project within a short span of time or with complex contracts in which financial and technical properties are difficult to identify. This negotiation tendering process is also used in situations involving security projects of national importance.

### Web-based Tender:

Web-based tendering has become a popular option. Web-based technology is used for the tendering processes. Under this system, tenders are advertised online and tender documents uploaded. Any interested person can fill out the tender documents and bid for a project online. Various electronic tendering applications are used in countries like America, Australia, Europe and Japan.

## **DEPOSITS TO BE MADE BY THE CONTRACTOR:**

### **a. Earnest Money**

Earnest money is paid by each tenderer to enable Government to ensure that a tenderer does not refuse to execute the work after it has been awarded to him. In case where a

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tenderer fails to commence the work awarded to him, the earnest money is absolutely forfeited. Generally, 1 - 2% of the estimated cost is deposited as the amount of the earnest money. Earnest money given by all contractors except the lowest tenderer should be refunded within a week from the date of receipt of tenders.

This earnest money deposit is about 1.5% of the estimated cost. It has to be deposited by all the tenderers while submitting their tenderer. It serves as a binding to the contractor not to refuse or withdraw, if his tender is accepted. The EMD will be forfeited, if he withdraws or refuse to take up the work. The EMD amount will not carry any interest. The EMD of unsuccessful tenderers will be refunded. The earnest money should not be in cash.

The earnest money may be accepted only in the following forms :

- (i) Cash upto Rs.10,000/-.
- (ii) Treasury Challan.
- (iii) Bank guarantees of Scheduled Banks.
- (iv) Banker's Cheque.
- (v) Demand Draft.

### **b. Security Deposit:**

After the selection of once tender, the selected contractor has to deposit a certain amount with the owner. This deposit is called as security deposit. The security deposit is kept as a check so that the contractor fulfills all the terms and conditions of the contract and carries out the work satisfactorily according to the specifications and maintains progress and completes the work in time. If the contractor fails to fulfill the terms of contract, his whole or part of the security money is forfeited. Generally, 10% of the estimated cost is deposited as the security deposit. The security deposit will be collected by deductions from the running bills of the contractors and the earnest money deposited will be treated as part of security deposit. The security deposit will also be accepted in cash or in the form of Government Securities, Fixed Deposit Receipts, Bank Guarantee of Scheduled Banks. The Security deposit shall be refunded to the contractor on completion of the work after a specific time, usually one rainy season or 6 months after the completion.

At the time of execution of the contract agreement, the successful tenderer has to deposit a further sum 1% of the contract amount to the department. This amount is known as further security deposit. This amount is kept as a check so that the contractor fulfills all the terms and conditions of the contract. The security deposit will be refunded to the contractor on the satisfactory completion of the whole work, after the observation period of 6 months.

## ARBITRATION

### DEFINITIONS

**Arbitration:** The process by which the parties under contract settle their differences and disputes by the decision not by the court of law but one or more persons chose by the parties themselves.

**Arbitrator:** The person(s) chosen by the parties to give the decision are called arbitrators.

**Sole arbitrator:** When both parties, involved in the dispute, agree on a single person to act as arbitrator, then he/she is called as sole arbitrator.

**Joint arbitrators:** When each party, involved in the dispute, appoint one arbitrator on their behalf then the arbitrators are called as joint arbitrators.

**Umpire:** Arbitrator appointed by the two arbitrators of the parties, involved in the dispute. If both of the arbitrations differ in their opinions, then the award of the umpire shall prevail.

### TYPES OF ARBITRATION:

Arbitration Acts:

The arbitration Act, 1940 has been repealed under Section 85 of Arbitration and Conciliation Act 1996. Notwithstanding such repeal, the provisions of the Arbitration Act 1940 still apply to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties, but the Arbitration Act 1996 applies to arbitral proceedings which commenced on or after the Act came into force.

The Indian Arbitration Act was enacted in 1940 and provides for arbitration in the following three cases:

- 1. Arbitration without intervention of a court:** The owner and the contractor enter into an arbitration agreement in advance or after the dispute have arisen and agree not to involve courts. The dispute is settled through arbitration according to the Arbitration Act. Only in exceptional circumstances, the court may set aside the award of the arbitrator. After the award of the arbitrator is declared, the parties concerned can apply for the decree on the award.
- 2. Arbitration with Intervention of a court:** When the owner and the contractor having entered into an arbitration agreement are unable to proceed further in terms of the agreement, the court's intervention is sought for settlement of the dispute. After hearing the applications made by the parties, the court passes suitable orders.
- 3. Arbitration in Lawsuits:** When a dispute is pending in a court and when both parties both parties agree to settle the dispute through arbitration before the judgment is pronounced, they can apply for the same and the court may refer the

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matter to the arbitrator. The arbitrator is appointed in such a manner as may be agreed upon between the parties.

### **Powers of an arbitrator:**

1. To administer oath to the parties and witnesses appearing before him.
2. To refer for opinion of court
3. To declare award
4. To correct clerical errors
5. To administer interrogatories

### **Advantages of Arbitration:**

1. **Cost:** arbitration is less expensive than litigation.
2. **Speed:** disputes are settled much faster (usually within 4 months) through arbitration as compared to lawsuit in the courts.
3. **Convenience:** arbitration hearings are fixed considering the convenience of the concerned parties.
4. **Technical Knowledge:** both parties have the distinct advantage of appointing arbitrator(s) having technical knowledge and expertise in construction.
5. **Informality:** arbitration proceedings are conducted in a relatively informal atmosphere observing certain minimum prescribed legal formalities.
6. **Proceedings in Private Premises:** Unlike proceedings in courts which are exposed to the general public, arbitration proceedings are held in private premises, Business interest and reputation of the parties will, therefore, not suffer.
7. **Finality of Award:** the award given by the arbitrator is final. It can only be challenged in a court of law on questions of law and / or misconduct or arbitrator(s).

During the performance of the contract, disputes may arise between the employer, engineer and contractor for various reasons of default in performance, progress payment, rates, time, etc. Negotiated amicable settlement is the endurable, quick solution, which requires mutual trust, cooperation, give and take policy, flexibility instead of rigidity of one's view, and vision for future relations. Unresolved disputes can conveniently be resolved through arbitration, which bears the stamps of law of natural justice, than resolution in court. Again, arbitration cannot succeed unless there is cooperation between contractor, client and arbitrator(s). Many times, when the award received is not palatable to either of the contesting parties, the unhappy party tries to drag on further in court to set aside the award. This defeats the very purpose of the arbitration process. The court does not set aside the award on flimsy ground

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or sits again for the judgment but on specific grounds. The court may even ask the arbitrator to review his award if any item is omitted. The responsibility imposed on the arbitrator is to conduct the proceedings with prudence and diligence and not arbitrarily or whimsically and discharge his responsibilities in a cordial manner. The reasons for setting aside the award has been set out in Arbitration Act, 1940, which has since been modified in Arbitration & Conciliation Act 1996. As per the new Act, the award itself is considered as a decree and it need not be filed in the court. It is final and binding on both parties unless disputed by either party. The tendency to challenge the award should vanish, instead the aim should be to reach a negotiated, agreed, amicable and early settlement. It is hoped that better awareness and acceptance of this method fructifies in future.

### **Reasons for disputes**

1. There are errors, ambiguities and omissions in the drawing and specification. Also, there is lack of proper coordination during construction.
2. Not complying with the intent of the contract or not adhering to the standards in the performance of work (Quality of conformance problem).
3. Incomplete, delayed, inaccurate response to the question by any of the party in the contract.
4. Unforeseen changes in sub surface conditions.
5. If site condition differs from those described in contract documents.
6. Extra work or changed work order
7. Not meeting schedule by the contractor.
8. Inadequate financial strength on the part of the owner, contractor or subcontractor.