



PMC Cell – MM

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Sub: Process to be followed in case of difference in GST quoted by bidder vis-à-vis assessed by ONGC in Service/LSTK contracts.

EPC, in its meeting (10/2020) held on 12.08.2020 approved the Process to be followed in case of difference in GST quoted by bidder vis-à-vis assessed by ONGC in Service/LSTK contracts. Accordingly, relevant provisions of IMMM stand modified as per enclosed **Annexure-1**.

Above guidelines should be meticulously followed by all concerned.

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28/8/2020

(A.P. Tripathi)

ED-Chief MM Services

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3. CVO, ONGC, New Delhi.

Existing vis-à-vis modified provisions of IMMM

Para No	Existing Provisions	Modified Provisions
22.7	No Provisions exist	<p>Process to be followed in case of difference in GST quoted by bidder vis-à-vis assessed by ONGC in Service/LSTK contracts:</p> <p>22.7.1 Rate-Difference opinion arising at Bid Evaluation Stage: Based on quoted rates, ranking of the bidders shall be worked out. Price reasonability shall be determined as per quoted tax rate. If the tender evaluation team (Tender Committee) notes that different tax rates have been quoted by various bidders in the tender and / or tax rates considered by L-1 bidder are different than the tax rate in the opinion of ONGC, action as proposed below may be undertaken:</p> <p><i>*{Tenders for centralized items which are processed as a special case by the work centre other than the normally authorized ones as per IMM Manual, the concerned tender evaluating team may refer to the similar contracts awarded by the authorized work centres. For decentralized items, contract related data for the concerned work centre will be sufficient unless brought to the notice of concerned work centre. }</i></p> <p>(a) Based on different data on quoted tax rates, TC shall work out applicable tax rates in terms of different line items considered by the L-1 bidder in the 'Change in Law' format of their bid.</p> <p>(b) If the tax rates considered by the L-1 bidder are <u>lower</u> than the tax rates worked out by tender evaluation team, the offer of L-1 bidder may be processed further as tax would be restricted to his quoted rates (no higher rates would be allowed) in terms of confirmation given by him with his bid.</p> <p>(c) If the tax rates considered by the L-1 bidder are <u>higher</u> than the tax rates worked out by tender evaluation team, the matter may be taken-up with the bidder (<i>through letters / e-mails / system generated messages / discussions</i>) by the team with the approval of Competent Authority (who is authorized to allow price negotiations for the case). The issue may also be discussed along with price negotiations, in case undertaken with the bidder, during the course of ascertaining price reasonability (to be based on quoted tax rate).</p>

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Process of Indemnification:

- I. The L-1 bidder shall be explained the reasons for applicability of lower tax-rate than as specified by him in his bid and he may be asked to accept the same.
- II. If difference of opinion with the L-1 bidder still persists, they (L-1 bidder) will be asked to provide detailed justifications in support of the same alongwith documentary evidence, if any, for further examination of ONGC.
- III. TC will examine the justifications provided by the L-1 bidder. If TC still holds on to its earlier position of lower tax rate, it will refer the matter to Corporate Indirect Tax Dept. for their opinion.
- IV. The Corporate Indirect Tax Dept. shall provide its view to the Work Centre on the applicable rate of tax; and if the applicable rate of tax is lower than the rate quoted by the L-1 bidder, then the process / procedure to challenge before tax authorities / tribunal / court and likely implications about interest and penalty in case ONGC's contention is finally not upheld, shall be indicated therein.

Corporate Indirect Tax Dept. may, if it feels necessary, seek opinion of outside empaneled expert also before finalizing its views.
- V. TC, based on the views of Indirect Tax Dept., will take up the issue of applicability of lower rate of tax with L-1 bidder. If the L-1 bidder still does not agree with the applicability of lower rate of tax, then the TC may consider the option of either :
 - (i) providing suitable indemnity with the approval of Competent Authority (as per para 22.7.7 below) to indemnify the contractor against differential amount of tax along with applicable interest and penalty, if any, and pay lower rate of tax till finalization of matter (Detailed process of application of this option shall be as per para VI below)



(this option to be considered if the cost of litigation and time involved in the process appear to be rational considering the amount of differential tax, interest thereon and possible penalty, if any. Further, this option will be exercised only when there is higher degree of possibility of acceptance of ONGC opinion of lower tax rate by the tax authority / judicial forum (Tribunal / Court) and chances of ONGC losing & thus applicability of Interest and penalty in that event, are very bleak. However, in case ONGC's point of view is not finally accepted and interest & penalty are applied, the same may be considered as business risk).

or

- (ii) agree with the bidder and recommend placement of the NOA with rate of tax quoted by the bidder *(if the cost of litigation and time taken thereon do not appear to be rational considering the amount of differential tax, interest and possible penalty, if any)*

VI. In case it is decided to provide indemnity as brought out at para no. (V) (i) above with the approval of Competent Authority, the L-1 bidder / contractor will be informed that ONGC would ^{like} pay lower rate of tax till finalization of matter and indemnify the Contractor against differential amount of tax along with applicable interest and penalty, if any subject to bidder confirming acceptance to the following in case of award of contract:

- (i) They (L-1 bidder / contractor) shall represent suitably with the concerned jurisdictional tax authority for applying such lower tax rate to avoid imposition of penalty at a later date. A copy of such communication shall also be provided to ONGC.

They (L-1 bidder / Contractor) will pay GST at the rate intimated by ONGC. However, if Contractor receives any notice / demand from tax authorities for payment of GST at higher rate, then Contractor will



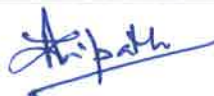
immediately submit a copy of the notice received from the tax authorities to ONGC. Contractor will take action on such demand as advised by ONGC. ONGC shall not be liable to reimburse or pay to the contractor any amount on account of such tax demand if Contractor does not contest the demand and or does not take action as advised by ONGC.

The decision of ONGC about applicable rate of GST shall not be referred to arbitration or conciliation and contractor shall take up the matter with tax authorities as per advice of ONGC. Any demand for referring any dispute relating to the rate of tax to arbitration or conciliation shall be void and not valid under the arbitration clause of the contract.

The above provisions shall be made part of the Contract, in case of award on L-1 bidder.

VII. **Payment process under Indemnity Provision:** In case final tax-rate assessed by tax authority/ judicial authority happened to be higher than the tax rate assessed by ONGC based on which payments were made till date of such decision, ONGC would be required to additionally pay only the portions of interest and penalty (if imposed) since the additional amount due to tax rate differential (between amount calculated as per contractual tax rate and payment made at lower rate with indemnity) would already be covered in the contractual provision. Payment towards interest and penalty would be additional payment(s), therefore their payment would require separate provisions to be made in the contract. These may be done under post contract issue as per provisions of IMM Manual and BDP with the approval of Competent Authority by creating separate line items for them (i.e interest and penalty, if any) by way of amendment to contract (and OLA) for the respective amounts and increasing the overall contract value (OLA target value).

22.7.1.1 In case indemnity is to be provided to a vendor in a tender, the same should be frozen before finalizing the award of



	<p>Contract. All efforts should be made by the work centres to conclude the process outlined at 22.7.1(c) above within the bid validities.</p> <p>22.7.2 In case the tender provides for distribution of requirement, similar process (as per para 22.7.1 and 22.7.1.1 above) may be adopted with L-2, L-3 ... bidders (as the case may be), if required.</p> <p>22.7.3 Rate Difference opinion arising after Award of Contract: The difference of opinion between ONGC and Contractor due to interpretation of "Change in Law" (such as issuance of new notification/clarification) announced after award of Contract (wherein GST rate in the opinion of ONGC is lower than as informed by Contractor for amending the Contract) may be handled in the similar manner as outlined at para no. 22.7.1 (c).</p> <p>22.7.4 Approval for providing /not providing indemnification considering implications as per para 22.7.1 (c) (V) (i) & (ii), approval of Competent Authority (as per para 22.7.7 below) will be taken.</p> <p>22.7.5 In case L-1 bidder / Contractor does not agree for lower tax (than his quoted tax) and indemnification process as brought out above even after protracted persuasion by ONGC, TC with the approval of Competent Authority(as per para 22.7.7 below) would decide further course of action in the best interest of ONGC. Wherever such lower rates of GST has been considered with indemnity, such case should be informed to all work centers for uniformity by indirect tax.</p> <p>22.7.6 The option of providing indemnity should be exercised only in exceptional cases considering time & cost of litigation.</p> <p>22.7.7 Competent Authority for deciding/approving grant of indemnity shall be as under:</p> <p><u>If decision for providing indemnity is to be taken during award stage:</u> CPA based on recommendation of TC</p> <p><u>If decision for providing indemnity is to be taken after award of contract:</u> Competent Authority for according approval as post contract issue, based on recommendation of TC.</p>
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