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Ensure professional project execution A contractor's perspective

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In the construction industry, project owners or employers need projects completed within a specified time and cost. Some general contractors and sub contractors are so eager to get new work that they are willing to sign any contract placed in front of them. Civil engineering contracts are risky enough without contractual unknowns. Therefore, a contractor should follow a systematic approach to get pre-qualified for the project, quote reasonable rates and get the contract awarded with suitable conditions. Only then, can he expect a professional project execution and make profit. At the same time, a good contract document minimizes claims and settles disputes amicably while avoiding arbitration. In the inherently complex business of civil engineering contracts, perhaps the most important need is to have mutual trust between the contractor and employer. Unfortunately, in reality this is not always the case. A successful approach to contracting therefore entails negotiated terms based on mutual trust. Such an approach is mutually satisfying to both project owner and the contractor.

Qualification criteria

In major construction projects, a qualification process for potential contractors is usually in place. However, some times a contractor gets tempted to quote low rates just to keep his workforce occupied during lean periods. If the lowest bid appears unreasonable and unworkable, the owner should not hesitate to discard the same. He should award the work to the next higher bidder who can give

a better performance rather than risk being troubled with poor execution. The owner should therefore adopt the practice of prequalifying bidders based on a set of guidelines including successful execution history of projects of equivalent size and complexity completed by the bidding contractors to ensure performance and timely completion of the project in tender. From the contractors' point of view, the prequalification criteria should be fair. A typical contractor is interested in knowing whether the qualification criteria is reasonable, tough, or aimed only at certain type of bidders.

Instituting a system of pre-bid meetings helps develop mutual trust between the owner and the contractor. It offers a platform to understand the bidding and prequalification criteria. Contractors interested in bidding get an opportunity to seek clarification about prequalification criteria and suggest modification in certain terms based on their earlier successes and experience.

In certain types of contracts instead of pre-bid meeting, there is only a post qualification process. In such a system, the contractor incurs tender cost, bid security cost and cost in quoting for the tender. To understand whether his bid qualifies or not, he has to wait until the opening of the bid. Because this route means more cost, the contractor should ascertain that he meets the qualifying criteria. If the contractor has any doubts about any of the details in the bid document, he should

not hesitate to approach the owners or their competent authority in time for amendments to the tender before its finalization and issuance. The employer should also gauge the response and capability of the prospective bidders. Because an employer normally expects 3 to 5 offers to get reasonable competition, if there are fewer contenders than this due to the high qualification criteria, he should review the qualifying terms so that he gets the minimum bidders needed for a competitive bidding.

For complex and large projects, owners often introduce rigorous criteria to avoid local or petty bidders. While this approach is understandable, competitive offers are only possible when there are enough bids received by the owner. Therefore, owners should exercise moderation in developing pre-qualification criteria.

If an employer fails to be fair and does not propose suitable prequalification criteria, then he is likely to invite dispute from those who disqualify for the tender. If he tries to lower the pre-qualification criteria and qualifies contractors following a poor response to the bid, he may be in for a legal battle from those qualifying. Those disputing, see favouritism towards lowest bidders who may not be fully qualified. Project owners should therefore guard against such potential disputes. Unfortunately, such situations do arise in quite a few contracts. When relaxing the criteria due to poor bid response, ideally the owners should re-invite the bid and extend the date of bid submission. Although this means a crucial loss of time, especially in projects with tight deadlines, the owners would do well if they adopted this route and demonstrated flexibility and reasonable approach in prequalifying contractors for large and complex projects.

Contractors often form Joint Ventures (JVs) to qualify for large and complex contracts. JVs are essentially an arrangement between more experienced contractors and less experienced contractors to meet the technical demands of a project. Those participating in JVs should therefore ensure that a proper Memorandum of Understanding (MoU) defines the role and responsibility of each member in the Joint Venture. JVs are an acceptable route to increasing technical competencies of a local contractor. However, there have been instances when JVs have lasted only until qualifying stage, and not beyond. Such arrangements do not yield the intended benefits to the projects. Unfortunately, Indian construction industry has experienced some JVs with foreign partners that were of this kind; in such cases, the purpose of JV formation was defeated.

Pre-tender

Pre-tender meetings are a norm in important, high-cost projects. Before such meetings, prospective bidders collect the tender document, go through the general conditions of contract, specifications, drawings and designs, bill of quantities etc, and visit the work site. The following are essential to making the pre tendering meets meaningful.

1. Contractors get full tender document
2. The employer provides adequate time to study the tender documents.
3. The bidders go through the provisions in the tender, study the site conditions, and make notes and seek clarifications wherever needed. They suggest alternative methods, specifications, and design ideas in the pre-tender meeting.

When pre-bid meetings do not have these elements, they lose their purpose. Such instances are likely when the employer issues the tender just the week before the pre-bid meetings, leaving no time to the contractor to visit the site and assess the condition. By studying project details, contractors develop the basis for seeking clarifications and proposing new clauses to the tender. However, when the bidders themselves do not do their homework before the pre-bid meetings and miss the opportunity to understand the job, they risk having unknowns in the contract. Those undertaking job site visits benefit from what they see and identify areas where contract needs changes. A proactive pre-bid meeting is a prerequisite for successful participation in a tender.

Often suggestions received from contractors are useful in improving tender conditions. By bringing up intricate site related problems contractors facilitate certain modifications in tender clauses. Hence, both employer and bidder should see usefulness in pre-bid meetings. Neither should hold such meetings just for formality and refuse to include genuine modifications in the tender.

The following lists the requirements for a successful pre-bid meeting

- The employer should be prepared to receive suggestions for improving contract conditions, clauses, and other provisions in the tender.
- The employer should adopt a flexible attitude towards meritorious suggestions.

- The bidder should interpret the provisions in the contract and identify problem areas and offer solutions.
- The bidder should study and identify any incongruent provisions and suggest remedial measures.
- The owner and the contractor should hold pre bid meetings in a harmonious atmosphere. Their purpose should be problem solving rather than fault-finding.

Typically, the following create dispute in civil jobs.

- The construction period given in the tender is insufficient for the quantum of work.
- The rainy season is included in the schedule.
- Land acquisition is left incomplete.
- Rehabilitation schemes of project-affected persons are not in place.
- Service utilities are not shifted.
- Permission from the Forest / Environment Department for cutting trees is not obtained.
- Approval of railways for works in or around railway area is not obtained.
- Mobilisation advance for initial mobilisation and for machinery required for execution are not paid. If the contract does not provide for mobilization advance, contractor could make a suggestion for doing so especially when a large fleet of machinery is involved in the execution.
- Timely payment of bills for the work completed is not made. Projects that do not have sufficient funds in place face this problem. When payments are delayed, they set a cascading effect and affect payments to labour, material and machinery suppliers leading to delay in project progress. Employers, on the other hand, continue to demand progress as per the agreed schedule. Before one realizes, the situation develops into a potential dispute. Both employer and contractor stand to gain by adhering to the payment schedule and linking it to the progress of work. Some contractors prefer payments within, say, 10 days after production of bills. In urgent projects, instead of monthly billing, if fortnightly billing helps execution, both the owner and the contractor should take a suitable decision in the best interest of the project.
- To be fair to the project and the project owner, contractors must agree to terms of penalties or the stipulated liquidated damages before finalizing the tender conditions.
- On the other hand, if a contract excludes a clause for compensating escalation in prices of petroleum products, it harms the project especially when international prices of crude increase.
- While the contractor is entitled to a reasonable and legitimate profit, good business ethics and practices help every one associated with a project.
- Although civil contracts are risky enough without unknowns, contractors can lower their risk by using a basic checklist for reviewing a contract. Both Employer and Contractor should share risks between them.
- The contract document should have a clear policy on the methods for resolution of disputes should they arise. If a tender denies the opportunity for a fair decision-making by excluding arbitration, the contractor should point this out during the pre-bid meeting and suggest its inclusion.

Award of tender

Normally the lowest bidder gets the job. Sometimes it happens that the lowest bidder, because he has to bid low, decides not to give the performance guarantee, and the tender award is cancelled. The course then open to the employer is to either re-invite the bid or choose the second lowest bidder. The latter decision is not difficult to make if the second bidder's offer is close to the rejected offer or the estimated cost of the project. However, if there is a wide variation between the cancelled offer and the second lowest offer, it is a task for the owner to reconcile the difference.

He tries to understand whether seeking another round of offers would be more beneficial than awarding the offer to the second lowest bidder. His exercise includes estimating the cost of time and effort saved in re-inviting the bid.

If the third lowest bidder is more articulate and influential than the second one and the latter does not know these strengths of the rival, then the former may win the contract. Such practices are more prevalent in private contracts. The pulls and pressures in contracting are so varied that one must be cautious in one's approach.

Another interesting situation arises when the lowest offer is so low that the employer doubts whether the bidder would actually be performing at such low rates. He starts to imagine about hidden costs that may surface during execution. Quoting low rates is understandable by a bidder already mobilised with full machinery, men and materials, having just completed some other job nearby. But when a bidder quotes low rates to get the work, and later manoeuvres events at site such that he leaves the site without completing the work, it is unethical.

The other extreme is an offer that is higher than the estimated rates. The employer should review such estimates, compare the rates of lowest offers, and explore whether the bidder can bring down the quotation. The owner has the option to retender. However, before embarking on this exercise, he must understand the market and assure himself whether retendering will give the desired result.

Another way of awarding work followed in some foreign countries is not to yield to the lowest bidder. Instead, project owners in these countries calculate the average of the quotations and award the bid to the contractor who is closest to this value or whose quotation matches with the estimated cost of the project.

Progress of work

While executing a project, site engineers often experience many bottlenecks that affect the progress of the work. For any extra work or necessary items, project engineers work out new rates from Bill of Quantities and from the basic principles of rate analyses using material, labour and overhead costs, and profit. If the work completion gets delayed for any reason, then the reasons for the delay and its effects must be assessed. Proper documentation of reasons for delays are recommended to avoid complications in obtaining time extension. Some examples based on which contractors apply for time extensions include:

- Asset not ready in time.
- Loss of liquidated damages.
- Additional escalations in cost.
- Claims anticipated from contractor for delays.
- Loss of overhead and profit due to continued and longer presence at site than originally estimated.

- Equipment kept for a longer period than anticipated.
- Additional escalation in cost, since the escalation paid did not fully compensate losses.
- Return of security deposit, delayed without paying interest.
- Demanding a performance guarantee for a longer period than originally envisaged.
- Reduced overall profit margin.

So it is in the interest of both the employer and contractor not only to avoid delays, but also see that disputes are amicably resolved. This is, of course, easier said than done, especially when there are different interpretations possible to contractual terms and a difference of opinion exists between the employer and contractor.

Consultant

Nowadays, in many projects, a third party called an engineer or consultant works on behalf of and for the employer. He must be professional and fair-minded; he must know his role and his limitations, and work in a coordinated manner as both judge and bridge between employer and contractor. His taking sides, either way, would erode his professional credibility. He has to act promptly and be consistent in his decisions against his responsibilities.

In most cases the employer pays for the services of the consultant. Hence the employer feels, dis-regarding the provisions, the consultant should favour him. In other words, taking a fair view of the issues becomes difficult. A pragmatic approach resulting in a fair decision is desirable.

Dispute resolution

Disputes during project execution complicate the relationship between employer and contractor. They cause delays and eventually result in financial losses. Often, payments are delayed, and rates for new items are not amicably decided. Drawings, designs, and the decision to proceed with further work are not given in time. All of these culminate in losses to both employer and contractor. Each attempts to pass on the blame to the other. While the contractors may have sought time extension citing various reasons well in time, the employer may not be inclined to accept them. Instead, owner may serve the contractor a notice imposing liquidated damages. The contractors get an additional

alibi not to progress with work. Such situations should be avoided.

The dispute resolution itself goes through different stages before a decision is made. A fair approach by a contractor should help him in resolving disputes. However, when an employer does not give decisions in time, it causes friction in employer-contractor relationship. A safe practice adopted by many employers is to deny payment, even when they are convinced that some cost is due to the contractor. They know that seeking additional funds for a project from the organisation would be difficult. Therefore, they shun and dither to forward any such proposal. Such a situation causes more strain to the contractor affecting his cash flow and capacity to carry out the work.

When disputes are taken up for arbitration, many employers delay appointing an arbitrator, or delay the arbitration proceedings, for example, by failing to reply to claim or counter claim statements. Finally, even if the award is received and payments are to be

made to the contractor, an easier course taken is to challenge arbitrator's award in a court of law (if need be, repeatedly) and thus cause more additional delay, despite the known fact that arbitration award is seldom set aside or modified.

One should appreciate the proverb 'Justice delayed is justice denied'. Delays could also occur with the contractor stalling the sincere efforts of the employer to settle amicably. A fair approach with good ethics and industry practice can avoid such situations, and ensure professional project execution.



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