SAGARMALA

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अध्यक्ष
VINIT KUMAR, IRSEE
Chairman

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MESSAGE

I am happy to learn that Vigilance Awareness Week- 2017 is going to be observed at Kolkata Port Trust from 30th October to 4th November, 2017 and Vigilance Department of Kolkata Port Trust is bringing out a booklet "ALOKE" to commemorate the occasion.

I whole-heartedly congratulate the Vigilance Department for the above effort and wish them all the best in their activities.

24th October, 2017

(Vinit Kumar)
Chairman

Shri Saroj Kumar Sadangi, IRSS
Chief Vigilance Officer,
Kolkata Port Trust.

“The only thing necessary for the triumph of evil is that good men should do nothing.”

.. Edmund Burke, 18th Century English Author and Philosopher

Annexure - B

Integrity Pledge for Organisations

We believe that corruption has been one of the major obstacles to economic, political and social progress of our country. We believe that all stakeholders such as Government, citizens and private sector need to work together to eradicate corruption.

We acknowledge our responsibility to lead by example and the need to put in place safeguards, integrity frameworks and code of ethics to ensure that we are not part of any corrupt practice and we tackle instances of corruption with utmost strictness.

We realize that as an Organisation, we need to lead from the front in eradicating corruption and in maintaining highest standards of integrity, transparency and good governance in all aspects of our operations.

We, therefore, pledge that:

- We shall promote ethical business practices and foster a culture of honesty and integrity;
- We shall not offer or accept bribes;
- We commit to good corporate governance based on transparency, accountability and fairness;
- We shall adhere to relevant laws, rules and compliance mechanisms in the conduct of business;
- We shall adopt a code of ethics for all our employees;
- We shall sensitise our employees of laws, regulations, etc. relevant to their work for honest discharge of their duties.
- We shall provide grievance redressal and Whistle Blower mechanism for reporting grievances andfraudulent activities;
- We shall protect the rights and interests of stakeholders and the society at large.

It gives me immense pleasure to announce to our friends in Kolkata Port Trust that Vigilance department has been able to bring out their first ever "Journal" or "Year book". Keeping in line with this year's theme of CVC i.e "*My Vision – Corruption free India*", the main thrust in this publication has been to not only include articles which are thought provoking but also appraise the port fraternity the areas where Vigilance Department has been able to make specific contribution to systemic efficiency.

During the time of little over a year that I have spent as CVO of this historic Port, Vigilance department has mainly concentrated in detecting systemic vulnerabilities in various port processes and suggest remedial measures for the same. In other words our emphasis has been more on preventive vigilance than punitive vigilance. In such a preventive function, first an area is taken up by Vigilance department for intensive study where investigative light is focused on all inherent processes. Then we try to isolate potential failings and fault lines and come up with distinct suggestions to prevent their recurrence. These suggestions are then put up to Port Administration for implementation and circulated with a detailed "Concept Note" which explains why the need for such improvement was felt in the first place with illustrated case studies wherever possible.

I am glad to inform that suggestions emanating from nearly 12 such major system studies undertaken by Vigilance have been enthusiastically embraced by Port Administration and already implemented through specific Administrative Orders.

There is one area where Kolkata Port Trust is uniquely blessed, perhaps, compared to all other ports - it's rich human resource. Here are scores and scores of highly qualified employees and officers – Graduates and Masters from some of the country's best colleges and universities. If the potential of this human resource is harnessed optimally, no ocean can limit the future voyage of this Port from where the history of modern Indian history had practically began.

Coming back to the theme of corruption free India, all that can be said is let us do our bit in our own organization. It is common to see people blaming corruption for every ill of our country. But our motto should be ***"Don't blame the darkness, light a lamp".***

Let "***Aloke***" spread to dispel the encroaching envelope of darkness of corruption and let the echoes of Brihadaranyaka Upanishad "***Asato ma sadgamay, Tamaso ma Jyotirgamay***" reverberate everywhere.

Sri S.K. Sadangi
Chief Vigilance Officer, KoPT

“The Darkest Places in Hell are reserved for those who maintain their neutrality in times of Moral Crisis.”

…. *Dante Alighieri, 13th Century Italian Philosopher*

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There is enough in this world for man's need but not for his greed.

….*Mahatma Gandhi*

The worst disease in the world today is Corruption. And there is a cure, Transparency

… Bono

It is easy to stand with the crowd. It takes courage to stand alone.

… Unknown Proverb

I will not let anyone walk through my mind with their dirty feet.

… Mahatma Gandhi

Those who corrupt the public mind are just as evil as those who steal from the public purse.

… A.E.Stevenson

CONTROLLING THE SUPPLY SIDE OF CORRUPTION:

Is There Morality In The Business Of Bribe?

"It always takes two hands to clap." - An Indian Proverb

Like the Indian proverb cited above, a "corrupt transaction" requires at least two players- a '*Giver*' and a '*Taker*'. In fashionable management jargon they can be termed as the two "Principal Stakeholders" in this unholy "enterprise of corruption". The person(s) or business entity (ies) who receives the bribe/ inducement is commonly known as the '**Demand side**' of corruption while the one(s), who supplies such unlawful consideration, is termed as the '**Supply Side'**.

Which of these sides is more to blame in the event of detection of such a transaction? The answer is simple, or at least seems simple - *both are to be equally blamed*. The "*giver*" is as guilty as "*receiver*". The law should punish them equally. Any anti-corruption policy should focus on both the demand and supply side on an equal measure to be an effective tool of deterrence.

The answer to the question of distribution of guilty and liability for consequence between "*Giver*" and "*Taker*" may seem rather deceptively easy. Yet, if one looks closer into the issue and compares with it with the ground reality, he may be in for some nasty surprises and ethical twists. After all, numerous people in many countries are known to pay bribes routinely for securing basic civic amenities like getting driving licences, paying electricity bills, for securing water supply to their houses. Everybody knows about petty bribing at land registration offices of various states. Yet, how often do we hear that the bribe giver is being punished for being an equal participant in the transaction?

Well, you will argue that those people are helpless victims of corruption. Had they got a choice, they would never have succumbed to the demands of those greedy Officers. But, by choosing to pay the bribe, are they not also securing preferential service over their equally unfortunate brethren?

Somehow societies tend to condone the "giver" while concentrating their ire on the "taker" of the alleged bribe. Somehow, there is a greater degree of tolerance to the *"supply side of corruption*" as opposed to the *"demand side*". The structure of the anti- corruption policy in many countries does reflect discernable tolerance to the "supply side" of corruption.

But the argument of equal justice and equal punishment to the "*giver and take*r" really turns on its head when it is applied to the business dealings *among sovereign nations* of the world. As opposed to intra-country bribery, the inter-country bribery assumes a different dimension where moral ground is often ceded to pragmatic national interest. Consider this hypothetical example. An Indian textile firm with three thousand lowly paid workers bids against a contract in Canada and pays a bribe to a Canadian public officer to secure the contract in his favour. The news gets detected and proven in a Canadian court. The Canadian government takes up their public official promptly and bans the Indian firm. But what should the standing of such a firm inside India, especially from the point of view of Indian Law? Should the Indian Govt. also penalize this firm for perpetrating an unethical activity such as paying bribe in a Foreign Country? More importantly, are there laws in India that would make such a firm liable for penal action when the firm might have nothing to do with any official or citizen of India? After all can it not be argued that the said Textile company, by securing the contract, has contributed to the national economy of India not to mention providing daily bread for the numerous subsistence workers on it's pay roll? Another interesting argument can also be advanced against meting out any punishment to such a firm in India. It runs like this - If the Foreign multinational are known to pay bribe to secure contracts and projects in our country what is wrong if one of our business person outwits them on their own land? Can the hypothetical entrepreneur of our example be heralded as a saviour to his workforce, one who merely employed "bribe" as a "successful business strategy" in the big, bad world of globalized competition?

You think the example above is too hypothetical to decide the question of global morality? Too unreal to happen? The incident described below reflects a chilling similarity that will make you realize the oft repeated cliché - Truth is often stranger than fiction!

The Secret Life of a German Business Executive:

It was very early hours of a cold, wintry December morning in Munich, Germany in 2006. As the night was giving way to a calm dawn, Mr. Siekaczek, a senior executive of the famous German multinational Company, Siemens, heard his doorbell ring persistently .Still drowsy and in his night dress, he rushed downstairs and opened the front door. In front him stood six burly German Police men and a suave well dressed Government Prosecutor. In the hands of one was dangling a piece of paper – An arrest warrant for Mr Siekaczek issued by the German court.

But there was no shock or awe on the face of Mr Siekaczek. Rather, it was of a kind of strange relief, a curious feeling of serenity that comes when the antagonist of a play approaches his inevitable denouement.

"I know what this is about," Mr. Siekaczek told the officers crowded around his door. "I have been expecting you."

As the news of Mr Siekaczek's arrest got splashed over the global media, the curtain came down on the drama of one of the largest organized bribery in corporate history. As Mr Siekaczek was being led to prison, Siemens was preparing to pay more than $2.6 billion (Rs 13000 Crores) to clear its name: $1.6 billion in fines and fees in Germany and the United States and more than $1 billion for internal investigations and reforms.

But, who was Mr. Siekaczek?

Mr. Siekaczek was a mid-level executive in Siemens AG with an uncanny skill in one area – The organization and distribution of bribes. Yes, bribes but with a difference - to be paid not to anybody inside Germany but to private and public officials of foreign countries who awarded contracts to Siemens! His domain knowledge was in accounting but he had mastery in supervising and managing this intricate underworld of international bribery. His expertise was a crucial determinant in ensuring the so called "competitiveness" of Siemens in global business. It added meat to the company's bottom-line in a period of inexorable global recession and rampaging joblessness in the western world.

But it was the very nature of the duty that Mr. Siekaczek had been discharging for his company that raises twisted questions of morality and ethics in international bribery. Could it be that scope of application of morality be different in international business?

In his the Siemen's Telecommunication unit, Mr. Siekaczek's duty was to efficiently manage his annual "Budget of Bribes". According to court documents, from 2002-2006, Mr. Siekaczek supervised an annual dispensation of a bribe budget of the order of $40 million to $50 million per year.

According to the interview given by Mr. Siekaczek after his arrest, each year, Mr. Siekaczek said, managers in his unit set aside a budget of about $40 million to $50 million for the payment of bribes. For Greece alone, Siemens budgeted $10 million to $15 million a year. Bribes were as high as 40 percent of the contract cost in especially corrupt countries. Typically, amounts ranged from 5 percent to 6 percent of a contract's value.

The most common method of bribery involved hiring an outside consultant to help "win" a contract. This was typically a local resident with ties to ruling leaders. Siemens paid a fee to the consultant, who in turn delivered the cash to the ultimate recipient.

Siemens has acknowledged having more than 2,700 Business Consultant Agreements, so-called B.C.A.'s, worldwide. Those consultants were at the heart of the bribery scheme, sending millions to government officials.

Mr. Siekaczek's telecommunications unit was awash in easy money. It paid $5 million in bribes to win a mobile phone contract in Bangladesh, to the son of the prime minister at the time and other senior officials, according to court documents. Mr. Siekaczek's group also made $12.7 million in payments to senior officials in Nigeria for government contracts.

In Argentina, a different Siemens subsidiary paid at least $40 million in bribes to win a $1 billion contract to produce national identity cards. In Israel, the company provided $20 million to senior government officials to build power plants. In Venezuela, it was $16 million for urban rail lines. In China, $14 million for medical equipment. And in Iraq, $1.7 million to Saddam Hussein and his cronies.

But here is the twist! *Although he supervised the Bribe Supply Chain fro Siemens with clinical efficiency, he never personally benefited from it. German prosecutors say they have no evidence that he personally enriched himself, though German documents show that Mr. Siekaczek oversaw the transfer of some $65 million through hard-to-trace offshore bank accounts. It was clearly different from the Enron Scandal of USA where the executives of the company were the biggest beneficiary when the company sunk. Indeed, Siekaczek considers his personal probity a point of honour. He describes himself as "the man in the middle," "the banker", "the master of disaster." But, he said, he never set up a bribe. Nor did he directly hand over money to a corrupt official.*

So did he feel any remorse while arranging those illegal payments? No, he said in an interview later. Those payments were vital to maintaining the competitiveness of Siemens overseas, particularly in his subsidiary, which sold telecommunications equipment.

"It was about keeping the business unit alive and not jeopardizing thousands of jobs overnight," he said in that interview

"It had nothing to do with being law-abiding; because we all knew what we did was unlawful." Mr. Siekaczek said. "What mattered here was that the person put in charge was stable and wouldn't go astray." That job, Mr. Siekaczek had done with due diligence. It is as if his act might seem to be unlawful from outside but not unethical or immoral from the point of view of survival of his company

It was an economic necessity economic necessity. If Siemens didn't pay bribes, it would lose contracts and its employees might lose their jobs.

"We thought we had to do it," Mr. Siekaczek said. "Otherwise, we'd ruin the company."

"Bribing" as "International Business Model" :

In Siemens, bribe was just another Line item. Till as recently as 1999, bribes were even deductible as business expenses under the German tax code, and paying off a foreign official was not a criminal offence. That was also the situation in most other EU countries. It is after the International Anti-Bribery and Fair Competition Act of 1998 (IAFCA) got signed by OECD countries that bribing foreign officials became illegal in most European countries . Germany became a signatory to it in 1999. Before 1998 the only Country that had a law against international bribery was USA – the Foreign Corrupt Practices Act (FCPA) - which had been promulgated in 1977 in the aftermath of infamous Watergate Scandal broke out.

But Siemens skirted the law as usual. Inside Siemens, bribes were referred to as "NA" -- a German abbreviation for the phrase "*nutzliche Aufwendungen*," which means "useful money." Siemens bribed wherever executives felt the money was needed, paying off officials not only in countries known for government corruption, like Nigeria, but also in countries with reputations for transparency, like Norway, according to court records.

Even by 2000, the very next year of Germany ratifying the OECD convention , authorities in Austria and Switzerland were suspicious of millions of dollars of Siemens payments flowing to offshore bank accounts, according to court records.

The court document in this case is very explicit. It shows Siemens bosses even created an internal Vigilance system which never did anything except to give an impression that the anti-bribery law ratified by the host country was being complied with.

Why are countries reluctant to punish their home grown Bribe Givers?

Unfortunately, countries do not tend to penalize their people for bribing officials on foreign lands if they secure lucrative contracts. In fact, according to one particular school of thought, it is the companies patronized by “developed nations” that are responsible for “corrupting” the “Government officials of developing nations”. Rampant bribery by influential western MNCs to secure expensive infrastructure projects has often been cited as the one of the main reasons of continuing misery of Sub Saharan Countries and the opulence of tin-pot dictators and their cronies. These wealthy few, in turn, stash the money abroad resulting in an accelerated “flight of capital” from their national economy. So why the developed nations should not tighten their own companies and help control the Supply Side of Corruption in the developing world ?

So how can we know who bribes more ? It is for this reason Transparency International started compiling a “Bribe Payers Index” from 1999 in two to three years interval. So far four such indices have been published

Is the West more Immoral!

During BPI survey , respondents from lower income countries in Africa, for example, identified French and Italian companies as among the worst perpetrators.

“It is hypocritical that OECD-based companies continue to bribe across the globe, while their governments pay lip-service to enforcing the law. TI’s Bribe Payers Index indicates that they are not doing enough to clamp down on overseas bribery,” said David Nussbaum, Chief Executive of Transparency International. “The enforcement record on international anti-bribery laws makes for short and disheartening reading.”

“The rules and tools for governments and companies do exist,” said Nussbaum. ”Domestic legislation has been introduced in many countries following the adoption of the UN and OECD anti-corruption conventions, but there are still major problems of implementation and enforcement.

So, are the rapacious Western Companies less moral than, say, their Asian counterparts? After all, the Chinese, Russian and Indian Companies are also now global players in this game. Do they resist the inherent temptation to bag an offshore contract by resorting to bribery in foreign lands? We can have an idea about the issue by looking at the only reliable data about bribing – The Bribe Payers Index or BPI.

East Meets West – Have Money will always bribe!

The BPI looks at the likelihood of companies from 30 leading exporting countries to bribe abroad. A perfect score, indicating zero perceived propensity to pay bribes, is 10.0, and thus the ranking below starts with companies from countries that are seen to have a low propensity for foreign bribe paying companies from the wealthiest countries generally rank in the top half of the Index, but still routinely pay bribes, particularly in developing economies. But the real surprise is reserved for the companies from emerging export powers India, China and Russia who rank among the worst. In the case of China and other emerging export powers, efforts to strengthen domestic anti-corruption activities have failed to extend abroad.

BRIC Countries as Emerging Bribe Powers

When the Bribe Payers Index was first published 1999, only 22 exporting countries had been surveyed for their bribe paying propensity. India was not included and therefore did not feature in the first two lists. China was the worst Bribe Paying

Rank	Country/Territory	Average score (0-10)	Percentage of global exports (2005)	Ratification of the OECD Anti-Bribery Convention	Ratification of UNCAC
1	**Switzerland**	7.81	1.2	**Yes**	No
2	**Sweden**	7.81	1.2	**Yes**	Yes
3	**Australia**	7.59	**1.0**	**Yes**	Yes
Highest ranked Bribe Paying Nations					
28	**Russia**	5.16	2.4	**No**	Yes
29	**China**	4.94	5.5	**No**	Yes
30	**India**	4.62	0.9	**No**	**No* (as on 2006)**

nation in this list. In the next survey of 2002, the top briber trophy went to Russia followed by China. But in the next list of 2006, India featured and straight away claimed the top position. That year, Indian business men had surpassed their Chinese and Russian counterpart in the fine art of bribe giving as the table below shows. **So, what happened to the famed "Asian values" or the "Morality of the mystic East" ? Is morality after all a matter of convenience for nations with the underlying rule that have** money will always bribe to thrive!

* *India finally ratified UNCAC in 2011* [Ref BPI Indices in TI Website]

The Circle of Poison: Many think, that now the developing countries are using the same method that used be practiced by the MNCs of developed nations. They now have not only learnt this method but are even perfected it to go a notch above their counterparts in developed world. Some argue that there is little point in crying hoarse about the dirty tricks played by the emerging nations like China, Russia and India in bagging contracts in developed countries and asking them to join Anti-Bribery Convention (Except Brazil none of the BRIC Countries have signed these treaty). Some say that the "Circle of Poison" has now turned full circle and reached the shores from which it originally flowed.

The Consequence of Competitive Corruption in global business:

While addressing the challenge of international bribery in July 2004 , the then Undersecretary , Department of Commerce , International Trade Administration spoke vividly on how the US Companies lost to their European Counterparts for observing fair play because the FCPA (Foreign Corrupt Practice Act) in USA. The executive summary of the minutes prepared on that occasion lists the effect of honesty and restraint for US business in rather vivid terms as quoted below :

” Based on information available from a variety of sources, we estimate that between May 1, 2003, and April 30, 2004, the competition for 47 contracts worth US$18 billion may have been affected by bribery by foreign firms of foreign officials. Although this represents an increase over last year's report of 40 contracts, the value of the contracts dropped, from $23 billion to $18 billion. U.S. firms are known to have lost at least eight of the contracts, worth $3 billion. Enforcement of the anti-bribery convention remains uneven. Apart from the United States, South Korea and Sweden, the department said it was unaware of any other country in which a conviction had been obtained for bribery of a foreign public official. Canada, France, Italy and Norway have initiated investigations or legal proceedings in some cases, but many other countries "have been slow to apply enforcement resources to address translational bribery," the department said.

In the more than two decades of FCPA Act and until 1998 , US companies had consistently complained to Federal Government about loss of business and demanded an “equal freedom to bribe” as their EU counterparts

So what is the Moral of the Story? *Game Theory for Trust and Betrayal*

The situation that can result when each nation thinks it will lose the contract because others will gain is akin to the famous “Prisoners Dilemma” of Game Theory. This fascinating theory , perfected by the enigmatic American Mathematician John Nash who got a Nobel for the same , has been applied to diverse situations – from Cold War era Super Power Negotiation to Bandwidth auctions in US and Evolutionary Biology . It predicts that in a game of mutual betrayal all players eventually lose. “Equal trust” is always better than “equal betrayal”. As was succinctly summed up by Huguette Labelle of transparency International ““*Bribing companies are actively undermining the best efforts of governments in developing nations to improve governance, and thereby driving the vicious cycle of poverty* ”. The Companies who bribe public officials whether from developed nations or emerging economic powers do not distinguish whom the bribe – in USA or in Uganda. Bribe knows no geographical boundaries.

So let not any country drag its national interest to claim a sovereign right to bribery. Bribery in any form is against humanity. Let us listen to the sound of both hands when we hear a clap!

S.K.Sadangi, CVO, Kolkata Port Trust

Reference:

1. *Game Theory : Analysis of Conflict* by *Roger B. Myerson*
2. *Executive Summary of the sixth annual report of Department of Commerce, USA , presented in July 2004 while Addressing the Challenges of International Bribery and Fair Competition.*
3. *BPI published in the Website of Transparency International, Germany*
4. *Report about Siekaczek role in Siemens Scandal published in Newyork Times in 21-12-2008.*
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THE BALMIKI- WHOSE SCRIPT WENT WRONG

A case study of Irregular Appointment in Kolkata Port Trust

Suman Biswas
Assistant Vigilance Officer
Kolkata Port Trust

As per available records, Sri Gopal Balmiki got a job in KoPT on compassionate ground (called Died-in-Harness Scheme). But a complainant reported to the Vigilance Department had something else to say – that Sri Gopal Balmiki whom the Port Records recognize is not only doing a job in Port Trust but is also at service somewhere else. The place where Gopal is working, according to the complainant, is Bengal Head Quarters, Kolkata under the Ministry of Defence assuming the name of "Bhopal Balmiki". That is how the investigation started – To find Gopal and Bhopal!

FACTS

a) Sri Gopal Balmiki got a temporary engagement under Marine Department in the post of 'Topaz'. Ironically, the duties of "Topaz" – a much valued precious stone - is that of a cleaner in a ship's deck. Subsequently, Sri Gopal Balmiki was engaged on regular basis under Marine Department, KoPT.

b) Immediately on receipt of the complaint an enquiry was started when it was found that Sri Gopal Balmiki was not attending the duty and remained untraceable. Marine Department made efforts to establish communication with him at his present and permanent address, but in vain.

c) A reference was made to Bengal Head Quarters, but initially we received no information from them. Then came the news that there was one person called Bhopal Balmiki had been working there since 01.02.1988. But is the Gopal appointed by Port Trust same as the "Bhopal" of Bengal Head Quarters? Bengal Head Quarters provided the photocopies of PAN Card, Aadhar Card and his appointment details alongwith his photograph. While asking for the documents from the concerned department of KoPT, although they provided the appointment details of Sri Gopal Balmiki but they were unable to provide any recent photograph of Sri Gopal Balmiki. The vigilance branch collected the "identity card details" alongwith Sri Gopal Balmiki's photograph from Port Security office of KoPT.

d) On scrutiny of the available documents it was found that there is a strong resemblance between the photographs collected from Bengal Head Quarter and the photograph of Sri Gopal Balmiki in the "identity card details" module maintained by KoPT. Other two evidences, i.e Father's name of both Gopal Balmiki and Bhopal Balmiki as well as their permanent address were same and this made the case instituted by Vigilance Department stronger.

e) Although it was an imperative need for the Vigilance Department to have a face to face interaction with Sri Gopal Balmiki, it could not be done as he was absconded from the Marine Department since 10.03.2016.

f) What complicated the matter more was another complaint informing us that Sri Gopal Balmiki was also simultaneously working in BSNL and had recently retired with superannuation benefits.

In the above backdrop, a detailed investigation was conducted. It could be established that Gopal and Bhopal are one and the same person. But the other actor – who presumably had held job in BSNL, could not be confirmed. Normally, when a matter under Vigilance investigation spans multiple Government Departments or private persons it is to be handed over to CBI who have jurisdiction over all Central Government entities and there instrumentalities with power to interrogate private entities and search private premises. The case of Gopal Balmiki is about impersonation and fraud played upon various Government departments to obtain a job. The alleged actions by Balmiki attract various provisions of Criminal Procedure Code, 1973 and possibly even Prevention of Corruption Act, 1988. Accordingly, with the permission of Chairman, the case was handed over to Anti Corruption Branch of CBI, Kolkata. What systems led to such a scenario, whereby the authorities of these Government departments got duped by Sri Balmiki is matter that would perhaps be unravelled by CBI in future.

In the meantime, a disciplinary action is underway against Gopal Balmiki who has absented himself from duty in an unauthorized manner for a long period of time in KoPT. Presently CBI is seized of the matter.

It was pleasantly surprising to see the subject matter of our investigation hitting headlines in the first page of prominent English daily under the caption **"THE TALENTED MR. BALMIKI"**. This is how the media report ran:

THE TALENTED MR. BALMIKI

He held three Government jobs – in the Defence Ministry, BSNL and Kolkata Port Trust.

At a time when the country is debating job losses due to showing GDP growth, a resourceful man has allegedly managed to land, and keep, not one but three government jobs. He is currently under investigation for fraud.

In March, 2016 Gopal Balmiki, an employee of the Kolkata Port Trust (KoPT), who had been promoted twice during 16 years of his service, went on a 6 day casual leave. Soon after, he sent his resignation. That was the last that anyone in KoPT saw him.

While attempts were still on to trace him, the KoPT received a letter from one Ravi Balmiki on September 05, 2016, alleging that the man held another job in the Defence Ministry. A vigilance case was instituted a day later, and what followed was a series of revelations that culminated in the registration of a case by the CBI. It transpired that Gopal was actually Bhopal Balmiki, who was already employed with the Defence Ministry's Bengal Head Quarters when he got a job with the KoPT as 'Gopal'. An enquiry with the station cell, Head Quarters Bengal area of the Defence Ministry, revealed that the photograph of Bhopal Balmiki bore a striking resemblance to Gopal's photographs in the KoPT records. .....

[Reported in The Hindu on 6th October, 2017]

Ports, Trading Rights and The Bribes That Changed History

A new "*administrator*" had just assumed charge in an Indian port town with sweeping powers to not only police the townsfolk but also decide on the matter of trading license , dock-area usage and customs duty on import and export cargo, the later being crucial to the thriving trade - dependent business community of the town. And the whispers got louder:

> *"The man is a compulsive bribe taker and an extortionist. All our trading activities will come to a standstill if this man remains in charge"*, said one group. "*We have verified his track record in* his *previous place of posting* : *It is simply horrible*" , said the other group and added "*We must get this fellow transferred out by complaining to the Chief or else we cannot transact any business and even have to leave the town itself"*.

But someone learnt that the "*administrator*" in question, had himself purchased the coveted post from his boss, the Chief of the province, by paying a bribe of Rs 60,000. So any complaint to his boss was likely to fall in deaf ears. Hope finally emerged among disheartened groups when the Province Chief himself received a transfer order from the Head Quarter. Undaunted by this development, the "administrator" approached the India-head, paid him a bribe of Rs 2 Crore and got the transfer order of his boss cancelled.

Sounds familiar? The story of "***managing***" posting/transfer order by some powerful bureaucrat / administrator which one hears so often?

Well, you are almost right but with a small difference - **The incident narrated above is not of recent origin but happened 344 years ago!** The "*administrator*" whose posting and transfer order have been alluded above is that of "**Malik Quasim**", the "**Governor of "Hugli**" in 1673 ("Hooghly, as it is spelt now) who had been transferred to "Balasore" by the order **of Shaista Khan of Dacca**, the Mughal Chief of the Province and maternal uncle to Emperor Aurangzeb. And the groups who were terrified on the impending transfer of Malik Quasim were the English and Dutch traders whose trading posts or "factories" as they were being called at that time were doing good business in Balasore , one of the most prosperous towns in the east coast of Mughal India ruled by emperor Aurangzeb.

The incident narrated above happened when Malik Quasim who was the "*faujdar*" or "*governor*" of Hugli under jurisdiction of Dacca Province of Mughal India managed to get himself transferred to the more prosperous town of Balasore where both the Dutch and the English operated on a much larger trading volume than Hugli. It was double delight for him because on payment of Rs 60,000 to Shaista Khan he had also made sure that his son, Zindi Khan, would be appointed as *faujdar* of Hugli a year later. Apart from the fact that Balasore posting was a huge boost to his career, it was also a lucrative position to be in since the Dutch and English were known to be engaged in a fierce competitive bribe-race to secure exclusive trading rights for themselves from Mughal officials in various port towns of India. In spite of such bribery being almost the order of the day in Mughal

Courts, Quasim's ability to negotiate bribe was so lethal that even the habitual bribe giving European trading community shivered to interact with him. In view of his previous track record, both the English and the Dutch tried to prevent him from coming to Balasore on his new assignment. So much feared was he that the Dutch even withdrew from their factory at Pipely to make the Balasore posting appear less lucrative to Quasim. Then they started sending complaints to Shaista Khan at Dacca regarding corrupt activities of the Balasore governor. This complains proved futile as Malik Quasim had purchased the governorship of Balasore Town on payment of Rupees 60,000 to Shaista Khan himself. Hopes began to emerge among the trading community when Shaista Khan got transferred from Bengal. But such hopes were premature as Malik Quasim approached emperor, Aurangzeb, paid two Crores rupees and got the transfer order of his boss, Shaista Kahn, cancelled. With this development, the English and Dutch's hope of removing Malik Quasim from Balasore lay shattered as his position in Balasore actually became stronger. After he resumed charge at Balasore, extortion from the trading community in the port town reached new heights. No complaint worked against him as he was too powerful. The English even tried to procure another aspirant for the Port in the form of Muhammed Raja, formerly governor of Murshidabad who was independently making efforts to get the posting of Balasore. But this too failed and the "ease of doing business" at Balasore Port took a serious beating as it lost its competitive edge to other eastern ports not administered by compulsive bribe taker like Malik Quasim. This could be one of the reasons that hastened the demise of Balasore Port, the most dominant of eastern ports after 1650 AD.

The incident, taken from an invaluable historical compilation called "**English Factory Records" by Sir Foster William**, is one of several anecdotes of bribery and venality prevalent among the chieftains and courtiers in the crumbling Mughal empire at the closing stages of the 17th century. Unaware of the events to come, these decadent officials were extracting as much bribe as possible from the European Trading Companies for granting "*firmans*" or royal rights for trade and commerce. Little did they know that less than 100 years later one of these trading groups will be able to amass so much power from these enabling trading rights that they would eventually take away the much vaunted Mughal Empire itself.

That day arrived on 22 October 1764 when dust settled over the battlefield of Buxar, a small fortified town within the territory of Bengal, located on the bank of the Ganges river when forces led by Hector Munro of the British East India Company destroyed the combined army of Mir Qasim, the Nawab of Bengal; the Nawab of Awadh; and the 16th Mughal King Shah Alam II. The victory of East India Company at Buxar disposed off the three main scions of Moghul power in Upper India in a single stroke. Mir Qasim disappeared into an impoverished obscurity. Shah Alam realigned himself with the British, and Shah Shuja fled west hotly pursued by the victors and later surrendered. The whole Ganges valley lay at the Company's mercy with the Company troops becoming the power-brokers throughout Oudh as well as Bihar

In one of the wicked ironies of history, a mighty civilization folded up before the private army of a Company! Yes a company, not a country or kingdom. When we read in history books that the British conquest of India began with the Battle of Plassey in 1757, we fail to perceive this wicked irony – that it was not the British Government who defeated us but a dangerously freewheeling private company headquartered in one small office, five windows wide, in London, and managed in India by an unstable sociopath –Robert Clive.

What happened after Buxar is, after all, history. Using its rapidly growing security force – its army had grown to 260,000 men by 1803 – it swiftly subdued and seized an entire subcontinent. Astonishingly, this took less than half a century. The first serious territorial conquests began in Bengal in 1756; 47 years later, the company's reach extended as far north as the Mughal capital of Delhi and almost all of India south of that city was by then being effectively ruled from a boardroom in the City of London.

> "**What honour is left to us?" asked a Mughal official named Narayan Singh, shortly after 1765, "*when we have to take orders from a handful of traders who have not yet learned to wash their bottoms***?"

That is how the mighty mogul empire ultimately crashed. Neither did the mogul emperors of the time nor did their venal administrators knew the dangerous consequences of allowing European traders secure seemingly insignificant trading rights in ports through little amounts of bribe.

Sri S.K.Sadangi
Chief Vigilance Officer, KoPT

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ENSURING "BEST VALUE FOR MONEY" IN PUBLIC PROCUREMENT

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Procurement of goods, services and works is one of the most important functions in any organization whether private or public. This function has special significance when the procuring organization is a government entity. In developing countries like India it is estimated that the volume of procurement is nearly 25% to 30% of GDP. This is nearly double of the total revenue collected by India from all taxes combined.

Given the importance of procurement function it is vital to maintain an enhanced degree of transparency, objectivity and fairness. Government contracts are also a source of business and livelihood for many in the private sector. One of the requirements of a public procurement contract is to ensure nondiscrimination and equity among people desirous of participating in it. In other words every public tender and its resulting contract must conform to Article 14 of Indian Constitution.

At present India does not have a national Procurement Act. In such a situation one may ask as to what are the rules and procedures to be followed by various government organizations in the matter of procurement.

While many government Organizations and public sector units have framed their own detail rules/procedures regarding procurement, they are invariably subject to **(a) Indian contracts act,1872 (b) sales of goods act,1930 (c) Guidelines framed by CVC (d) General Financial Rules (recently amended in 2017).**

For Port Trusts, the power to make policy is entrusted with the central government under section 111 of Major Port trust act,1963. As per the policy guidelines on procurement issued by Ministry of Shipping, purchase of goods/services/work in the various Port Trusts are also governed by the above acts and instructions. Recently another regulatory pillar has been added to the procurement policy regime of Ports i.e. "Manual of Procurement of Goods-2017" made by Ministry of Finance and implemented vide Ministry of Shipping's directive Number PD – 24015/23/2017 – PD –III dated 07/06/2017 .

The fundamental principles of public procurement have been enunciated at Section 144 of GFR-2017 which states as follows:

> ***"Every authority delegated with the financial powers of procuring goods in public interest shall have the responsibility and accountability to bring efficiency, economy, and transparency in matters relating to public procurement and for fair and equitable treatment of suppliers and promotion of competition in public procurement"***
>
> Stated under the same article are the following words*:*
>
> ***"The procuring authority should satisfy itself that the price of the selected offer is reasonable and consistent with the quality required."***

Out of the principles enunciated in GFR , perhaps the most important is the concept of "best value for money" spent by public authorities. This is also one of the 3 basic pillars upon which the foundation of international procurement stands. This is called the VFM Principle (as depicted below) which is followed by World Trade Organization's Agreement on Government Procurement as depicted below :

a) Transparency

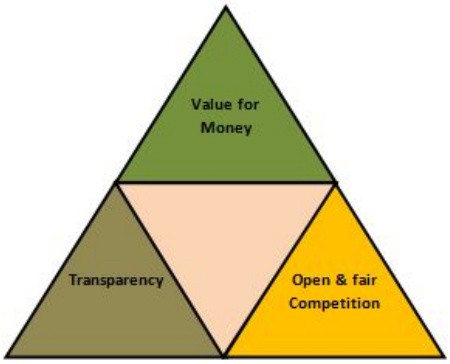
The government's procurement requirements, procedures and evaluation criteria for quotations and tenders are to be published openly on the Government entities.

(b) Open and Fair Competition

An open and competitive environment to encourage suppliers /contractors to give their best offers. Bidders are to be given equitable opportunities and access to compete on a level playing field without any barrier to entry through restrictive conditions , prior-approvals etc.

(c) Value for Money

Value for money is derived from the optimal balance of benefits and costs on the basis of total cost of ownership. As such, value for money does not necessarily mean that a tender or quotation must be awarded to the lowest bidder.



How the principle of "Best value for Money" is followed in actual practice in Indian Scenario?

This principle is a typically administered by the procurement authorities through a detailed and rational justification of procurement prices before entering into a contract. In organizations where procurement is done through tender committee, the members of such committee tried to ascertain the reasonableness of the lowest technically acceptable offer in response to the tender floated by the organizers. During many of the interaction meetings conducted by vigilance in the past, many have varied as to what methods should be adapted to determine reasonableness of bidder's price. Notwithstanding the fact that there can be myriad ways of determining the justification to recommend /accept a particular price and the fact that a tender committee might use any of the several means available to them to achieve this objective, a particular section of the recently circulated "Manual of Procurement of Goods-2017" does deal with this subject in an exhaustive manner. The same is extracted below for guidance:

Para 2.1.1 (iii)(e)

"Estimation of cost:

1. *The estimated cost in the indent is a vital element in various procurement processes, approvals and establishing reasonableness of prices at the time of evaluation of the bids. Therefore, it should be worked out in a realistic and objective manner. The prevailing market price ascertained through a market survey or budgetary quotations from one or more prospective suppliers or published catalogues/Maximum Retail Price (MRP) printed on the item is the main source for establishing the estimated cost of items for which there no historic data available. It may be noted that MRPs usually include significant margins for distributors, wholesalers and retailers;*

2. *For equipment/craft which are uniquely custom-built to buyer's specifications, the best way to get a fair assessment of costs is by obtaining budgetary quotes from potential parties. Ideally, there should be three quotes. However, there is need to have a time schedule for receipt of quotes to ensure some timeframe for this activity. Thus:*

   a) An attempt should be made to obtain as many budgetary quotes as possible from reputed/potential firms and a time of 21 (twenty-one) days be indicated therefore. In the event of receipt of less than three budgetary quotes, two extensions of up to 10 (ten) days each may be considered; and

   b) In the event of non-availability of three quotes within the above extended period, the estimates should be prepared on the basis of the number of budgetary quote(s) received, which may even be one; and where more than one budgetary quote is received, the estimate should be framed on an average of the quotes which will reduce variations and fluctuations;

3. *In addition, wherever they are available Directorate General of Supplies and Disposals (DGS&D) rates should be considered. Likewise rates should be compared with recent orders/purchases of similar equipment by other states/ Departments. Other methods for establishing the estimated cost in the indent and tender evaluation are:*
   a) Estimated rate in past indents of the same goods;
   b) Last purchase price of this or similar or nearly equivalent requirements;
   c) Costing analysis based on costs of various components/raw materials of the item;
   d) Rough assessment from the price of the assembly/machine of which the item is a part or vice versa;
   e) Through the internal or external expert costing agencies; and
   f) As a last resort, rough assessment from the opportunity cost of not using this item at all;

Para 2.1.1 (iv)

"These methods are not mutually exclusive and can be supplemented with escalations to cater for inflation, price increases of raw materials, labour, energy, statutory changes, price indices, and so on, to make them usable in conditions prevailing currently. In case of foreign currencies, the rate should be reduced to a common denomination of Indian Rupees……"

Para 7.5.6:
*"***Reasonableness of Prices**

In every recommendation of the TC for award of contract, it must be declared that the rates recommended are reasonable.
(For more details on judging reasonableness of prices, please see para 2.1.1 (iii)(e) in Chapter 2 above).

Where there is no estimated cost, a comparison with Last Purchase Price (LPP - the price paid in the latest successful contract) is the basis for judging reasonableness of rates. The following points may be kept in mind before LPP is relied upon as a basis for justifying rate reasonableness:

i) The basic price, taxes, duties, transportation charges, Packing and Forwarding charges should be indicated separately;

ii) Where the firm holding the LPP contract has defaulted, the fact should be highlighted and the price paid against the latest contract placed prior to the defaulting LPP contract, where supplies have been completed, should be used;

iii) Where the supply against the LPP contract is yet to commence, that is, delivery is not yet due, it should be taken as LPP with caution, especially if the supplier is new, the price paid against the previous contract may also be kept in view;

iv) Where the price indicated in the LPP is subject to variation or if it is more than a year old, the updated price or as computed in case of the Price Variation Clause (PVC) may also be indicated;

v) In the case of wholly imported stores, the comparison of the last purchase rate should be made with the net CIF value at the current foreign exchange rate;

vi) It is natural to have marginal differences in prices obtained at different cities/offices for the same item, due to their different circumstances. The prices obtained are greatly influenced by quantity, delivery period, terms of the contract, these may be kept in view;
and

vii) Prices paid in emergencies or prices offered in a distress sale are not accurate guidelines for future use. Such purchase orders and TC proceedings should indicate that "these prices are not valid LPP for comparison in future procurement"."

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DEADMAN BILLING

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A ninety five year old man, barely able to walk, entered through the doors of Vigilance Department one rainy afternoon. With a letter in hand and accompanied by a young girl he appeared distraught and angry. Opening the letter and handing over the same, he started to speak about his problem without even being asked to take a chair.

He said that he lives in a small house located in a prime residential area of Kolkata on a piece of land leased to him by KoPT, a year before Indo-China war. Like any law abiding citizen, he has been paying rent for the land leased to him by KoPT all through these years. But recently one of his neighbors residing in an adjacent plot, also leased by KoPT, started building a high rise wall, completely blocking sunlight and air to his house. This, according to the complainant, was affecting his health at such old age. The obstruction of natural air and sun light had choked his house and was undermining his already frail health condition which brought him to the doorstep of Vigilance.

On the to top of it all, he said that he was sure that this neighbour had never paid his dues to KoPT and was an unauthorized encroacher of Government land. The neighbour constructing a multi-storied complex was a further travesty of Government Authority.

When asked, why he had notapproached theconcerned Port authorities,the old man's agitation seemed to spill over to the table.*"I have made enough representations but nothing ever came out of it. Do you think that illegal construction byan unauthorized occupant is happening for such a long time without the knowledge of any authority?"*, he shot back.

A preliminary investigation into the allegations made by this old man opened a can of worms that holds serious lessons for the need of implementation of an appropriate systemin our prevailing Estate Management function, which generates a sizeable slice of KoPT's annual revenue to the tune of more than 200 crores.

This is how the case unfolded so far :

Since the complainant had divulged the exact Plate Number (a unique alphanumeric identification number ascribed to each Plate / Plot of land by Estate Division), where the said unauthorized construction was supposedly

in progress. A Vigilance Inspector was deputed to verify the same. On reaching the site he found 3 occupants operating in the premise - a two-storied car selling unit, a locked godown and a residential dwelling. The occupants did know that the land belongs to KoPT, but said they were living there since 2002 permitted by one Ram Rahim Singh (name changed) to whom they used to pay rent regularly till 2010.**They had no knowledge whether or not this Ram Rahim Singh paid anything to KoPT towards lease/license charges.**When Ram Rahim died in 2010, his son Krishna used to collect rent from them till he too expired in 2013.After Krishna's death, the three occupants did not know what to do and as per their version, frantically tried contacting "Port's Estate Officials" but in vain. **As no one from Port was willing to take rent from them, *they are living there absolutely free* !**

To find more detail about the plot and its *bonafide* owner, the next stop for vigilance was the Estate Division. It is the division which maintains files against each Plate/Tenancy containing details, such as Original lease/license agreement between the lessor/licensor and lessee/ licensee, correspondence between lessee/licensee and Estate Department, reports of periodic inspections by designated estate official, payment/breach details, legal disputes, if any, purpose of use, etc.

On being queried that when was the lease/license granted by KoPT and if so, what were the governing terms and conditions for such lease, **Estate Department informed that such details could not be provided as the file was "missing" and hence no detail could be provided to Vigilance.**

However, what the division confirmed about this plot was very interesting and needs to be narrated below:

- *The plot in question had indeed been leased (or licensed ?) to one Ram Rahim Singh. There was no information with them as to whether he is dead or alive!*

- *Although, they did not know when the lease/license was first awarded by KoPT, their department has been sending bills to Ram Rahim Singh which has been pending since 1984 i.e for 33 Years. The accumulated unpaid bill amount against Ram Rahim Singh (dead or alive) stands today at Rs 8.73 Lakhs of rupees or a little more.*

- *There is no record of any official inspection of the site to verify, if not anything, at least whether the lessee/licensee is dead or alive.*

When the estate official was asked that whether Ram Rahim Singh or any one on his behalf were paying the bills raised against him and

were being sent at his address, he said that bill has not been paid since 1984. Does it mean that KoPT has been religiously preparing bill for last 33 Years to this lessee, spending time, energy and expense for bill preparation and not even once has the lessee Ram Rahim Singh paid*? "Yes"* said the official *"not just this one, there may be hundreds of such cases",* he added.

But surely, as easily verified by Vigilance, not just Ram Rahim is dead since last seven years, but his son is also dead since last 4 years. Does it mean that we could be sending bills to a *"dead man"* since seven years*?* He said *"Yes, it could very well be." A look at the "bills" raised by KoPT revealed that KoPT even pays "Service Tax" on the billed amount.* **So, not only we have been incurring expenses in generating and despatching bills against a dead man without getting a single rupee, but we are probably paying even service tax on the billed amount as reflected on the bill!**

At this juncture, one may ask whether these unpaid bills being despatched to the lessee were ever returned back undelivered? Well, not really, since these bills are sent out to the addresses through ordinary post and do not return back to KoPT undelivered.

Asked as to how, he has never inspected the location even though the same was within his jurisdiction, the concerned official explained that he was in charge of nearly 350 "plates", means Tenancies, spreading across huge area and has to deal with all paperwork associated with each such "plate / tenancy" including litigations. He has not even opened the file of many of these plates to see whether even there is a valid lease agreement for the plates in the file. If he is to inspect a particular location even once in six months, it will take him many years to complete the entire area under his jurisdiction to gather authentic details verified with physical records. He said, he had minimal and almost no effective supporting staff at his disposal to complete such inspections, data compilation and verification. Hence he is completely unaware of what is happening on the ground in many such locations.

He also asserted that the onus of informing KoPT about the death of the lesse lies on the lessee, his / her near and dear ones and there is no proactive / system driven approach from KoPT to verify why the rent is not received from a Lessee / Licensee for such a long period.

So would that mean that there are many other such cases of "dead men being billed by KoPT?" Many such cases where billing is going on religiously but no lessee pays anything in return?

"Oh yes, certainly" came the reply. "*There are many such plots, operating under the curious system of 'Monthly License' where no effective inspection has been carried out since long. In such sites, the possibility that the original lessee might have been dead or has sublet his plot to others, illegally, cannot be ruled out.* ***There certainly are considerable numbers of cases where a lessee is not paying anything to Kolkata Port Trust but have rented the entire premises to others who might have sublet the same to others with no revenue coming to KoPT from anyone."***

Interaction with the said official revealed even more astonishing aspects. For instance, he said out of all the "Plates" under his jurisdiction, there are lots of "Plates" with no valid "lease or license agreement", duly signed by "lessor" and "lessee". He has knowledge of few of these plates but he has never seen all the files of the plates under his jurisdiction. As everyone knows, when a government authority licenses/leases any of it's property, the most basic thing required is a detailed agreement with various terms and conditions. This is the first document that would be required in case of any dispute for establishing the rights and obligations of each of the party. For instance, if the licensee is found by law enforcement agency to be storing prohibited material in a licensed site, how could KoPT forsake their responsibility for this criminal act without producing a copy of the "Lease/License" Agreement where such storage is specifically

prohibited? The legal ramification of a missing or non-existent agreement can be extremely dangerous for KoPT in a court of law.

The official mentioned that among the plates under his jurisdiction, only for very few plates, there is a properly signed license / lease agreement available. Curiously, in some other cases there is a "draft" agreement in the file without anyone's signature -neither that of the lessee nor of anybody belonging to KoPT.

It is pertinent to mention here that the aforesaid situations may not be stand alone examples for a particular section under Estate management function of KDS, but in all probabilities, similar situations exist amongst majority of the more than 2500 odd tenancies under KDS. This is more so vindicated, going by the fact that, there exist identifiable litigations to the tune of more than 1200 in numbers.

Lease or License?

What is a a license and what is a lease? What is the difference between the two? A lease or a license is nothing but an "Agreement" between two parties regarding enjoyment of certain rights over a property. Under Indian Contract Act, 1872, a "contract" is an "agreement" which is valid in the eyes of law. To be valid; such agreements need not be "registered" with any government authority except in certain situation where such "Agreement" concerns transfer of property /land by way of "lease" or "sale" to another party. In such cases, the "agreement" between the parties needs to be "registered" with a designated government authority on payment of certain fee like "registration fees/stamp duty". An agreement specifying for enjoyment of certain type of property rights of one party by the other for a longer period (typically more than 11 months), is termed as "lease agreement" and is manifested in the form of a "lease deed". For such "lease deed" to be a legally valid contract, it needs to be signed by both parties and registered with the designated authority of State Government with payment of appropriate amount of

registration fee/stamp duty. However, if such an agreement is for enjoyment of property rights only for a very short period (less than 12 months) then there would be no need for registering the agreement for bestowing legal validity to it and both parties would be free from payment of registration fee for the sake of being legally valid.

As per Para 10.1 of Amended Land Policy guidelines issued by Ministry, "land inside custom bond area which are required on an immediate basis shall be given on license and no lease is permitted". It is further stated therein that "license may be granted up to a maximum period of 11 months… ". As for giving land outside custom bond area, the Para 11.1 states that "normally, land outside custom-bonded area shall be given on lease basis only. However, in specific cases, for reasons to be recorded in writing, land can be given on license basis only for port -related activities." As per Para 11.2 , the Board of Trustees of a Port can award lease of land maximum up to 30 years which can be extended up to a maximum cumulative period of 99 years with renewals beyond 30 years being granted by Central Government through an Empowered Committee mechanism. Land Policy Guidelines Clause 9.4 states "Port will formulate the guidelines for Licence of land within or outside the Custom Bonded area in accordance with the land use plan of the port and the spirit of the Land Policy Guidelines and get them approved at the Board level. The Ministry of Shipping should be kept informed about the guidelines."

From the above three aspects, it becomes very clear that as a Policy Guideline:

- Licenses have been visualized, basically as "short term instruments" required for immediate use of Port Users whose duration can be upto a maximum period of 11 months and that too inside custom-bonded dock area.
- It's use outside port area is strongly discouraged (where the predominant instrument for land management is "long term lease" based on various modes of competition).

- In general, there is no provision whatsoever in Land Policy for making "renewal" of a short-term license once its original currency expires. However, Board is to formulate the guidelines for license in accordance with Land Use Plan, which is understandably yet to be approved.

The case of Ram Rahim Singh was a case of short-term "monthly license" running since 1964, as per the land file subsequently retrieved from archive. There was a continuous billing for the said plate. The question arose as to how a short-term license given for a "month" could be running for nearly 53 years! It is then, that several serious systemic deficiency in the area of the so called "monthly licenses system" were observed. Some of which are:

1. Although the land policy normally prohibits issue of short-term licences outside custom bonded area, the existence of such monthly licenses outside custom bonded area appear to be the norm rather than an exception.
2. Many of such short term monthly licenses are continuing for years together without renewal. When the duration of a "license" is allowed to run for years together, it effectively assumes the character of a "lease" without qualifying the conditionality laid down in the Land Policy for issuance of a "lease". For instance, in a case like Ram Rahim Singh, KoPT's property has been given away for 50 plus years. Under Land Policy stipulation, even a long term lease of 30 years would require the beneficiary to face competitive tendering / auction procedure.
3. It was a mystery, to find out how a license awarded initially for a few months, can be continued for 30/40/50 years. It was then the following peculiar abnormality was found :

Converting "Short Term Monthly License" to "License -in-perpetuity" :

As has been narrated earlier a monthly license is only for a very short term. Unless renewed, it should come to expire. However, an interesting condition embedded in the license document, can effectively convert a short-term

license to a lease-in-perpetuity. This condition quoted below is indeed found in many of the license letters issued by Estate Division.

"The tenancy will be on a month-to-month basis terminated by 15 days notice on either side expiring with the end of an English calendar month".

While it is obvious that such a license can be cancelled by either party by giving a 15 day notice what is not obvious is, what would happen if either party remains silent? Will the contract expire or will it continue further. The answer is that the contract will continue indefinitely, if no one sends a termination-notice to the other. Such a clause serves as a kind of an automatic-extension-generator and the license agreement which contains such a clause has the potential of being an "eternal license" or "license-in-perpetuity".

In a situation where there are several plates / plots with no proper "license agreement" available, while in many plates / plots, the files / relevant records might be missing, payment details are not proper, etc., the question of monitoring such "monthly licenses" does not simply arise without a robust, real-time, authentic and alert-generating computerised online database for all tenants (active / inactive). The estate official said, he inherited a responsibility where around 60% of his Plates do not even have "any agreement" in the respective file. In absence of the original agreement, nobody would know the latest status of the plot and the question of terminating the same would hardly arise. **In Estate Management, where each file is a register of each premise / plot / tenancy, situations, where the Plate / Tenancy file is altogether missing&/all relevant real time information are not readily available in the file at a glance, the question of monitoring such a continuing lease / license does not arise at all!**

In fact before detection of this case of a dead man being billed was noticed, there was another case, right in the premises where Vigilance Office and CDLB office are located. It was found that in the same premises, some licensees had encroached upon the open space belonging to KoPT converting

it to some sort of private godown since years. When a search was made, as to who these unauthorized occupants were and since when they had resorted to such encroachment, details were difficult to come by. Here too estate details of one of the licensee, who had locked up his godown could not be found, as the file had apparently gone missing. When the Port authorities tried to hold one licensee accountable for such encroachment, he took Kolkata Port to Court. Vigilance has also come across cases where ejectment notices were issued to lessees after many years of due expiry of the lease as the premises were never inspected and files of the plates never looked into. Moreover, PP Act proceedings have also been initiated long after expiry of licenses/leases and such proceedings have continued for decades. Legal cases in civil courts are also continuing years after years with dates after dates or no dates.

The case of these seemingly short-term monthly-licenses metamorphosing gradually into longer than a long term lease is not only injurious to KoPT from a revenue point of view but also from a legal standpoint. Non availability of valid license agreement and non maintenance of documents / information for ready and easy retrieval would compromise the winnability of KoPT in case of any legal dispute. It is also a negation of Land Policy guidelines issued by Ministry.

To **conclude**, it is evident that Estate Management of KDS, KoPT, which is accountable for hundreds of crores of revenue for KoPT's survival, is not only vulnerable to financial, legal and vigilance scrutiny / audit, but also having acute deficiencies of appropriate manpower, information flow to manage such a vast **national** property of around 4500 acres spread across different districts of West Bengal, in particular, at Kolkata, and Howrah. Hence a thorough **System Improvement**, manpower and infrastructure **augmentation** of Estate Functions of KDS, KoPT is a call for the day.

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निवारक सतर्कता का महत्व

सुश्री मिताली घोष

उप श्रम सलाहकार व औद्योगिक संपर्क अधिकारी

कोलकाता पत्तन न्यास

जब एक सार्वजनिक प्राधिकरण का कर्मचारी, व्यक्तिगत लाभ के लिए अपनी आधिकारिक क्षमता का लाभ उठाता है, तब उसे भ्रष्टाचार कहा जाता है। विश्व बैंक ने भ्रष्टाचार को इस तरह परिभाषित किया है *"the abuse of public office for private gain. Public office is abused for private gain when an official accepts, solicits, or extorts a bribe. It is also abused when private agents actively offer bribes to circumvent public policies and processes for competitive advantage and profit. Public office can also be abused for personal benefit even if no bribery occurs, through patronage and nepotism, the theft of state assets, or the diversion of state revenues."* (The World Bank report- Helping Countries Combat Corruption: The Role of the World Bank).

जिन देशों में भ्रष्टाचार निवारक साधन हैं , उन्हें हमेशा भ्रष्टाचार मुक्त राष्ट्रों के सूची पर उच्च स्थान या रैंक प्राप्त होता है । कुछ देश कठोर कानूनों के जरिए भ्रष्टाचार को रोकने का लक्ष्य रखते हैं, और भ्रष्ट लोक सेवकों को मौत की सजा भी प्रदान करते हैं। अन्य देश शासन के पारदर्शी तंत्र पर भरोसा करते हैं, तकनीक का उपयोग कर भ्रष्टाचार निरोधक तौर-तरीके अपनाते हैं । दुष्कर्म रोकने के लिए अपने नागरिकों में सार्वजनिक कर्तव्यों की भावना पैदा करते हैं।

भारत सरकार ने सदा भ्रष्टाचार निवारण और स्वच्छता पर जोर दिया है । जैसा कि आप जानते हैं, श्री संथानम की अध्यक्षता में जो कोमेटी गठित की गई थी, उसका नाम "*Committee on Prevention of Corruption* " या भ्रष्टाचार निवारण कमेटी रखा

गया था । संथानम कमेटी के सिफ़ारिश अनुसार केन्द्रीय सतर्कता आयोग की स्थापना 1964 में हुई । आज सभी सरकारी संगठन में एक सतर्कता विभाग है ।

सूचना का अधिकार अधिनियम 2005 लागू होने के बाद ,सरकारी काम-काज में स्वच्छता और जवाबदेही की शुरुआत हुई । इस कानून ने भारत के नागरिकों का लोक प्राधिकारियों के नियंत्रणाधीन सूचना तक पहुँच सुनिश्चित की है । यह कानून निवारक सतर्कता की सबसे मजबूत स्तम्भ है । अकसर RTI सवाल के माध्यम से सार्वजनिक प्राधिकरण की कमियाँ ,अनैतिकता या दुर्नीति को सबके सामने लाती है। ऐसे खुलासा को सकारात्मक भावना से ग्रहण करके, भ्रष्टाचार निवारक कार्य प्रणाली अपनाना चाहिए।

हमारे देश के केंद्र और राज्य सरकार के सभी विभाग, सार्वजनिक क्षेत्र उपक्रम आदि में सतर्कता विभाग है । इनका उद्देश्य है लोक सेवकों के भ्रष्ट और अनुचित कार्य पर दृष्टि रखना और उपयुक्त जांच-पड़ताल करना । आमतौर पर सतर्कता को निवारक सतर्कता और दंडात्मक सतर्कता में विभाजित किया जा सकता है। निवारक सतर्कता या भ्रष्टाचार को रोकने की उपाय निकालना दंडात्मक सतर्कता से बेहतर है । क्योंकि दंड देने से पूर्व दुराचरण हो चुका है और सार्वजनिक संपत्ति का नुकसान हुआ है । बेहतर यही है कि हम भ्रष्टाचार को रोकने की उपाय करें ।

मैं निवारक सतर्कता और स्वच्छता पर कुछ विचार और सुझाव आपके साथ बाँट रही हूँ । यह एक विशाल विषय है । इन पर ये विचार या सुझाव संपूर्ण नहीं है और इन्हें brain storming ही माने।

(i) सतर्कता जांच से भ्रष्टाचार निवारक उपाय निकालना

कार्य प्रणाली में सुधार के उपाय पर सुझाव, सतर्कता जांच रिपोर्ट में उल्लेख किया जाना चाहिए। सतर्कता जांच दुर्नीति सामने लाती है, और उसके पश्चात अभियुक्त लोक सेवक के खिलाफ अनुशासनात्मक कार्रवाई किया जाता है । दंडात्मक कार्यवाही समाप्त होने के बाद सभी घटना को भूल जाते हैं । पर संगठन के मुख्य कार्यकारी अधिकारी (CEO) और सतर्कता विभाग को भ्रष्टाचार निरोधक उपाय सुनिश्चित करना चाहिए ताकि भ्रष्टाचार की घटनाएं की पुनरावृत्ति न हों; अन्यथा सतर्कता जांच और दंडात्मक कार्रवाई व्यर्थ है।

(ii) जवाबदेही स्थिरीकरण द्वारा भ्रष्टाचार निवारण

कार्यालय के मैनुअल में स्पष्ट रूप से संगठन में प्रत्येक पद की शक्ति और जिम्मेदारी का उल्लेख रहना जरूरी है , ताकि प्रत्येक कर्मचारी अपनी नौकरी मानदंडों के भीतर अपनी कर्तव्य का निर्वहन कर सके। सार्वजनिक क्षेत्र के उपक्रम में शीर्ष प्रबंधक वर्ग को कुछ विवेकाधीन शक्ति (discretionary power) प्रदान की जाती हैं । यह ध्यान में रखना चाहिए की विवेकाधीन शक्ति का प्रयोग स्वैच्छिक रूप से नहीं हों। अगर कोई भी काम विवेकाधीन शक्ति का प्रयोग करते हुए की गई हो तो उसे संगठन के वेबसाइट में प्रकट करना चाहिए । शक्ति का दुरुपयोग के खिलाफ ये निवारक के रूप में कार्य करेगा।

(iii) कुछ प्रकार के सार्वजनिक धन के दुरुपयोग की रोकथाम

कभी-कभी सार्वजनिक क्षेत्र उपक्रम के कोष का मनमानी ढंग से दुरुपयोग किया जाता है। उदाहरण के लिए, एक महंगी मोबाइल फोन या लैपटॉप या ऑफिस कार एक अधिकारी को प्रदान की जाती है, जबकि यह उनके सहकर्मी को नहीं दी जाती है । ऐसे मामले भी हो सकते हैं जहां कोई अधिकारी बिना न्यायोचित कारण अलग सा भत्ता ले रहा है । ऐसे अतिरिक्त सुविधाएं / भुगतान manual बिलों के माध्यम से, खातों के अनावश्यक कोने में छिपा रहता है और कर्मचारी के वेतन में भी प्रतिबिंबित नहीं होता है। कुछ ऐसे मामले कभी-कभी सतर्कता जांच के माध्यम से प्रकाश आते हैं। सार्वजनिक निधि के दुरुपयोग की रोकथाम का उपाय है - अगर किसी कर्मचारी को कोई विशेष या अतिरिक्त सुविधा संगठन की और से मिल रहा है, तो उस सुविधा का विवरण अनिवार्य रूप से संगठन की वेबसाइट पर दिखाया जाए ।

(iv) भ्रष्टाचार रोकने हेतु अंदरूनी या बाहरी परीक्षा ऑडिट का उपयोग

ऑडिट संभवतः निवारक सतर्कता का सबसे पुराना और सार्वजनिक साधन है। हर लोक सेवक ऑडिट के बारे में सावधानी रखते हैं। सार्वजनिक प्राधिकरण के खातों, प्रक्रिया और कार्यों की नियमित अंदरूनी या बाहरी परीक्षा भ्रष्टाचार रोधक या दुर्नीति प्रकट करने का उपाय है । प्रभावपूर्ण ऑडिट सही सवाल पूछने पर निर्भर करता है, जो संगठन की कार्य प्रणाली के कमज़ोरियाँ प्रकट करेगा और भ्रष्टाचार निर्मूलन का सहायता करेगा ।

(v) इलेक्ट्रॉनिक प्रौद्योगिकी द्वारा भ्रष्टाचार निवारण और स्वच्छता

इलेक्ट्रॉनिक प्रौद्योगिकी और इंटरनेट की व्यवहार से काफी भ्रष्टाचार निवारण और स्वच्छता आ रही है । इंटरनेट आगमन के पूर्व साधारण लोगों को बैंक , रेल टिकट ,

ईन्काम टैक्स, न्यायालय के आदेश की प्रतिलिपि, म्युनिसिपाल्टी से काम ,आदि पर काफी परेशानी झेलना पड़ता था। अब इंटरनेट से आप यह सब काम सुविधा से कर सकते हैं। इलेक्ट्रॉनिक प्रौद्योगिकी का जितना इस्तेमाल बड़ेगा, उतना ही भ्रष्टाचार निवारण संभव होगा। हमारे लोकतंत्र में चुनाव से संबंधित सभी मामलों की स्वच्छता ई-टेक्नोलॉजी द्वारा संभव हो गई है।

(vi) **रक्षक पर कौन निगरानी करेगा ? "*Sed quis custodiet ipsos custodes?"***

अब एक आखरी सवाल। रक्षक पर कौन निगरानी करेगा? "***Sed quis custodiet ipsos custodes?"*** अर्थात "*who will guard the guards?* " पुराने लैटिन भाषा की एक कहावत है,जो दुविधा व्यक्त करता है, की जिन पर शासन की जिम्मेदारी सौंपा गया है , उन पर कौन निगरानी करेगा ? सतर्कता कर्मचारी भी लोक सेवक हैं। पर सभी भ्रष्टाचाररोधी एजेंसियां- को कभी-कभी अपने ही लोगों द्वारा किए गए कुछ अन्याय कार्य का सामना करना पड़ता है। इसलिए सतर्कता ऑडिट की भी जरूरत है। ऐसा ऑडिट सतर्कता की निष्पक्षता पर आम जनता और सरकारी कर्मचारियों की आस्था को बढ़ावा देगा। RTI के जरिए सतर्कता विभाग को भी अब अपने नियंत्राधीन दस्तावेजों का खुलासा करना पड़ता है , जिनसे विभाग के कामकाज और सोच प्रक्रियाओं का पता चलता है और वे विभिन्न मुद्दों पर जनता से जवाबदेह होते हैं।

सतर्कता अर्थात जागरूकता। समय पर निवारक कार्रवाई भविष्य की मुसीबतों को रोकता है। भ्रष्टाचार निवारण द्वारा ही भविष्य में स्वच्छता आएगा। इस लेख में व्यक्त विचार लेखक के अपने हैं।

SYSTEM STUDY ON TENDERING & CONTRACTING REGIME OF KOPT

World over, tenders and contracts of various hues have become some of major instruments in the hands of public and private organizations for achieving project goals. Given the dwindling manpower, their importance can hardly be overemphasized for ensuring efficient management and operation of Kolkata Port Trust (KoPT). An analysis made by Vigilance Department on the subject presented below suggests that the current architecture of contractual decision making in KoPT needs significant remodelling/revamping. Interestingly, this is needed more for ensuring basic efficiency in the existing tendering /contracting process itself than for things connected with Vigilance administration.

(A) OVER CENTRALIZATION OF CONTRACTUAL DECISION MAKING

(i) ***Tendering system in most Organizations***:

In most organizations that deal with sizeable volume of tenders/contracts, decision making is generally done in two phases. The first phase starts with constitution of a multi-member committee called "Tender Committee" (generally comprising of 3 members – a Convener Member, a Finance Member and an Associate Member) who examine the bids received in response to tender on various technical and commercial parameters set out in the bid document. Thereafter, the Tender Committee recommends a suitable offer to a higher authority (called "Tender Accepting Authority) for awarding of contract. The Tender Accepting Authority is entrusted with full power to accept or reject or modify the recommendation put up to him/her by the Tender Committee Members and is generally an officer one rank higher than the officers who constitute the tender committee. This is popularly known as **"3+1 System of Tender-decision-making"** i.e. a *recommendatory body of 3 Officers* and another officer - a rank higher than the officers who comprise the Tender Committee - having power to accept/reject/modify their recommendations. In some cases, the number of Tender Committee members may vary depending on the nature of tender and number of stake-holding departments. Nevertheless, the basic structure of tender-decision-making in most organizations follows the above percept. Organizations may also fix a threshold financial limit below which constitution of such multi-member Tender Committee of decision making can be dispensed with. These are generally known as Non-TC cases and are decided by single officer of appropriate level subject to vetting by the internal finance wing.

(ii) *Tendering Process followed in KoPT:*

In our KoPT system, the threshold limit for decision through Tender-Committee is set at the level of Rs.10 lakhs in terms of estimated value of tender. Above this value constitution of a recommendatory Tender Committee and the subsequent acceptance of their

recommendation by a Higher Authority is mandatory. At present 4 levels of Tender Committee have been envisaged depending on the estimated tender value as given below:-

Group	Estimated value of tender	Level of officers (in general)
1	Rs 10,00,001 to Rs 60,00,000/	In the pay scale of Rs 20600 -46500
2	Rs 60,00,001 to Rs 1,00,00,000	In the pay scale of Rs 24900 -50500
3	Rs 1,00,00,001 to Rs 2,00,00,000	In the pay scale of Rs 32900-58000
4	Above Rs 2,00,00,00/-	HoD/GM

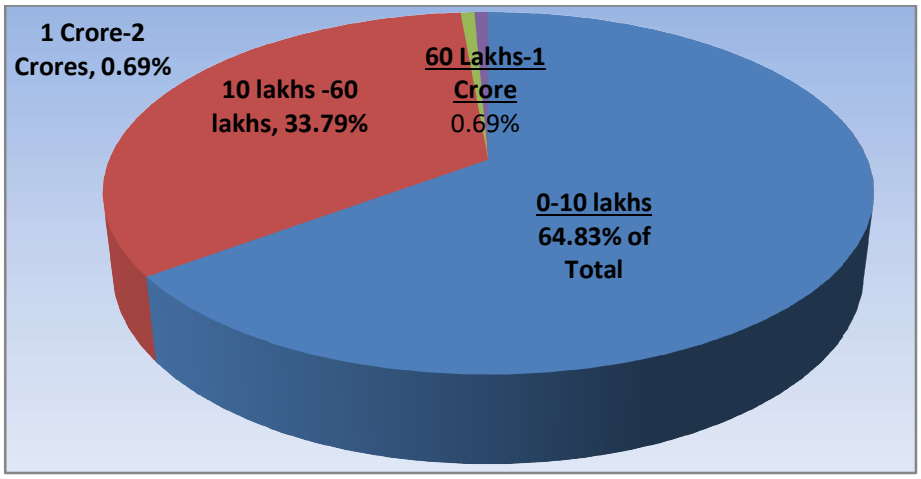
As can be seen from the above table, the lowest level of "**sanctioning power**" at KoPT starts at HoD level for normal works tenders with estimated value ranging from 0 to Rs 1 Crore. Since a majority of tenders floated in KoPT happen to be in the value range of Rs.0 to Rs.60 lakhs (Non-TC cases and within the recommendatory power of first level TC), the HoD becomes the **"Sanctioning Authority"** for all these cases. **In fact currently the HoD is the sanctioning authority for not only cases coming within the recommendatory power of the two lowest level TCs but also for the vast majority of tenders below Rs 1 Lakhs which do not require formation of Tender Committee**.

(iii) *Case Study in Tender Distribution in a typical contracting Department of KoPT*:

As a sample study, Vigilance branch analyzed the value-wise distribution of tenders in one department of KDS i.e. Civil Engineering Department. The findings presented below are a clear pointer to over-centralization in the present model of tender-decision making followed in KoPT.

TENDER –DISTRIBUTION IN CIVIL ENGG DEPARTMENT

Estimated Value Range	Tender Count	Recommendation Level (KDS/HDC)	Sanctioning Authority	% of Total Tender Count	Cumulative Share(%)
0-10 lakhs	94	Non-Tender Committee	HOD	64.83	64.83
10 lakhs -60 lakhs	49	Level-1 (Exe En / Asst Mgr)	HOD	33.79	98.62
60Lakhs-1 Crore	1	Level-2(Sup. Engg/ Dy. Mgr)	HOD	0.69	99.31
1 Crore-2 Crores	1	Level-3(Dy. CME Dy.CE, /Sr. Dy. Mgr)	Dy. Chairman	0.69	100.00
TOTAL TENDER POPULATION	145				



iv) <u>Over-Centralization of Tender-Decision Making</u>

The above case-study shows that **nearly 99.3% of the tender files** of KDS Civil Engineering Department with value range **Rs.0 to Rs.1 crore** end up on the table of the Chief Engineer for sanctioning. **This includes Non-Tender Committee Cases amounting to 64.83% of the tender population of the department**. Obviously one does not require the highest level of a department to be saddled with the decision making power of the lowest level of tenders. The state of over-centralization in tender decision making becomes even more evident when viewed from the fact that among **630 class-I officers in KoPT the "power to accept" a tender is vested with only 16 officers (Chairman, 2 Deputy-Chairman and 13 HoDs/GMs). In other words contracting power begins at only 97.5% Percentile of Executive Hierarchy of KoPT. It appears that in past some financial powers in the matter of tendering/contracting were delegated to authorities below HoD level. But the same were withdrawn as evident from the following extract from Ministry's letter No.PR-17011/2/98-PG. Dt.24th October,2000.**

> *"<u>As the delegation of financial powers is not envisaged below the level of HoDs as this Ministry's letter No.PR-17011/2/96-PG dated 28.8.1997, the powers that are hitherto being exercised unauthorisedly by below HoD level are withdrawn and henceforth be exercised by HoDs.</u>"*

The above is contrary to what had been envisaged by the Committee constituted by Ministry of Shipping in 2015 to go into "Delegation of financial power in Major Port Trusts" as reflected from their following recommendations:

" .....

i) *Delegation of powers should foster faster decision making.*
ii) *It should result in effective implementation of projects and avoid time and cost overrun.*
iii) ***Higher levels of Port Authority should focus on important port development management issues and projects, not routine matters. ..."***

The analysis and case study presented above indicates that the present way of managing the tender system in KoPT has to be significantly altered to remove the abnormal congestion of decision making at the highest level**.**

v) *<u>The Statutory Background of Delegation of Power and possible alternatives</u>*:
It may be noted that the term "***Executing Contract on behalf of Board***" reflected in the 2015 letter of MoS which lays down the financial limits of such power for various Port Authorities stems from Section 34 of MPT Act. The said section declares " *Every contract shall, on behalf of a Board, be made by the Chairman [or by any such officer of the Board not below the rank of the Head of a department as the Chairman may, by general or special order, authorise in this behalf] and shall be scaled with the common seal of the Board".* Hence it appears that any delegation of contracting-power below HoD level would contradict Section 34 (Although Draft Major port Authorities Bill,2015 pending before Parliament does away with such restriction, it is yet to be converted into an Act) .

It should also be kept in mind that "Executing a Contract" and "Entering into a Contract by Accepting Offer of a Tenderer" are two different actions. The question of "execution of contract" comes only after an "Acceptance of an Offer" is made by an appropriate authority. Hence it may be worthwhile to explore the possibility of delegation of "Tender Acceptance Power" to authorities "below HoD Level" on the strength of Section 21(b) of the existing Act read with section 111 which state as follows "

> <u>Section 21(b)</u>: ***Delegation of powers***
> "*Board, with the approval of the Central Government, to specify (b) the powers and duties conferred or imposed on the Chairman by or under this Act, which may also be exercised or performed by the* ***Deputy Chairman*** *or* ***any officer of the Board*** *and the conditions and restrictions, if any, subject to which such powers and duties may be exercised and performed: Provided that any powers and duties conferred or imposed upon the Deputy Chairman or any officer of the Board under clause (b) shall be exercised and performed by him subject to the supervision and control of the Chairman*". [Section 21(b) of MPT ACT,1963]
>
> <u>Section 111</u> : ***Power of Central Government to issue directions to Board***
> "*Without prejudice to the foregoing provisions of this Chapter, the Authority and every Board shall, in the discharge of its functions under this Act be bound by such directions on questions of policy as the Central Government may give in writing from time to time .... The decision of the Central Government whether a question is one of policy or not shall be final.*

Needless to say that the desirability of delegation of financial power for "Acceptance of Offer" definitely comes within the "policy matter" of Ministry as has already been stated at the outset of their 2015 letter.

(vi) *<u>Added Complication in exercise of existing power</u>*:
Even more worrisome is the fact that even the above delegation of powers i.e. at HoD level is not being followed uniformly in all departments. These files, as per current practice, are being sent upward to another level higher i.e. to the level of Dy.Chairman. From informal discussions with various officers of KDS and HDC, it is understood that such a situation has arisen due to the following

a) The GM level officers in HDC are not exercising the power of HoD because there exists a regulatory confusion as to whether the power of HoD, as specified in the delegation of powers, can be applied to the post of GM in HDC. It is contended that although the power of GM in HDC is equivalent to that of HoD in KDS a conclusive notification of the same is yet to materialize.

b) The other confusion arises from the "phraseology" used in the delegation of power enshrined in letter No17011/1/2005- PG dated 11th February, 2015. In this letter the power of Rs 1 Crore for HoD has been mentioned as "***Execution of Contract on behalf of Board***" and not **"*Power to Accepting Recommendation of Tender Committee*" or "*Power to accept Offer*" etc.** Apparently there is confusion among some as to whether the term "***Execution of Contract on behalf of Board***" can be construed to mean acceptance of recommendation of TC members. Needless to say that financial powers in relation to "tenders" and "contracts" need to be labelled unambiguously without any possibility of differing interpretations.

(vii) *Situation same for Proposals/Estimates also*:

Not just "Tender Committee Recommendations", but proposal and estimates of even smaller values are observed to be invariably being pushed to the desk of Dy. Chairman for various types of approval/concurrence. There appears to be no clear financial-delegation for such pre-tendering activities. In any case, demand for decision taking at higher levels for cases that can be handled at lower level is highly detrimental to organizational efficiency and is contrary to the spirit of decentralized decision making as emphasized by the MoS appointed Committee, stated in Ministry of Shipping's letter in F No. 17011/1/2005-PG dated 11th February,2015.

(viii) Non-Certification of "Reasonableness of Rate "

Rule-137 of GFR lays down the fundamental principle of public buying. This forms a part of the financial power delegation of power for Major Ports conveyed vide MOS letter dated 11.2.15. Although rule 137(iv) says that *"the **procuring authority** should satisfy itself that the price of the selected offer is reasonable and consistent with the quality required."* Despite such requirement, Vigilance has come across several TC cases where no such clear certification of rate-reasonableness is found recorded explicitly either by TC Members or Sanctioning Authority. Moreover, in many TC cases, there are multiple signatories – TC Members, HoD , FA & CAO – before the TC-recommendation for contract award reaches Dy. Chairman/ Chairman level for sanction. In such cases a confusion may arise as to which precise authority should record compliance to the above rule of GFR by being labelled as "**Procuring Authority**". Neither the delegation of power nor any circular/procedural order at local level could be located which stipulate the level at which such certification is required to be made/recorded.

(ix) ***Post-Contract Management***

The skewed nature of decision making is also evident in the post - contract management stage which most often involves requests from supplier/contractor for extension of time to complete project/deliver goods. At present time-extension in contracts without imposition of Liquidated Damage (LD) travel all the way upto the Dy. Chairman's desk. The only time such time-extension requests get decided at HoD level is when the extension is with Liquidated Damage. While such a system might have been envisaged in the Port for controlling time - overrun in contracts, concentration of decision making at higher levels, for very low value contracts, may prove counterproductive. Certain limits, at least for low value contracts, can be laid down to be decided at Dy. HoD/HoD level instead of transmitting the same to Dy. Chairman.

Most organizations have a balanced delegation of power in place to enable distributed decision making i.e. low value tenders being decided at lower level of hierarchy and only high value of tenders travelling upwards. **Considering the fact that the quality of human resources even at entry level of management in KoPT is quite high – being at least graduate engineering level (in Technical Departments), it is not understood why the responsibility of decision making of very low value tenders cannot be accomplished at these levels**. Whenever any system embarks upon a deregulation - exercise (in case of KoPT, the same had already been recommended by the Ministry) concerns for runaway contractual expenditure do arise. However, if an effective system of monitoring of tenders/contracts is put in place, then it will not be difficult for higher management to track low value tenders and accrual of expenditure there from. In such a scenario the highest management would be free from avoidable day-to-day participation in decision making of such low value tenders and be able to concentrate on larger organizational goals.

(B) ACCOUNTABILITY – DIFFUSION

In most organization, the boundary between the role of "***Tender Committee Members***" and "***Accepting Authority***" is very clearly demarcated. The role of "Tender Committee Members" is to present their recommendations for award of contract or otherwise to a Higher Level Officer i.e., the "Tender Accepting Authority". The role of the Tender Accepting Authority in turn, is to either accept or reject or modify before a final supply order / LOA / agreement is made. Once the Tender Accepting Authority accepts the recommendation of the Tender Committee Members and the eventual LOA / Supply Order is prepared, that is sent for vetting by the associated finance before conversion into a legally enforceable agreement. Thus, in most organizations, between the Tender Committee (who render recommendations to the accepting / sanctioning authority) and the accepting authority / sanctioning authority (who accepts / rejects / modifies such recommendations) no other entity's role of is envisaged. So strict is this procedure that no **authority other than the designated TC Members and Accepting Authority** can have access to the tender file until the decision to award (or discharge) is taken. The underlying intention behind such rule is to maintain the confidentiality in government tenders till the final award and limit access to

only those who have the necessary delegation to participate in procurement decision making.

In KoPT the above boundary between "Recommendatory Body" and "Sanctioning Body" appears to be blurred. Here, the Tender Committee Members are observed to be putting up their recommendations to the "Sanctioning Authority" via a series of other higher officers like departmental HoD and Finance. As a result, between the recommendatory body and its final sanctioning authority there exist inter-mediate layers of higher officers. Unfortunately, the role expected from such inter-mediate authority has not been clearly defined in any Circular / Procedural Order. If such intermediaries are assumed to be having the power, to modify/accept the recommendation of the Tender Committee, then their role would encroach upon the powers delegated to the Sanctioning Authority. On the other hand, if they are expected to simply forward the recommendation of the Tender Committee, then their role would be that of an extra-layer in the recommendatory process. In either case, the desirability of such additional layering in the tender-decision-making process needs to be looked into by the KoPT / Ministry as a critical systemic need. The more is the existence of extra-layer/authority between 'TC' & 'Sanctioning Authority', the more will be the diffusion of Accountability, due to unclear/overlapping delegation-boundaries. These aspects have also been observed in the analysis of some of the vigilance cases that are currently under process. Another issue that emerges from the above scenario is that the accountability for even trivial decisions gets unnecessarily diffused among various functionaries including Dy. Chairman/Chairman. This is contrary to what had been envisaged by the Ministry of Shipping who remarked "delegation should also enable the ports to function like real commercial organizations, on par with Public Sector enterprises."

(C) ABSENCE OF COMPREHENSIVE DATABASE OF TENDERS/CONTRACTS

Presently, KoPT does not have any comprehensive and searchable computer database of Tenders and Contracts. Considering the fact, that most projects / work in KoPT are dependent upon the speedy progress of tenders / contracts, absence of a proper computerized database hampers effective monitoring of progress at the highest level of organization i.e., at the level of Deputy Chairman / Chairman. Without computerization of at least this part of the Tender system, one would be unable to know how many tenders have been floated, how many are being decided / retendered and how many have undergone repeated time-overruns and whether the bills of contractors are held up at any stage. As has been experienced in multiple audits / vigilance cases, these are the most vulnerable points that need to be monitored not only from the vigilance point of view but also from the views of administration. Fortunately, given the abundant software skills available in our country, creation of such searchable database would take minimal time, effort and also entail very low cost. Kind attentions of Chairman / Deputy Chairman are invited to these vital aspects.

(D) INTERNAL INCONSISTENCY IN DELGATION OF POWER FOR TENDERING/CONTRACTING

It has been stated in Ministry of Shipping's letter F No. 17011/1/205-PG dated 11.02.2015 that ".. *according to Ministry of Finance O.M.No.1(37)/2010-EII(A) dated the 2nd November 2010, relevant provisions contained in General Financial Rules shall be deemed to be applicable to autonomous bodies except to the extent the bye laws of an autonomous body provide for separate Financial Rules which has been approved by the Government. ".* The said letter lays down a financial delegation structure for tendering/contracting activities, among other activities, at Annexure-I and applicable provisions of GFR at Annexure-II separately. However, in closer scrutiny, both within the delegated structure and in their co-relation to provisions of GFR, several mutually inconsistent aspects have been found. Few illustrative examples are detailed below:

i) At Annexure-I, under the subject of "Non-Statutory Delegation of power to Major Ports" , at Sl. No.15, the power for "Single Tender/Special Tender" has been stated Rs. 1 crore for Dy. Chairman.

In the same Annexure, at Sl. No.8, the power to "Purchase of Stores and Medicines" has been mentioned as Rs.50,000/- for HoD, Rs.3 lakhs for Dy. Chairman on the basis of "competitive quotation with concurrence of Finance". This is anomalous because the power for "Single Tender" (which is the most restrictive form of tendering) for an authority cannot exceed his power for Normal Tendering. In the above example the power for normal tendering to procure "stores" is considerably lesser for Dy. Chairman compared to his power for resorting to Single Tender.

ii) While laying down power for "Single/Limited tender" under Sl. No 8 of Annexure-I, it has been stated that such power will be exercised "subject to adherence of CVC guidelines". In reality CVC guidelines are to be followed by Public Procurement Authorities for any kind of tendering/contracting activity if such guidelines exist and not just in the case of "Single/Limited Tendering". Mentioning the compliance to CVC guidelines only for Single/Limited Tendering gives an impression as if adherence of same can be dispensed with in other cases! It would also be in contradiction to a recent letter of Secretary, MoS which instructs authorities in all Major Port Trusts under MoS to strictly follow CVC guidelines in all areas of functioning.

iii) The applicable parts of the GFR has been annexed along with the aforesaid MoS letter dated 11.2.15 at Annexure-II. Sl. No.5.3 of the letter deals with procedure for execution of work which correspondence to Rule 32 of GFR 2005. The said rule, quoted at Annexure-II, says "no work shall be undertaken before issue of

administrative approval and expenditure sanctioned by the competent authority on the basis of estimate framed." However, no delegation of power for financial limits for estimate approval by various authorities is separately indicated. At present in many departments even very low value estimates are being sent to Dy. Chairman Level for obtaining sanction before floating the tender.

There are many places where the delegated powers are (stipulated at Annexure-1 of Ministry's 2015 letter) inconsistency with GFR (provided at Annexure-I of the same letter). For instance as per rules 146 of GFR lays down that the maximum power of purchase of goods from Local Purchase Committee is Rs.1 lakh for Dy. Chairman. However the same delegated vide Sl.No.6 of Annexure-I is upto Rs.2 lakhs for Dy. Chairman. If the power given in the delegation chart at Annexure-I is supposed to override the power of GFR reiterated at Annexure-II, then simultaneous mention of Rule-146 a part of the same letter would create avoidable confusion.

Improving clarity and objectivity in PQ / Eligibility Criteria

1. Need for System Improvement:

For any tendering process to succeed one of the essential requirements is to frame various conditions, technical specifications and scope of works in the bid-document and the resulting Contract in clear and unambiguous terms. Lack of clarity in the language in such documents becomes prone to differing interpretations at later stage giving rise to disputes that not only can jeopardize contract-execution but may also result in adverse financial consequence for the contracting parties if they decide to go down the litigation route. Not surprisingly, the following is mentioned in one of the CVC's Guidelines :

> *"**An ambiguous agreement leads to poor contract performance and litigations**. **It also gives an opportunity to a contractor to make profit out of ambiguous conditions**. It has been observed that the tender documents are prepared in a hurried manner without checking the conformity among the schedule of items, drawings, specifications, and contract conditions etc."*

While clarity is an desirable requirement for framing any condition of a tender, it's impact is perhaps felt most in one particular Tender Condition/Clause called **"Eligibility Condition or/and Pre-Qualification (PQ) criteria"**. This is all the more important for Government Tenders/Contracts which, unlike those between private parties, must also conform to attributes of rationality, equality and non-arbitrariness projected by Article 14 of Constriction.

2. Drawing upon analysis done by Vigilance during investigation of tenders of KoPT, this System Improvement Note aims to improve understanding on this vital tender clause i.e Eligibility Condition or/and Pre-Qualification (PQ) criteria.

3. Case Study in KDS and HDC:

PQ criteria or Eligibility Criteria as stipulated in a bid document are commonly known to be framed in objective terms with no scope for subjectivity or ambiguity. It is like a go / no-go area in the bidding domain. If a bidder does not fulfill such PQ / Eligibility Criteria in toto, their offer gets ejected out of zone of consideration. Once an Eligibility/PQ Criteria" is stipulated in the bid document the same cannot undergo modification / relaxation after bids get opened. However, Vigilance Department has noticed that the stringency and

importance of this vital condition i.e PQ / Eligibility Criteria has not been duly appreciated in certain cases as illustrated below :

Tender Case 1 : In a high value tender of KDS, the bid document stipulatd a Pre-qualification Criteria requiring bidders to have a specified average turn-over during the past 3 years . After the bids got opened, one bidder was an Indian company incorporated barely a year before the bid opening date and therefore could not have fulfilled the required experience / turn-over stipulated in the Pre-qualification criteria. However, the company claimed that since they were the "subsidiary" of another "holding company" (located abroad) who owned 100% of them, the credential of the "holding company" should be counted towards satisfying satisfied the PQ Criteria. Incidentally the holding company , who had not participated in the KoPT's tendering process happened to satisfy the PQ criteria of this tender. The Tender Committee could not decide what to do, declined to open the price bid and sought legal opinion. Opinion collected from a High Court Advocate was to give benefit of the credential of foreign based holding company if they stood guarantee for their Indian subsidiary's performance and subject to some other safeguards. However the Head of Kolkata's own Legal Branch opined that the same cannot be done since the "eligibility condition" stipulated in the bid document was meant to be fulfilled by the "bidder" only i.e in this case the Indian Subsidiary and not anyone else. Ultimately the High Court Advocate's opinion was opted for and the Indian subsidiary was declared "eligible" on this relaxed/altered criteria.

Tender Case 2 : However, in a similar high value tender case in Haldia, in a similar scenario, the Tender Committee took a diametrically opposite stand i.e they rejected the offer of a bidder because the said "bidder" (an Indian subsidiary) did not possess the required experience but attached the credential of their foreign Principal who did satisfy the PQ Criteria. This revealed the existence two contradictory stances on a identical tender evaluation issue within the same KoPT system.

A question arises as to what should be done in the above situation. Can the PQ Criteria be relaxed or altered after bid opening?

4. Analysis:

One way is to analyze the decision on the touchstone of "equity" and ask what other potential bidders could question in such a situation. They would simply say "if the intention of the organization was to accept the credential of a holding company for their subsidiary then why the tenderer did they not stipulate so in their bid document upfront? In other words, if the intention was to consider the credential of holding entity with any type of safeguard for their subsidiary, then nothing forbade the organization to incorporate

the same in any bid document with the approval of Competent Authority of that organization.

4.1 Advice of CVC

The Commission has issued guidelines vide circular No12-02-1-CTE6 dated: 12.12.2002 and 07.05.2004 advising the organizations to frame the pre-qualification criteria in such a way that it is neither too stringent nor too lax to achieve the purpose of fair competition. During intensive examinations of the works of the organizations dealing with the power projects, following deficiencies were observed:

* Stringent PQ Criteria resulting in poor competition.
* Unduly restrictive criteria, creating entry barrier for potential bidders.
* Evaluation criteria not notified to the bidders, making the PQ process non-transparent.
* **PQ Criteria relaxed during evaluation, thus creating entry barrier to the other potential bidders fulfilling the relaxed criteria.**
* Credentials of the bidders not matched with the notified criteria.
* Credentials of the bidders not verified.

4.2 Verdict of Supreme Court

Following the detection of such contradictory procurement practice in two different units under the same administration system, Vigilance Department made further research into the legality of the same. **It was then found out that the matter had been resolved in a landmark judgment passed** by **Hon'ble Supreme Court in the case of Ramana Dayaram Shetty –Vs- The International Airport** , Bombay 1979 AIR 1628,1979 SCR (3) 1014. Very briefly the case was as follows :

International Air port, Bombay (1st Respondent) floated invited tender with the eligibility criteria that stated that the bidder must be registered second class hoteliers having at least five years' experience for putting up and running a second class restaurant Out of the six tenders received only one tender was complete and offered the highest amount as licence fee (The 4th respondent) . All the other tenders were rejected because they were incomplete. Since the lone bidder who remained in the fray did not satisfy the description of "registered second class hoteliers having at least 5 years' experience" prescribed under the eligibility" clause of the tender notice, International Air port, Bombay called upon this company to produce documentary evidence whether they were registered second class hotliers having at least 5 years' experience. The company stated once again that they had considerable experience of catering for various reputed commercial houses; clubs, messes and banks and that they had Eating Houses Catering Establishment (Canteen) Licence. Satisfied with the information given by the fourth respondents, the first respondent accepted their tender on the terms and conditions set out in its letter. The decision of International Airport, Mumbai was later challenged by a petitioner who alleged that being a Government Unit they had considered an offer in

deviation to the stated eligibility criteria laid out in the bid document. After running the full gamut of judicial discourse the case ultimately landed up before Supreme Court who stated as below:

" HELD: The action of the first respondent in accepting the tender of the fourth respondents, who did not satisfy the standard or norm, was clearly discriminatory since it excluded other persons similarly situate from tendering for the contract and it was arbitrary and without reason. Acceptance of the tender was invalid as being violative of the equality clause of the Constitution as also of administrative law inhibiting arbitrary action.

(a) What paragraph (1) of the notice required was that only a person running a registered second class hotel or restaurant and having at least 5 years' experience as such should be eligible to submit the tender. The test of 1) eligibility laid down in this paragraph was an objective test and not a subjective one. If a person submitting the tender did not have at least five years' experience of running a second class hotel, he was eligible to submit the tender and it would not avail him to say that though he did not satisfy this condition he was otherwise capable of running a second class restaurant and therefore should be considered. This was in fact how the first respondent understood this condition of eligibility. The first respondent did not regard this requirement as meaningless or unnecessary and wanted to be satisfied that the fourth respondents had fulfilled this requirement. The fourth respondents were neither running a second grade hotel or restaurant nor did they have five years' experience of running such a hotel or restaurant. Therefore the fourth respondents did not satisfy the condition of eligibility laid down in paragraph(l) of the notice.

.... Admittedly the standard or norm was reasonable and non-discriminatory and once such a standard or norm for running a IInd Class restaurant should be awarded was laid down, the 1st respondent was not entitled to depart from it and to award the contract to the 4th respondents who did not satisfy the condition of eligibility prescribed by the standard or norm. ***If there was no acceptable tender from a person who satisfied the condition of eligibility, the 1st respondent could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of the 4th respondents.*** *When the 1st respondent entertained the tender of the 4th respondents even though they did not have 5 years' experience of running a IInd Class restaurant or hotel, denied equality of opportunity to others similarly situate in the matter of tendering for the contract. There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years' experience of running a IInd Class restaurant, but who were otherwise competent to run such a restaurant and they might also have competed with the 4th respondents for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years' experience.* ***The action of the 1st respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other person similarly situate from tendering for the contract and it was plainly arbitrary and without reason.*** *The acceptance of the tender of the 4th respondents was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."*

5. Keeping in view CVC's guidelines and Apex court Judgments on the above subject, the following System Improvements were accepted and implemented through an administrative order in the designing of Eligibility Conditions / PQ Criteria in the Tendering Processes followed in Kolkata Port Trust

Proposed System Improvement

1) *While framing PQ /Eligibility Criteria the following must be kept in view :*

   a. *PQ Criteria should be neither be too stringent nor too lax to achieve the purpose of fair competition.*
   b. *Unduly restrictive criteria should be avoided as it can create entry barrier for potential bidders.*
   c. *Evaluation criteria should be duly notified to the bidders making the PQ process non-transparent.*
   d. *Credentials of the bidders not matched with the notified criteria.*
   e. *Credential of a bidder should be properly verified.*

2) *Eligibility criteria given in a tender is on objective test for determining the admissibility of the offer submitted by a bidder. Since this is not a subjective criterion, formulation of the same should be done with utmost care. Once, the eligibility criteria is adopted by a Tendering Authority which is not arbitrary then, relaxation of same must not be granted at a post* – tender stage. For that reason words/expressions like "*bidder should have* ..", "*submit necessary document*" "*bidders should preferably perform* ..." under eligibility condition must be avoided. Only the requirement which is non-negotiable in nature for decision making should be included under this condition.

3) Eligibility criteria *must be fulfilled by the bidding entity only and not on the strength of any of their sister / associate / holding company. If it is consciously desired by the Tendering authority that fulfilment of eligibility criteria can be done either by the bidder or their Subsidiary / Holding Company then the same should be specified well in advance in the eligibility clause of the bid document , recording appropriate reasons and with the approval of the authority competent to sanction such bid document. However in such case the exact entity who would bear the risk of failure, contractual disputes or any such liability etc. should be spelt out clearly in the bid document. Should such an eligibility criteria be felt inevitable and if approved so by the Competent Authority, then formulation of such contractual safeguard must be stipulated upfront in the bid document in consultation with Legal and Financial Branch.*

NOTE **: THE SUGGESTED SYSTEM IMPROVEMENT HAS BEEN ACCEPTED AND IMPLEMENTED THROUGH AN ADMINISTRATIVE ORDER.**

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Improving Transparency in File Notings while seeking Approval/Sanction from higher authorities

1.0 The Need for System Improvement :

The "filing system" or "filing procedure" prevalent in a government organization is very crucial to ensure transparency in decision making and preserve a verifiable audit trail for the process.

Within a "file", the "Noting" section is of particular significance as it contains comments, observation and views of various officials representing a snapshot of the unfolding decision making process. Consequently notings within a "file" or on a "Note Sheet" are required to be recorded in a coherent, orderly and chronological manner. This is especially important when the end goal of a such nothings is to obtain approval from a higher authority for sanctioning expenditure , granting license , awarding contracts or effecting modification etc.

Defective filing system and improper notings are not only a source of disputes but can lead to potential vigilance cases as the case study described below depicts. Realizing the significance of the above the following has been aptly observed by CVC:

> ***"The filing system adopted in most or the organizations are not satisfactory. Even the files are not being paginated. The part files are opened as and when new action is initiated and these part files are not merged with the main file, which inter-alia results In break in continuity and arbitrariness In decision making. The decisions / deliberations of the individuals or the Tender Committees are not properly documented or recorded which dilutes the accountability of the officers and may result in the interested officers going scot free even if serious lapses are established against them."***

The present system improvement is aimed at improving the existing filing system and noting procedure in KoPT.

1.1 What is the present situation in KoPT ?

Following a major vigilance case that revolved around differing interpretations of "notings" made on a Note Sheet by higher authority and subordinate authorities, Vigilance studied the filing and noting system prevalent at KoPT. Th**e result of the study revealed the following :**

Files of even sensitive nature have been found to be maintained in loose condition without any pagination or improper pagination. Such situation

makes the file prone to easy-tampering through simple replacement of page(s). **This is exactly what happened in a Vigilance case wherein a financially-sensitive document was found to have been conveniently replaced with a fabricated one.**

1.1.1 A surprising lack of improper file maintenance emerged when one officer who had been newly inducted to KoPT revealed that an "official contract file" which he needed for him was handed over to him by the "contractor" himself.

1.1.2 In many cases Proposal and Note sheets are being marked to higher authorities i.e Dy. Chairman & Chairman in a routine manner even though the action/approval proposed therin did not require such decision as per any laid down rules /regulations KoPT. As a result, sever congestion of such files/proposals occur at the higher level for decisions which could well have been taken at a lower level.

1.1.3 In some cases the note sheet does not mention what exactly is sought to be approved under which rule while in some cases the identity of the authority competent to approve is not indicated.

1.2 Case Study:

A proposal was generated by one user department of KoPT for releasing payment worth of Rs. 42 lakhs to a private contractor. After the note passed through several officers, it came to the HoD of Finance Branch. He mentioned the following in the last paragraphs of his elaborate notings

> ***"In view of the above .. payment amounting to Rs. 42,21,000/- plus service tax to the … Contractor …. may be considered for approval please"***.

He then marked the note sheet to the Coordinating Head who, in turn, made the following noting:

> ***"Some deductions have already been made from M/s X for non-execution /poor execution of works supposed to have been done by them. The matter would be re-examined item-wise and deductions made on Action Taken report in this regard shall be placed for consideration of the appropriate authority after due examination.."***

Having noted as above, he marked the note sheet to ***Deputy Chairman, who simply appended his signature without making any comment or observation***.

This signature of the Deputy Chairman was considered as "approval" by the Coordinating Head and the said payment was released to the party.

Innocuous noting like the above may appear to be routine and commonplace in official discourse of Government Organizations. However, on closer scrutiny the following questions automatically manifest themselves to any prudent mind:

- What did the Deputy Chairman, through his act of only appending his signature, approve on the Note sheet ? Did he approve the noting of of Coordinating Head (which did not speak of release of any payment) or that of Finance Head (which was a proposal for release of payment) ?
- Who is the authority competent to approve either of these tow nothings and according to what rule/provision ?After all neither the Divisional Finance Head nor the Coordinating Head had mentioned the exact "authority" whose approval was required for whatever action was envisaged by them in their noting?

The questions mentioned above are neither trivial nor hypothetical as the events that unfolded afterwards indicate. **After passage of nearly one year, the same Dy. Chairman recalled the file and expressed his surprise as to how payment was made <u>when he had not accorded approval for any payment</u>**. According to him, his signature, appearing below the noting made by Co-Ordinating Head, was an endorsement for item-wise re-examination and placement of Action Taken Report etc. as suggested by the Co-Ordinating Head in the immediately preceding portion. The concerned officials also agreed to this view of Dy. Chairman and undertook recovery of paid amount from the firm .

Later these notings and their contested interpretation became the subject of a Vigilance case which saw recovery of nearly Rs.77/- lakh rupees and advice from CVC for penal action on several officers.

<u>PROPOSED SYSTEM IMPROVEMENT</u>

Notes/Proposals put up to any authority should clearly indicate its basic purpose i.e whether it is being put up for "***information***" or for seeking specific "***Approval/Sanction***". This should preferably form a part of the "subject" of the Note itself.

1. **Note Sheet/Proposals should not be marked to higher authority(ies) in a perfunctory manner for "approval/sanction" unless such "approval/sanction" has been envisioned in any Delegation of Powers (DoP) / Internal Circular of KoPT or Order of Ministry / Act or Rule/ Directive of any Superior Authority /Regulatory or Statutory Authority applicable to the case.**
2. **If approval / sanction on any issue from any higher authority is being contemplated through a written Note Sheet / Proposal**, *then the following must be indicated therein, preferably in the last paragraph of the Note:*

   a) **The specific portion(s) / paragraph(s) /content of the Note Sheet or Proposal which requires "approval /sanction".**

   b) **The designation of the exact Authority competent to sanction / approve the intended proposal and the specific provision of DoP / Circular/ Order /Directive/Act etc which mandate such approval. This should preferably be indicated at the last paragraph of the Note addressed to sanctioning/approving authority. Non-specific phrases like "Proposal is being put up for approval of appropriate authority/competent authority/authority as applicable" without revealing the exact identity of such authority should be strictly avoided.**

   c) **If a Note sheet / Proposal comprises of a sequence of nothings by multiple officers belonging to different level or department, then the officer of the Unit/Department making the last noting, immediately prior to Sanctioning Authority, must clearly indicate / mark / side-score what exactly is being sought to be approved by the approving authority**. (*If the approving authority also does not indicate the specific point(s) on which approval has been accorded by him/her and simply appends his /her signature at the end of the Note Sheet, then the approval process gets afflicted with ambiguity which leaves open the possibility of each noting-maker claiming endorsement of his / her view by the sanctioning authority*.)

3. Files of sensitive nature related to Tenders, Contracts, Payment , Appointment, Selection or Litigation should be strictly paginated to prevent possibility of tampering at later date.

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NOTE **: THE SUGGESTED SYSTEM IMPROVEMENT HAS BEEN ACCEPTED AND IMPLEMENTED THROUGH AN ADMINISTRATIVE ORDER.**

Recording of "Reasonableness of Rate" in The Minutes of Tender Committee Meeting etc.

CONCEPT NOTE :

1.0 <u>Need for System Improvement</u>:

The need for the above system improvement will be evident from a recent Vigilance case where the Chief Technical Examiner (CTE) of Central Vigilance Commission (CVC) made some serious observation regarding lack of due diligence in appreciating reasonableness of recommended rate in a tender case pertaining to KoPT. It is important to mention here that the Vigilance department of KoPT too has come across similar lapse in several tender cases and hence the case narrated below can only be illustrative in nature.

2.0 **<u>The Case</u> :** A Consultancy Tender was floated by KoPT to hire a Project Management Consultant (PMC) for purpose of managing the contracting process of another high value Tender. Since the intended job to be undertaken by the PMC was merely to frame details of Bid Document, assist in Pre-bid meetings, make draft Agreement/Work Order etc. for the future tender, the then FA & CAO objected to float a consultancy tender for such purpose by expressing the view that such expertise was already available in KoPT. However, the competent authority decided to go ahead with the Consultancy Tender.

To determine the "estimated value" for this Tender , only one Organization was contacted and that too "verbally" without indicating any detailed scope of work. The value obtained through such verbal communication was adopted as "estimated value" for the consultancy tender.

When bids were opened, it was noticed that only one bidder had participated in the tender. It was the same Organization from whom the verbal quote had been obtained by KoPT authorities at pre-tender stage. Normally budgetary quotes for any item/work collected from market tend to be a little higher than the actual price. But, in this case, when their price bid was opened it was found that the said Organization had quoted a price that was 20% higher than what they had intimated to KoPT through their verbal budgetary quote barely 2 weeks ago. The Tender Committee who deliberated on this lone offer, recommended the same to Accepting Authority for award of consultancy contract without recording even a word about the reasonableness of the offered price. No justification was given as to why the same organization quoted 20% more than what they themselves intimated to KoPT only a few days before.

2.0 <u>Analysis</u>:

The basic aim of a Tender committee is to examine the bids received, evaluate them in terms of various tender conditions and make a clear recommendation on the acceptability of the lowest-evaluated bid for placement of award provided the price offered is reasonable. If the price offered by the lowest evaluated bid is not reasonable, the Tender Committee may suggest to go for negotiation or retender the case altogether depending on circumstances.

Needless to say that the aspect of reasonableness of price of an offer upon whom an award is being contemplated goes into the very heart of procurement decision making by a public authority. That is why the General Financial Rule (which is being followed by Kolkata Port Trust) mentions this as one of the **fundamental principle of public buying** under subsection (vii) & (viii) **of Section 144 (of GFR,2005)** as quoted below :

> **"Rule 144** *: **Fundamental principles of public buying (for all procurements including procurement of works)***
>
> ***vii) The procuring authority should satisfy itself that the price of the selected offer is reasonable and consistent with the quality required.***
>
> ***(viii) At each stage of procurement the concerned procuring authority must place on record, in precise terms, the considerations which weighed with it while taking the procurement decision."***

Not only the GFR but even the "**Manual for Procurement of Goods 2017**" (whose **strict compliance by KopT and MbPT has been mandated by Ministry of Shipping** vide their recent directive No PD – 24015/23/2017 – PD –III dated 07/06/2017), says the following at Para 7.5.6:

> "***Reasonableness* of Prices *: In every recommendation of the TC for award of Contract, it must be declared that the rates recommended are reasonable.***

PROPOSED SYSTEM IMPROVEMENT :

1.0 Any Tender Committee which recommends an offer for award of contract to the Accepting Authority, **must discuss in detail the** "reasonableness of price" of such recommended offer **and record the same in a distinct and transparent manner withi**n the Minutes of Tender Committee Meeting. A paragraph , preferable titled, "*Discussion on Reasonableness of Rate(s)*" must be incorporated in the Minutes of Meeting containing the reasons/factors/circumstances which justify the recommended offer's rate(s) in the perception of the Tender Committee Members.

2.0 The said Paragraph in the TC Minutes relating to "*Discussion on reasonableness of rate*" must additionally contain a declaration stating that the price(s) offered by the "recommended bidder" is reasonable.

3.0 There are tender cases below certain threshold estimate value where constitution of a Tender Committee may not be mandatory as per stipulation made at Port level. In all such cases where a formal multi-member Tender Committee does not undertake the process of bid-deliberation and recommendation for acceptance/approval of a particular offer the authority competent to accept offer of such value (in terms of the relevant provision of the latest Delegation of Power circulated by Ministry) must ensure that detail justification and recording of reasonableness of rate is made on file.

** The term "Tender Accepting Authority" or "Accepting Authority" used here corresponds to officers of various ranks/levels who exercise procurement power within definite financial limits stipulated in the most recent Delegation of Power circulated by Ministry of Shipping.*

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***NOTE* : THE SUGGESTED SYSTEM IMPROVEMENT HAS BEEN ACCEPTED AND IMPLEMENTED THROUGH AN ADMINISTRATIVE ORDER.**

Delay in Bill-Processing due to improper application of a Provision in Delegation of Power

1.0 Need for System Improvement:

Timely passing of bills raised by contractors against works executed by them is an essential requirement for efficient and healthy contract management. Unusual delay in bill-passing not only leads to customer dissatisfaction and potential litigations, but can also result in increased procurement price, as contractors/suppliers tend to factor the expected delay into their bidding response against our tenders. Old, outdated and circuitous procedures can complicate simple official tasks, slow down organizational functioning and lower the ease of doing business for our external stake holders.

In a recent letter, Ministry of Shipping had solicited ideas from Port officials, to identify areas having repetitive and unwanted steps adversely effecting any port process. One such process which is already having serious systemic-consequence has been noticed by Vigilance Department, deserving immediate attention of Chairman. This is the area of mis-application of a particular provision in the DoP (Delegation of Power) for Major Port Trust circulated by the Ministry in 2015 concerning the powers to make ***"additions/alterations***" to "**works during course of examination**", enumerated in Annexure-I of the said DoP.

The consequence of *mis*-perception of this clause at KDS (and interestingly not at HDC), described below in detail, has already resulted in pendency of more than 40 bill-files belonging to several MSME Contractors for durations ranging from 3 months to 1.5 year. This number is understood to be growing by the day.

2.0 What is variation of quantities in a Contract?

Variation of quantities in individual "items of work"/"supply" contained in any Contract during execution, is a natural phenomenon. Depending upon the operational exigency, such quantitative contractual variation can take the form of increase/decrease in quantity contracted for individual item(s) of work/supply or even requiring a completely new, off-BoQ item not foreseen prior to contract-award. The net effect of all such variations made to individual item(s) in the BoQ at post-contract stage, constitutes the total quantitative change to a given Contract resulting in a "modified/Revised/Altered" Contract-Value. A Contract based on perfect estimate would have no need for any post-contract variations. Organizations undertaking contractual activities do provide for such "alteration/variation" within specified limits, subject to approval of Competent Authorities, through their financial delegation structure. The reason for placing limits on the amount of quantitative variations that can be effected to a contract at execution-stage, is to exercise caution. Allowing unbridled variations at execution stage encourages the tendency to first make an inexact estimate without due technical diligence , decide a contract on its basis and then go for either making alteration to existing quantities or even add a few off-BoQ items. Moreover post-contract operation of excess quantities for selective items of BoQ, or addition of

completely new off-BoQ items, can amount to conferring non-competitive advantage to a single contractor, without the usual tendering route.

3.0 Analysis :

Analysis of pendency of these files by Vigilance Wing traces its origin solely to an interpretation by Finance Division at KDS regarding "**Sl. No.10 of Annexure-1 of Delegation of Power to Major Port Trusts (Non-Statutory)",** which concerns with the limits of financial power exercised by various authority/authorities i.e HoD/Dy. Chairman/Chairman/BoT for allowing "addition/alteration" to works during the course of contract-execution. The exact reproduction of the aforesaid provision is as below:

10	To make additions/alterations to works during the course of execution	"***Chairman***- *Upto 30% provided the total amount of* ***WO/SO*** *remains the powers of Chairman.* ***Dy.Chairman***- *Upto 20% provided the total amount remains within the powers of the Dy. Chairman* ***HODs***- *Upto 10% provided the total amount remains within the powers of HODs"*

From the above provision it can be seen that as long as the total amount of WO/SO remains within the power of Chairman as a result of effecting additions/alterations to the contract, a variation of 30% can be approved by Chairman. Similar powers for Dy. Chairman & HoD for effecting alteration are 20% and 10% respectively subject to the provision that the "altered total contract value" must be within the power of Dy. Chairman / HoD.

From the limits of financial power stipulated at Sl.No.10 of the said Annexure, it is evident that a variation of 30% by Chairman is conditional only upon a single factor, i.e. that the net effect of such additions/alteration(s) not resulting in taking the modified value of the "WO/SO" beyond Chairman's powers. In other words no matter whatever the addition/alteration to "individual constituent" of a contract (i.e an individual item of BoQ) during execution, as long as the net effect of such variations on the "total WO/SO value" does not exceed 30% of the original contract value and the altered total-contract-value after work-execution remains within the Chairman's acceptance power, it would be permissible, as per the above provision of DoP.

Although the meaning of the said clause seems to be self-evident, it is understood to be applied differently in KDS & HDC (both under KoPT). For instance in KDS, even if the result of alteration to a given Contract remains within 30% and the modified value is within Chairman's Power, if the variation to an individual constituent in BoQ exceeds 30% over the Agreemental-quantity, Finance Wing in KDS insists such proposals to be approved by BoT even though nothing in the above DoP Provision suggests that the alteration/addition limits prescribed therein should also be applied to "individual constituents of a Work Order". In fact, had the intention of this provision been to limit the % variation to individual items of BoQ , then the subject on the left would have been written as "*To make additions/alteration to any item in the BoQ*" instead of its present form. For instance, suppose the BoQ of a contract contains an item of quantity 10 Units valued Rs 2000/- and

during execution it is required to alter the same by another 10 Units. Such a variation amount to 100% increase for this particular item of BoQ. If one assumes the aforesaid provision to be applicable to individual items of a BoQ, then the above scenario would trigger the file movement all the way upto BoT for approval although the financial implication in such alteration is a mere additional two thousand rupees – a patently irrational result. Many of the contract files having execution-stage variation, currently remaining stuck up for long periods of time in the procedural-pipeline, belong to precisely this category.

4.0 How is this provision applied at HDC ?

When the Finance Authority at HDC were queried as to how they deal with a file where the alteration to an individual item in BoQ exceeds 20% but the enhanced total contract value (called STV in Port Parlance) is within 20%, the reply came in the following words:

> *"At HDC, the various limits prescribed at Sl.No.10 of Annexure-I of Delegation of Power referred to in the letter do not apply to individual constituents/item of the BOQ of a Work Order. It applies to the total value of the executed work. For example, if the Bill of Quantity or contacted quantity for an individual element/item in the BOQ increases by any percentage during execution, but the total financial value of the contract remains within 20% of the sanctioned value (STV)/ordered value, then sanction of Dy.Chairman is taken. In case the total executed value is more than 20%, but within 30% in excess of the sanction Tender Value, then sanction of Chairman is taken. Sanction of BOT is taken when total executed value is more than 30% of the Sanctioned Tender Value."*

5.0 Unchecked Post-Contract Variation: *A Potentially Vulnerable Area*

Such a perception might have arisen due to a zeal to curb opportunistic increase of item-quantities in a BoQ (called "Excess item" in KoPT parlance) at execution stage, decreasing quantities of unprofitable items or post-contract introduction of new "off-BoQ" items (called "extra item"). It is not to say that such concerns are not genuine. Runaway introduction of "extra items" at post-contract stage is worthy of concern since such operation results in favouring the contractor with "new" items of work, almost on a single-tender basis without going through the competition route. **But as it appears from the relevant provision in DoP (which is circulated by the Ministry) that the only limit prescribed is a 30% alteration to the Contract subject to such variation remaining within acceptance power of Chairman) beyond which Board of Trustees approval has been mandated**. If Administration desires to limit operation of "extra items" to a lesser extent, then guideline in this regard has to be separately circulated without infringing upon the said provision of DoP which has been laid down by Ministry.

It is however, important to note that in case of tenders where prices for each item is solicited (instead of the general practice of asking bidders to quote a certain % above below the total BoQ Value), quantitative variation of existing items may lead to tender-vitiation at execution stage which is to be always prevented. Such tender vitiation is not possible in case it is not a item-rate contract decided in terms of "percentage above/below basis".

6.0 <u>Required System Improvement</u>

The provision of Delegation of Power vide Sl. No.10 of Annexure-1 of DOP to Major Port Trusts which lays down the limits of "additions/alterations to work" during the courses of execution, does not make any reference to "addition/alteration" to individual constituent(s) of the BOQ in a WO/SO during execution. Hence the percentage limits should not be construed as being applicable to individual item(s) in the BoQ of a WO/SO. As long as the effect of all such alterations does not alter the total value of WO/SO by the percentage limits specified in the foresaid provision for the relevant authorities and the altered total value of the contract remains within the power of acceptance said respective authority/authorities, it is permissible as per DOP.

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NOTE **: THE SUGGESTED SYSTEM IMPROVEMENT HAS BEEN ACCEPTED AND IMPLEMENTED THROUGH AN ADMINISTRATIVE ORDER.**

"Building of a definite accountability structure of the Organization" Systemic Improvement.

In connection with an ongoing vigilance investigation and while interacting with an officer of the Finance Department possessing an user name and password with an accessibility to sensitive pay roll modules, he claimed that he had never been entrusted any particular list of duties/responsibilities either in written or verbal manner by any authority. Even the administrative process through which such password had been given to him turned out to be vague and improper not befitting its sensitive nature. It is well that in any organization handing over confidential things like 'password' is governed by a definite written confidential policy wherein the recipient of the password is given detailed instruction as to how to handle its usage.

In a similar manner, during an interaction with an official of Estate Division (who had been working there for a longtime) revealed that the said officer did not have any well defined list of duties / responsibilities. When pro further, he claimed that in absence of such detailed list of duties, some important functions are being performed by him as per verbal order from his superiors and on a case-to-case basis.

In another case pertaining to selection of officers to KoPT cadre, it was revealed that the responsibility for important functions like determination of structure of question papers, scope of syllabus had not been entrusted to any one in particular. Even invigilation during the examination had been outsourced completely to an external consultant with not even minimal participation of Port Officials. The entity to whom the examination process had been outsourced admitted to Vigilance that although some officials from Port visited the examination halls he was unaware of their exact identities or their role.

In yet another case, an officer having access to the sensitive pay roll and Employee Service Record Module was unaware of the basic duties regarding management of confidential passwords. His computer access allowed alteration/insertion and deletion of master data pertaining to employee service history without any mandatory validation field. During discussion with vigilance the said officer stated that his superiors had even given him any defined list of duties / functions to be performed by him. He was frank enough to admit that he too had never given such instruction to any of his junior.

Many a times, CVC has emphasized that there should be clarity and transparency in any Government process for fixation of individual accountability. If, no specific duty list exists in any department/division, it becomes easy for any official to blame his lapse on somebody else. For achieving the level of transparency desired by CVC, the basic minimum requirement is to have as under:-

"***detailed allocation of duty and responsibility to all officers/officials of divisions/departments. It is for that purpose, organization and their departments, invariably prepare written list of duties and jurisdiction for, at least management level officers. In fact, it is desirable that even employees/staff belonging to the supervisor cadre other than Class-I & II should also be given proper authorization /duty description if there are processes of sensitive and financial nature such as billing/tenders and contracts/employees disbursals/ court/arbitration proceedings etc. under their jurisdiction."***

In the light of the above detailed duty list pertaining to officers/officials under the jurisdiction of each department/divisions within the organization is essential. The duty defined in such list can be as detailed as possible outlining all the functions and processes that the employee is mandated to perform.

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Engagement of Consultants: Latest Guidelines from CVC

If one can isolate the single most systemic deficiency observed in Public Sector Setting it would perhaps be the area of Consultancy Contract. Coupled with the area of Nomination Contract they form the biggest chunk of CVC cases in many organizations.

It is for that reason measures are required to be taken to improve the existing practice and procedures followed in finalization of contracts for "*Engagement of Consultants*" for implementation. In fact the situation has undergone a radical change after CVC issued their circular No **CVC's Circular No 01/01/2017 dated 23/01/2017 regarding Engagement of Consultants**.

The following points are of particular concern:

1. CVC has stated the fact that the employer (organization which engages the Consultant) has a definite share of accountability in accepting the advice/service rendered by a consultant.

2. In turn, the Consultant is also responsible and accountable for the services rendered /advice given by him/her since such advice/service is the result of contractual relations between the consultant and the employer. To ensure (1) & (2), CVC has advised incorporation of suitable terms and conditions for apportioning accountability between the employer and the consultant.

   [Para (b) of CVC's letter]

   CVC's above advice dispels an oft-held notion that Consultants are not accountable in any manner for the advice rendered them. Taken with Para (a) & 2(d) of the circular, discussed below, this assumes even greater clarity.

3. CVC has advised that all organizations should explore the possibility of using in-house expertise before arriving at a decision to engage consultant and accepting the advice/service rendered by such consultant. [Para (d) of CVC's letter]

4. CVC had advised that while engaging a Consultant their attention should be attracted to the need for their advice to be complaint with provisions of GFR, CVC Guidelines and Instruction of GoI etc. as applicable to the subject matter. [Para (a) of CVC's letter]

5. CVC has advised to ensure that a consultant must avoid any conflict of interest while discharging contractual obligation and bring, before hand, any possible instance of conflict of interest to the knowledge of the employer. Further a consultant is expected to undertake an assignment /project only in areas of its expertise and where it has capability to deliver efficient and effective advice/service.

   [Para (C) of CVC's letter]

   The subject of avoidance of conflict of interest in consultancy contracts had been elaborated in detail by CVC in an earlier circular of 2011 which has also been enclosed with the current circular.

6. However, perhaps, two of the most important advices of CVC are contained at Para 2(c) and 2 (d) of the aforesaid circular. At para 2(c) CVC directs that an advisory should be issued to the consultant's to keep in view transparency, competitiveness, economy, efficiency and equal opportunity to all prospective renderers of the bidders while rendering any advise public services to the employer in regard to selection of technology, determination of design and specification of the subject matter, with bid eligibility criteria, bid evaluation criteria, more of tendering, tender notification etc.

   It is not difficult to observe the resemblance of this particular advice to provision 160 and 161 of GFR which enumerate the fundamental principles of public procurement required to be followed by government procuring authorities. The implication of 2 (c) is that these principles are also required to be adhered to by the consultant/consulting body which need not be a government entity.

7. CVC's advice Vide 2(d) is aimed at ensuring the co-operation of consulting entity , through special provision, with any legitimately provided /constituted investigative body in the event of an enquiry related to execution of the consultancy contract.

   It is pertinent to note here that many a times when an enquiry is held in the unfortunate event of detection of irregularities/fraud etc. in a consultancy contract awarded to a private entity, such entity may refuse to cooperate or refrain from extending full cooperation to the vigilance Department of the employer or a body/committee constituted by the executive branch(s) of the employer tasked to conduct such a probe. It is in such an eventuality that incorporation of a prior-provision, as advised by CVC, can be a potent legal/contractual tool to ensure full co-operation from the consulting entity.

8. *Given the inherently intangible nature of consultancy service, such tenders/contracts are more prone to potential irregularity/pitfalls/abuse than the normal contracting process. In recognition of the same, CVC has issued a number of Circulars in past on the subject. The GFR, which guides the procurement process of PSU and Autonomous Bodies, devotes a number of provisions on this topic. These instructions on Consultancy Contract also find place in the Delegation of Power issued by Ministry of Shipping in 2015.*

While the above CVC circular will have immediate effect and needs to be adhered to by any authority engaging in consultancy tenders/contracts, a Comprehensive Administrative Order regarding manner of implementation of the various advices/instruction contained in this CVC Circular is under preparation. Since such an exercise will involve addition of new clauses /conditionality in the bid document/Agreement pertaining to procurement of consultancy services the same will be intimated in shortly.

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