

## CHAPTER IX

## RISK PURCHASE

## 9.1. Definition

(i) Clause 14 of the conditions of contract (Schedule 'B') provides that if a contractor fails to make the supplies either in full or in part within the delivery period originally stipulated or subsequently extended, the Govt. is entitled to arrange the supplies of the stores not delivered, at the risk and cost of the defaulting contractor after serving a registered notice upon him to complete the supplies within 15 days. Clause 17 of the conditions of contract also further enables the Government to terminate the contract and arrange supplies at the risk of the contractor, if he commits any breach of the contract or indulges in malpractices rendering him liable to penal action. Risk purchase is effected only when the demand for the stores still exists as certified by the indenting Officer or when the contractor has wilfully committed breach of the terms of the contract. In other words, no risk purchase is made where the demand has ceased to exist or the breach of terms of contract has occurred due to reasons beyond the control of the contractor.

(ii) It may be difficult for Government to invoke the condition No. 17 (ii) of Schedule 'B' in cases which are covered by condition 14(c) *ibid.*, for effecting risk purchase. If the risk purchase is not made under clause 14(c) of Schedule 'B' within prescribed period it is not possible to effect risk purchase under condition 17(ii).

(iii) Risk purchase cannot be effected under condition 14 (c) of Schedule 'B' if the supply order has not been placed. Action under condition 14(c) presupposes the placing of supply order. Action can, however, be taken under condition 17(ii) *ibid.* for debarring the firm from transacting business with Government.

## 9.2. Procedure

A risk purchase against the defaulting contractor is initiated on receipt of information from the Indenting Officer/Consignee. A show cause notice is issued to the contractor explaining his default in the execution of supply order and he is asked to complete the supply within a period of 15 days from the issue of said notice. If the contractor fails to comply with the notice, action to effect purchase at the risk and cost of the defaulting firm is taken by inviting short-term quotations from the known/registered suppliers. But the defaulting firm is not permitted to quote in the risk purchase proceedings. The purchase is effected on the basis of the lowest technically valid offer so received.

## 9.3. Terms

In effecting risk purchase at the risk and cost of the defaulting firm, the same terms as contained in the original contract in the matter of specifications/inspection, payment, penalty, arbitration etc. should be adopted except in point of delivery period. The terms should be neither more onerous nor liberal. But if before the placement of order of risk purchase the defaulting firm in the meanwhile offers to complete the supplies and requests for the extension of the delivery period, the case is considered on merits, the risk purchase proceedings are stayed and the firm is allowed to complete the supplies without prejudice to the right of



the Government to claim damages under the terms of the contract. Ordinarily if the delay in supplies does not result in any financial loss to Government and the reasons for delay are found to be genuine, the delivery period is extended to enable the firm to complete the supplies and no penalty levied on account of the delay and the risk purchase proceedings are finally dropped. But if the firm again defaults in adhering to the extended delivery period and there are reasons to believe that bonafides of the firm are questionable, it will not be advisable to grant any extension but proceed with the risk purchase on the basis of the previous quotations if the period of validity still subsists or invite new quotations as the case may be.

#### 9.4. Period to Effect Risk Purchase

Under condition 14 of Schedule 'B', risk purchase at the risk and cost of the defaulting firm can be made within 6 months of the expiry of the original or the extended delivery period. However, it is the responsibility of the Directorate to ensure that the risk purchase is effected within the shortest possible time without waiting for the completion of the period of 6 months. But when such risk purchase is to be made under clause 17 for reasons other than the non adherence of the delivery period, this time limit does not apply, and the purchase can be effected within a reasonable time.

In case of rate contract each supply order placed against the rate contract will have independent delivery period. The limitation period of 6 months for effecting risk purchase will be counted from the expiry of delivery period of each of the supply order.

#### 9.5. Recovery of Loss Incurred in Risk Purchase

(a) The payments due to firm against the relevant and other contracts are withheld as soon as the decision to start risk purchase has been taken to enable the Government to recover the loss incurred in making the risk purchase. As soon as the risk purchase has been completed, a demand notice under registered cover is served upon the defaulting firm to deposit the amount of loss incurred by Government within a reasonable period to be specified in the notice. If the firm fails to deposit the amount or challenges the recovery, the firm is called upon to give their consent for referring the matter to the arbitration under clause 18 of the conditions of the contract. After the receipt of such consent or the refusal to refer the case to arbitration from the firm, the matter is referred to arbitrator appointed by Government or Court as the case may be.

(b) Where the second contractor also defaults and risk purchase proceedings are taken up against him also and the supplies are arranged from the third contractor the first defaulter is liable to pay only the difference between the rates of the original contract and those of the second contract and the second contractor is liable to pay the difference between the rates of the contract placed on him and the third contractor. But no recovery can be effected from the defaulting firm where the risk purchase is made for quality of stores different from those covered by the original contract.

#### 9.6. Cases where no Risk Purchase is possible

No risk purchase is possible in the following cases :—



1. Where the limitation period of six months from the date of expiry of the original or extended delivery period has elapsed.
2. Where the stores have been brought under controlled distribution by State/Central Government or the trade of which has been banned.
3. Where the stores of the same specifications are not available due to the closure of the factories etc.
4. Where the default was under circumstances covered by force-de-majeure clause.
5. Where the contract was subject to prior sale, availability of raw material, import Licence, assistance in arranging the raw material etc. and the contractor is able to establish that the default was due to any of these reasons.
6. Where a binding contract has not come into existence due to one or more of the following reasons :—
  - (i) Offer was withdrawn before the communication of acceptance was complete as against tenders e.g. the communication of acceptance was posted on 12-11-83 but the letter of withdrawing offer was posted by tenderer on 11-11-1983. In this case the withdrawal of offer is valid & no risk purchase can be made.
  - (ii) Contract documents were not signed by the tenderer or the Government.
  - (iii) The earnest money was not deposited and the offer was considered without earnest money inspite of a condition in NIT to the effect that Offers without earnest money shall not be accepted," and no exemption was granted by the competent authority.
  - (iv) Where acceptance given to the tenderer was conditional regarding signing of Schedule 'B', deposit of security, approval of counter sample etc.
  - (v) Where counter offer was given in acceptance or supply order & the contractor has not agreed to the same.
  - (vi) Where the detailed supply order has not been issued.
  - (vii) Where supply order is issued without obtaining security, which was the condition precedent in the letter of acceptance for the issue of the supply order.
7. Where the stores were offered for inspection within delivery period but were not inspected by the inspecting officer till after the expiry of delivery period and the contractor refused to offer the stores for inspection again.



9. Where certain essential conditions precedent to the performance of the contract have not been fulfilled by the Indenting Officer e.g. despatch instructions not furnished, plans or drawings not finalised, civil work for installation not completed counter sample not approved etc.

9.7. Various advices from L.R. received from time to time on the subject are given in Annexure to this Chapter.



## ANNEXURE

## VARIOUS ADVICES OF L. R. REGARDING RISK PURCHASE

(referred to in para 9.7)

1. Risk Purchase is not possible if no valid contract has come into being. No valid contract comes into being just by putting acceptance of offer into communication within the validity period unless the firm complied with the requirement of depositing security which was a condition precedent to issue of supply order and hence no risk purchase can be effected. Firm cannot demand any variation in the terms of the offer after the opening of tenders.

Tenders through Press advertisement were invited for the supply of I.S.I. Marked. Sluice Valves. In response six firms quoted rates and as per decision of Standing Purchase Committee (Higher) held on 26-9-81 acceptance was issued to M/s Makali Engg. Works Calcutta on 30-6-81. - Vide letter dated 6-6-81, they were informed by this office that their earnest money was converted into security and they were asked to deposit balance amount of security of Rs. 16,800/-. Despite reminders they failed to deposit the requisite security. A lot of correspondence was exchanged between this department and the firm. A show cause notice was issued on 15-9-81. In the said show cause notice they were asked to explain within 15 days as to why their earnest money of Rs. 2,000 may not be forfeited and risk purchase be not effected against them as warranted under the terms and conditions of the contract given in Schedule B. In reply to the said show cause notice M/s Makali Engg. Works informed vide their letter dated 5-10-81 that the telegram dated 30-6-81 was received by them on 2-7-81 i.e. after the expiry of their offer which was extended by them in good faith upto 30-6-81. The case was referred to L.R. on the following points vide this office U.O. No. 18 dated 5-5-82.

(i) Whether or not a binding contract came into force by issuing telegraphic acceptance on 30-6-81 (the last date of the validity of the offer) though it might have been received by the firm after 30-6-81. As such whether or not risk purchase can be made in this case against the said firm.

(ii) Whether or not 10% increase in rates demanded by M/s Makali Engg. Works, Calcutta can be allowed under the given circumstances of the case.

L.R. advised as under vide U.O. C(i) -OP-82/990 dated 14-5-82.

In view of the principle laid down in cases L.R. 1966 S.C. 1724 and 1976 P.L.R. 494 no valid contract came into existence simply because acceptance was conveyed by putting into communication a telegram dated 30-6-81 as required under section 4 of the Indian contract Act. It was a condition precedent of the contract that the firm was required to deposit Rs. 16,800/- as balance security and there after a supply order was to be placed with the firm. The question of invoking risk purchase of the agreement does not arise in view of the situation mentioned above.



The demand of 10% increase in the rates of the goods by the firm cannot be entertained because it involved variation of the terms of contract. However, in the present case no valid and enforceable contract came into existence.

(File No. 451/HR/12/80-81)

**2. Risk Purchase can be effected with clause 17 (ii) at the cost of the firm if it is proved that the firm accepted the clause 8 regarding the deposit of security as mentioned in the tender form.**

In case of purchase the lowest offer of M/s Shankar Steel Rolling Mills was accepted and the acceptance was issued to them telegraphically on 5-9-79 within the validity period of their offer. The firm was requested to deposit the earnest money and security but there was no response from the firm despite a notice issued to them to deposit the requisite earnest money/security within a week failing which penal action as warranted under the terms of Schedule B will be taken against them without any further notice.

L.R.'s advice was sought on the following points vide U. O. No. 372 dated 10-3-80.

(i) Whether in the cases where a firm has signed Schedule B and conditions of tender, risk purchase can be effected against them under clause 17(ii) of Schedule B being violation of terms and conditions of contract.

(ii) Whether the firm can be debarred from doing business of Government of Haryana.

Clause regarding security stands deleted where it is signed by the firm as having been read and accepted. Unless the department is able to prove beyond doubt the acceptance of this condition by the firm it cannot invoke clause 17(ii) of Schedule 'B', for making the risk purchase as proposed.

(File No. 31/HR/6E/79-80)

**3. Risk purchase cannot be effected under clause 14 of the Schedule 'B' unless a detailed supply order has been issued. However, this can be done in terms of clause No. 17 (ii).**

In case relating to the supply of polythene bags the offer of the firm M/s Kanpur Plastic Co., Kanpur was accepted within the validity period and they were requested to deposit the requisite amount of security so that the detailed supply order could be issued in their favour. But the firm did not deposit the security amount and informed that they could start the supplies only in December, 1974 but this delivery period did not suit the Indenting Officer.

Fresh short term quotations were invited and a show cause notice was also issued on 2-1-76 for effecting risk purchase. As desired by Government the matter was referred to L.R. for advice as to whether risk purchase can be effected against this firm under condition No. 14 of schedule 'B' which had been duly signed by the firm while counting limitation period of three months stipulated in clause 14 from the date of issue of the risk purchase notice, even though no supply order had been issued in this case.

The L.R. tendered the following advice vide his U.O. No. 5237-C(i)-OP/76/813, dated 9-4-1976 20(25)75-76/G-49.



"In the light of facts made available by the stores Department, it is opined that risk purchase cannot be effected in this case under condition No. 14 of the Schedule 'B' as this condition presupposes the placing of a supply order, which was not placed with the firm in this case. Action can, however, be taken under condition No. 17 (ii) of Schedule 'B' for black listing of the firm and for effecting risk purchase in terms of condition No. 17."

4. It may be difficult for Government to invoke condition No. 17 (ii) in case covered by condition No. 14 (c) of Schedule 'B'.

A reference was made by this office to L.R. on the following points.

(i) Whether condition No. 14 (C) of Schedule 'B' is subservient to or supercedes condition No. 17 (ii) of the Schedule B which does not provide any time limit for effecting risk purchase.

L.R. advised as under vide U.O. No. 1167/OP-57 469 dated 22.4.69.

This Department is of the opinion that it may be difficult for Government to invoke condition No. 17(ii) in case covered by condition No. 14(C).

5. Period of 3 months for effecting risk purchase is not to be calculated from the date of expiry of the risk purchase notice but from the date of expiry of the delivery period. Penal action against a firm can be taken under clause 17 (ii) of the Schedule 'B' for breach of the terms of contract even though no risk purchase has been effected at their cost on account of limitation.

The rate contract for the supply of Tarring outfit was concluded with M/s Jaswant Rai Mani Ram, Jullundur City, on 16.12.76 for one year. Under the terms of contract all the direct demanding officers/Heads of the Departments were competent to place their indents/orders direct with the approved contractors. The contractor was required to complete the supply within 1 to 6 weeks from the date of the supply order placed with them. The Superintending Engineer, P.W.D., B & R Ambala Cantt. placed an order for three consignees for 2,000 sets for each consignee on 18.3.77. The delivery period of the said order expired on 2.5.77. One of the consignees reported that the firm had not supplied 2,000 sets of tarring outfits to him. The risk purchase notice was accordingly issued on 4.7.77 as per condition No. 14(c) of schedule B. The firm did not supply the material even after the notice.

L.R. advice was sought on the following points vide U.O. No. 162 dated 30-8-1977.

(i) Whether the period of three months for completion of risk purchase as per condition No. 14(c) indicated above can be counted from the date of issue of the risk purchase notice or from the date of its expiry because the risk purchase notice is to be issued only after the receipt of an intimation from the consignee/indenting officer regarding the breach of non-execution of supply by firm.

or

Whether the period of three months as per condition No. 14(c) as reproduced above, be counted straightaway from the date of expiry of



original stipulated delivery period mentioned in the supply orders/ rate contracts including the extension in delivery period authorised by competent authority.

- (ii) What other penal action can be taken against the defaulting firms under condition No. 5 of the rate contract and 17(ii) of the Schedule B on account of breach of contract as mentioned above.

L.R.'s advice was received through Government as under vide U.O. No. 5615-51B-11-77 dated 14-10-77.

- (i) The period of three months provided for in condition 4(c) of Schedule 'B', is to be counted straightway from the date of expiry of original/ extended delivery period mentioned in the supply order.
- (ii) Penal action can be taken against the firm in terms of condition 5 of the Rate Contract and 17(ii) of Schedule 'B' on account of breach committed by the firm.

(File No. GL/RC/396/75-76).

**6. Pending payments including earnest money/security in other cases can be withheld to recover the cost of risk purchase which might become due in any particular contract as an interim measure in public interest.**

A reference was made to L.R. for advice as to whether the pending payments including earnest money due to firm in another case can be withheld in view of the facts that the Department has started risk purchase proceedings against that firm.

L.R. advised as under vide their U.O. No. 1313-C(i) OP-75P/454, dated 18-2-75

1. The payment of the firm in other cases may be withheld.
2. The amount of earnest money/security deposit in other cases may also be withheld.

The opinion given above is being tendered keeping in view the interest of the department and as an interim measure to claim set off as and when the contractor enforces his claim in a court of Law".

(File No. 732/HR/7-B/73-74/II.)