

**APEC WORKSHOP ON GOVERNMENT PROCUREMENT PRACTICES
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STAGE 3

FULFILLMENT OF CONTRACT AND PROJECT EVALUATION

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Introduction

I would like to thank the APEC GPEG Chair, the APEC Secretariat and the organisers for the invaluable opportunity to participate in this workshop. The format of the workshop, based on a simulation case with specific questions directed at a wide range of topical issues in procurement, makes for an interesting and focused discussion on procurement practices. There is, I think, much commonality amongst the economies on the basic principles of government procurement, as is well encapsulated in the set of GPEG non-binding principles, such as transparency, value for money, effective competition and fair dealing. But, given the same procurement scenario, it is likely that two different economies would not be conducting their procurement in exactly the same way although they may adopt the same principles. Each has developed its own practices, driven by its different social and economic considerations and as well as different legal systems. It is with this backdrop of different practices in mind that I find meaning in sharing my views on this morning's workshop topics, drawing upon my experience in the Singapore context.

Fulfillment of Contract

2. In the area of fulfillment of contract, both the procuring entity and the contractor are bound by and are required to perform whatever terms and conditions have been agreed in the contract concluded. Clearly, if the contractor defaults in performing any part of his obligations, the procuring entity would have a right to terminate the contract. But, under what other circumstances could the procuring entity terminate or rescind the contract? To a large extent, it would be dependent on what specific terms that had been provided in the contract for termination. In high value or complex projects, where the risk of failure is correspondingly high, such as the contracts for the construction of the laboratory building or for the mainframe from Economy A which imposes certain export restrictions, the procuring entity might find it in its interest to incorporate comprehensive provisions identifying the specific

circumstances allowing for termination by the procuring entity. Such provisions are important particularly in international contracts where one of the parties may not be equally familiar with the applicable law of the contract.

3. Circumstances allowing for termination could include:-

a. Export License on Restricted Goods

Failure by the contractor to obtain or maintain all the necessary export licenses or approvals from the country of origin of the contracted goods.

b. Delay in Delivery

Delay by the contractor to deliver goods or complete the service or works beyond a reasonable period.

c. Force Majeure

Any Force Majeure event relied upon by the contractor to suspend performance beyond an agreed period of time.

d. Suspension or Termination by the Procuring Entity

If the procuring entity is affected by a state of war, or acts of enemy or other circumstances disrupting public safety. Under any of these circumstances, the procuring entity reserves the right to terminate or suspend the contract.

e. Insolvency

In the case where the contractor becomes bankrupt or insolvent or goes into liquidation.

f. Gifts, Inducements and Rewards

Where the contractor or its employees are charged and found guilty of corruption or illegal offerings of gifts, inducements and rewards, particularly to officers in the procuring entity.

4. The contractor may not have defaulted but is affected by a Force Majeure event. A Force Majeure event is any event or situation that is beyond the control of the contractor but prevents or delays the contractor from performing or fulfilling his obligations under the contract. In order to avoid

any doubt as to what constitutes Force Majeure, it is advisable to identify and state all the circumstances, such as Acts of God, war and act of foreign enemies, riots, civil commotion, strikes, lockouts, other labour disturbances and any other circumstances beyond the control of the contractor.

5. It is normally obligatory for the contractor to give formal notice to the procuring entity within a certain number of days after the start of the Force Majeure event, and to provide some form of evidence. It is also acceptable that Force Majeure events affecting the contractor's sub-contractor could similarly be considered grounds for giving extensions of time to the contractor. The required time is often difficult to determine. The duration of the Force Majeure event itself could be very short, e.g. in an earthquake the duration can be measured in seconds, but the recovery from damage may be protracted. For this reason, the Force Majeure clause should also call upon the Contractor to mitigate the consequences of any delay caused by the Force Majeure event.

6. As I had indicated earlier, the procuring entity may want the right to terminate the contract in event that the Force Majeure extends beyond a certain duration and its continued delay might affect the success of the procuring entity's overall project. Under such circumstances when the contract is terminated not owing to the default of the contractor, an acceptable settlement with the contractor would be for the procuring entity to pay for all the goods, services or works completed and accepted by the procuring entity. On the other hand, the procuring entity may claim the return of any advance payment made to the contractor.

7. In construction procurement, proper management of the construction phase by a team of dedicated professionals or experts is essential for a successful completion of the construction work because of the complexity of the project. It is standard practice in Singapore's construction industry to employ an architectural consultant to oversee and be responsible for the whole construction project. Additionally, mechanical and electrical engineering consultants should be employed where necessary. A project manager is also appointed to ensure proper co-ordination of the construction works, and a supervisory officer to represent the procuring entity to monitor progress of the project, authorise progress payments and decide on any changes to the works requirements. Regular inspections and tests are conducted on works completed based upon which progress payments are released to the construction contractor.

8. While much can be done to oversee and control the construction works to ensure required quality standard and specifications are met, the success and quality of the construction would depend also on how the construction company and the relevant consultants for the building or construction works were appointed. The procuring entity could consider setting up a central

body to promote quality in construction, and to evaluate the performance of the contractor and the quality of its construction works. For example, a bonus could be awarded to construction companies for good performance.

9. The question is often asked if the contract could be modified after the contract award? Modification of the requirement specifications after tender award should be avoided or minimised for obvious reasons. Numerous changes at this stage reflect possible poor planning or drafting of requirement specifications at the upstream tender stage, and may cause complications and project delay. For this reason, any contract changes should be subject to properly scrutiny and approval by authorised officers in the procuring entity. Nonetheless, contingency work variations especially in construction procurement are often inevitable because of the uncertainty of site and other conditions. An approved contingency sum could be pre-approved and set aside for such purposes.

Inspection and Acceptance of Supply

10 An inspection plan for testing and acceptance before and/or at delivery of the equipment or completion of the works is always necessary to ensure that the minimum requirement specifications have been met. The procuring entity has to decide on the number and extent of the inspections and tests. In simple purchases, such as for ready-made or off-the-shelf products, a visual inspection at time of delivery might be adequate, particularly if the product comes with an extended guarantee and some assurance of minimum mean-time-between-failure performance verification. In more complex procurement involving design and build or special customisation effort, more elaborate inspection and testing requirements could be implemented to assure maintenance of consistent quality at critical stages of the product or project development. Such inspections and tests could include:-

- (a) Preliminary Integration Test (PIT)
- (b) Qualification Acceptance Test (QAT)
- (c) Factory Acceptance Test (FAT)
- (d) On-Site Acceptance Test (OSAT)
- (e) Integration Checkout & Installation Test (ICIT)
- (f) First Article Inspection (FAI)

11. The government may opt to perform the inspection and acceptance tests on its own if it has trained engineers with the capability. Generally, however, it is difficult to maintain such a body of people with the relevant expertise to perform acceptance of the diverse range of procured equipment. An alternative arrangement where the government does not have fully trained inspectors is to have the contractor perform the acceptance tests in the presence of the procuring entity's representatives who will subsequently endorse the acceptance certificate jointly with the contractor. If the procuring entity has no in-house expertise or the resources to conduct or witness the tests, it could consider engaging third-party specialist inspectors to do the work.

12. If the government has an existing national programme promoting the adoption of the ISO9000 quality management system, it may also want to consider specifying ISO9000 certification as a pre-requisite or preference criterion in the award of contracts. This could be applied to the construction procurement and other large tenders involving design and development work. Having ISO-certified contractors gives government the assurance of consistent output quality by contractor and government thus reducing the need for frequent inspections and acceptance tests by government.

13. Risk of failure by the contractor to meet the requirement specifications can be minimised by careful selection and pre-qualification of suppliers at the tendering stage. Price must not be the only consideration in tender award. The capability of the tenderer and the quality of its products must be evaluated in deciding on the most optimal or value-for-money offer.

14. However, if the contractor were to fail acceptance test even after repeated tries, the procuring entity would have no choice but to terminate the contract and take remedial actions to salvage the project. It could, for example, look for alternative contractors and invoke its rights under the termination clause of the contract to claim compensation and recover the cost of engaging the new contractor. If it is not feasible to engage another contractor to take over, the procuring entity might consider reviewing the requirement specifications of the contract. The original specifications or test criteria might have been set too high. In the worse case scenario, the procuring entity would have to cut its loss and abandon the project.

Settlement and Registration

15. Payment is normally made after acceptance of the delivery and upon presentation by the contractor of his invoice. Progress payment is also commonly made upon completion by the contractor of agreed major milestones in the contract. A small portion (5%) of the contract price may be retained as a retention fund in the form of a banker's guarantee to cover the defects during the defects liability period of 6 – 12 months. Final settlement of the contract is

reached when the defects liability period expires and the retention fund is returned to the contractor.

16. Actual payment of large sums should be centrally handled by a specialist payment agency under the Treasury. Payment of small sums could be delegated to procuring entity for convenience in payment. Centralisation of payment under the Treasury ensures that a single agency has visibility and control of all the government funds for better management and investment purpose.

Post Evaluation of Project

17. On post-evaluation of project, I think the procuring entity would be in the best position to co-ordinate the evaluation as it has dealings with all other agencies involved in the procurement, such as the technical project managers, the user agencies that requested for the procurement, and the finance agencies that received the order for payment. Such post-evaluations are often carried out as a matter of course at the end of the contract. However, I believe that the benefits of and the need for post-evaluation are often difficult to establish for the following reasons:-

- a. Assessments by officers involved in the procurement for the equipment are often seen as not completely objective. This limits the usefulness of the evaluation for use as a measuring tool.
- b. There is no clear way to apply the evaluation results in future procurement tender selection.

For these reasons, I must caution that the procuring entity should carefully determine the objectives of performing post-evaluation especially if the results are intended to be used public in the selection of future tenders in which the evaluated contracted participates.