

## **ADMISSIBILITY OF TIME EXTENSION IN MES CONTRACTS**

1.0 In MES Contracts the "E" Section deals with audit of Approval in Principle (A-in-P) letters from the Accepting Officers for Time extensions granted to MES Contracts and also the consequent Deviation orders issued by the GE, which are subsequently received through the AO/AAOGE. The common reasons quoted in the A-in-P for grant of extension are:-

- (a) Non-Availability of land
- (b) Delay in handing over the site
- (c) Non-availability of stores for the contractor
- (d) Contractor's sickness
- (e) Rains
- (f) Non-availability of skilled / unskilled labour

2.0 **REASONS FOR WHICH TIME EXTENSION CAN BE GRANTED:** As per Condition No. 11A of General Conditions of Contract (IAFW-2249) which is an integral part of all MES Contracts, Time Extensions sought by the Contractors can be granted by the Accepting Officers only under the following circumstances.

- (a) by force majeure; or
- (b) by reason of **abnormally** bad weather; or
- (c) by reason of **serious** loss or damage by fire; or
- (d) by reason of civil commotion, local combination of workmen, strike or lockout affecting any of the trades employed on the work; or
- (e) By reason of **delay on the part of nominated sub-contractors or nominated suppliers** which the contractor has in the opinion of the GE taken all practicable steps to avoid or reduce; or
- (f) By reason on the part of delay on the part of the Contractors or tradesmen **engaged by the Govt.** in executing works not forming part of the contract; or
- (g) By reason of **any other cause**, which in the absolute discretion of the Accepting Officer is beyond the Contractor's control

Clause (a) above is applicable only if there are natural occurrences which are accepted as some event of exceptional or unusual occurrence not commonly

encountered in day to day life, the cause of which not susceptible to human control or manipulation. Therefore medical treatment, non-availability of labour etc., cannot be treated as *force majeure*. Abnormally bad weather is an acceptable reason under clause (b). The use of the adjective "**abnormally**" clearly points out that seasonal rains / normal level or quantum of rains cannot be accepted as valid reason for granting extension. Under Clause (c) serious loss or damage by fire has been prescribed as acceptable condition. The word "**fire**" restricts that the damage should be the consequence of fire and the word "**serious**" connotes that the impact must be substantial or significant. In clause (e) the use of the words "**nominated**" clearly points out to the position that that there must have been a clear nomination of a sub-contractor or supplier under the Contract. Delay in receipt of goods by the contractor from his normal source of supply when the supplier has not been nominated in the terms of contract cannot be covered under this clause. The term "sub-contractor" can be invoked only when the Contract provides for 'sub-contract'. Clause (f) would come into play when there is delay in the execution by the contractor of some other work not forming part of the contract. It is needless to emphasize that such other work must have direct relationship with the execution of the MES Contract for which deviation is under consideration. It is important to note that the expression "**absolute discretion**" used in clause (g) can be taken only to mean discretion which cannot be questioned by the Contractor. However consistent with various judicial pronouncements, "discretion" vested with administrative authorities will always signify "Objective discretion" and not "subjective discretion" and therefore would be susceptible to audit scrutiny and queries.

Under Condition 11B if the works be delayed by reason of non-availability of Govt. Stores shown in Schedule "B" or by reason of non-availability of breakdown of Govt. tools and plant listed in Schedule "C", then the Accepting officer can suo motto grant reasonable extension of time. As per Para 3.11.2 of MES Manual of Contracts, the GE has to certify before acceptance of tender that "stores procurement action in respect of Schedule "B" Stores has progressed sufficiently and enough stores will be available for issue to the contractor on acceptance of contract". Thus while clause 11B gives claim for the contractor for time extension when there is non-availability of Schedule "B" Stores, such extension if and when granted would directly bring to light the incorrect certification by the GE before acceptance of tender and render him liable for the delay.

### **3.0 SIGNIFICANCE OF CLAUSE (g) OF CONDITION 11A – PRINCIPLE OF**

***EJUSDEM GENERIS***: According to the Black's Law Dictionary (8th edition, 2004) the principle of ***Ejusdem Generis*** is where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. It is a canon of statutory construction, that where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated.

For example, if there is a reference to automobiles, trucks, tractors, motorcycles and other motor-powered vehicles, "vehicles" would not include airplanes, since the list was of land-based transportation. The term *Ejusdem Generis* in other words means words of a similar class. The rule is that where particular words have a common characteristic (i.e. of a class) any general words that follow should be construed as referring generally to that class; no wider construction should be afforded.

With reference to Condition 11A it is evident that the enumerations made in clause (a) to (f) relate to exceptional and unforeseeable situations to which the parties to the contract can possibly have no control whatsoever to prevent or allay the impact and therefore constitute a class. In that sense none of the reasons generally cited (like the ones listed in para 1) would fit into the said class and consequently would not qualify as a valid reason for grant of Deviation. The point made in Para 19.2.3 of the MES Manual of Contracts that "Brief reasons for the deviation, eg., for technical reason, due to site conditions, due to user's requirements due to non-availability of specified material and the like and approximate financial effect shall invariably be stated in the copies of the letters (A-in-P) endorsed to the CDA/AAO" in as much as it is violative of the interpretation based on the well settled principle of "Ejusdem Generis" cannot be accepted in audit. As regards the reasons "non-availability of land" and "delay in handing over of site" , they constitute the curious case of incorrect certification, since the GE has to certify before acceptance of tender in terms of Para 3.11.2 of MES Manual of Contracts that the site is available for all works and free from all encumbrances".

**4.0 SIGNIFICANCE OF CORRECT INTERPRETATION:** It is apparent that reading clause (g) of Condition 11A without invoking the above principle would lead to a naïve and disastrous approach of mistaking that the powers of “absolute discretion” conferred on the Accepting Officers to consider what is beyond the contractor’s control, are unquestionable and does not have any validation point or a boundary for consideration and that the term “any” would mean any reason whether or not it is on any of the similar circumstances as brought in clauses (a) to (f) of Condition 11A. This approach is not merely incorrect but also has serious financial and vigilance ramifications in as much as it would emancipate the contractor’s liability for delays, on surreptitious grounds and cause significant revenue loss to the State. A correct and conscientious application of the aforesaid legal principle would result in Deviation orders being issued only in very rare circumstances with extreme care and accountability unlike in the prevailing situation. As a result there would be significant cut down in the volume of work at all levels, on processing transactions which in the first place have no legitimacy to be caused.

**4.0 SOME GUIDING POINTS FOR AUDIT OF A-IN-PS AND DEVIATION ORDERS RELATING TO TIME EXTENSION:-**

(a) The Accepting Officer while conveying his approval in principle to the time extension is required under Para 19.2.3 of MES Manual of Contracts to endorse copies to CDA/AAO simultaneously to enable them audit and convey the observations without waiting for the formal Deviation order issued by the GE in IAFW-1823. It is therefore necessary to ensure that the system of timely receipt of A-in-P letters from the Accepting Officers well ahead of the actual receipt of Deviation orders is in place at “E” Section as well as AOs/AAOsGE.

(b) The Approval in Principle letters should be audited on the lines indicated above and it must be ensured that the causes for which deviation is sought by the Contractor is wholly extraneous to the contractor or his environment. The reasons for time extension sought by the Contractor should relate to events or causes which are of exceptional / rare occurrences and must not be normal possibilities in day to day life.

(c) Observations on A-in-P should be conveyed without waiting for Deviation letters through Fax etc., to GE and AAOGE so as to enable the GE not to proceed with grant of time extension without clearance of audit objection. In case the Deviation has already been issued, it becomes a contractual liability and the loss on

this account must be got investigated and worked out and responsibility fixed for the avoidable loss caused to the State due to irregular grant of time extension without compensation. In case time extension is granted due to non-availability of Schedule B Stores the certification given by the GE before accepting the tender under Para 3.11.2 of MES Manual of contracts need to be looked into and in case false certification is established necessary action to regularize the loss as stated above must be taken.

(d) In case at the time of receipt of Deviation Order from MES it is found that the A-in-P has not been received, the A-in-P letter must be called for and before perusing the Deviation Order audit of A-in-P letters must first be taken up and in case it is noticed that the time extension granted in irregular action as in para © above must be taken.

(e) Proper record of all objections (Audit Progress Register) raised in this regard must be maintained and reflected in the Monthly Progress Report of "E" Section. AOs/AOsGE before forwarding the Deviation orders to Main Office should carry out audit on the above lines and bring out their objections in the covering letter / enclosure. Continuous disregard to the well laid down principles in grant of time extension must be consolidated and considered for inclusion in the MFAI report. "E" Section/AOsGE/AOsGE must ensure that in all cases of irregular grant of time extension, the loss caused to the state is properly got regularized under the orders of the CFA and remedial measures taken.

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