Sub: Payment of Agency commission in import contract.

Ref: (i) DLW's letter No. COS/Misc/2008-09 dt 20/09/08.
(ii) Board's Letter No.89/RS(G)/779/6 dated 13.11.92.
(iii) Board's letter No. 82/F(Ex.).24-1/CLW/11 dated 16.11.82.

DLW vide their letter under reference has raised the issue of payment of agency commission in import contracts. In this regard a committee comprising of EDRS(P), EDRS(G) and EDF(S) was formed for making detailed study to ascertain the relevance, implementability, workability etc of instructions/directions contained in Board's letter No. 82/F(Ex.).24-1/CLW/11 dated 16.11.82 and 89/RS(G)/779/6 dated 13.11.92. The Committee has examined the instructions in consultation with Ministry of Finance and legal Advisor/ Railway Board. Extracts of the recommendations of the Committee is reproduced below for information and guidance:-

1. Instructions on the above subject were issued vide above referred letters based upon instructions of Ministry of Finance and in consultation with DG(S&D) and after due examination by the Board. The gists of these instructions are as under:

   a) Board's letter of 1982 states that agency commission beyond 5% as a normal course should be discouraged.

   b) Payment of agency commission more than 5% would need concurrence of FA & CAO and approval of GM.

   c) Agency commission should be carefully determined keeping in mind nature of stores and country of origin.

   d) In cases where agency commission appears to be on high side specifically, question of reduction of percentage of agency commission and consequent reduction of FOB price should be taken up with the firm and negotiations may also be held with the firm if and where necessary.

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2. Further, based upon instructions issued by Ministry of Finance, additional instructions were issued vide Board's letter of 1992. Important features of the letter are:

i) The agency commission would be paid in Indian rupees on the basis of TT transfer buying rate of exchange on the date of acceptance of offer.

ii) Agency commission would be paid after successful completion of the contract.

iii) The purchaser indemnifies the supplier against payment of agency commission in a contract arising out of tender where Indian agent's commission cover part of the price quoted.

iv) In cases where it is felt that stores being imported do not need any after sale service, a suitable clause may be added indicating the intention of purchaser that the purchaser would prefer to deal directly with the manufacturers.

v) A check list as per Annexure-I of the letter is to be filled up by the tenderer participating in the tender. One of the requirements is a copy of agreement of the principal with the agent to be furnished. Information has been sought on various other aspects but where the tenderer has to indicate 'yes' or 'no' only. However, the instructions of the Board do not provide any guidelines as to how these information are to be used for determining/quantifying the remuneration of the Indian agent in an import contract.

3. GM/DLW, in the recent past, reported to have some problems in complying with the instructions, as above indicated and referred the following issues to the Board for a review and sought further instructions on the subject:

a) Since as per the Indian Contract Act, the agent provides services to his principal and not to the buyer, unless specifically asked for, how can the purchaser evaluate the remuneration for the agents for the services rendered by him to his principal? It would appear logical and justifiable that the determination of the commission is left to the foreign principal.

b) How can the agency commission be carefully determined by buyer when a pre-existing agreement between the principal and agent is a pre-requisite for submission with the offer and which will invariably fix the %age of agency commission also.

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c) Does the purchaser have any locus standi to intervene on the aspect of agency commission in an agreement of agent and supplier, when he is not a party to the agreement?

d) How can the agency commission be carefully determined with reference to the country of origin and nature of stores in quantifiable terms?

e) As long as the offer is justified from the rate point of view a commission up to 5% should be acceptable.

4. Board after careful examination has considered it necessary to review the existing instructions in the light of issues raised by GM/DLW. Accordingly, a committee of EDRS(G), EDRS(P) and EDF(S) was nominated to examine the existing instructions and issue fresh instructions.

5. The committee noted that agency commission of 5% mentioned in the 1982 letter was based upon observation of Finance Ministry in a specific foreign exchange release proposal pertaining to CLW and this was not a policy directive.

6. The Finance Ministry has, till date, not issued any instructions on the quantum of agency commission to be paid to an Indian agent of a foreign supplier. This has been confirmed by Finance Ministry again.

7. DG(S&D) has also confirmed that they have not issued any such guidelines.

8. GFR 2005 also does not provide for any instructions on the quantum of agency commission payable.

9. Committee also noted that 1992 instructions of the Board were issued based upon instruction of the Finance Ministry issued vide their letter No.F-23(1)-E.II(A)/89 of 31.1.1989 (copy enclosed). These instructions lay stress on declaration of agency commission and payment through proper channel in Indian Rupees. The thrust of the instructions is towards declaration of agency commission. The instructions issued by Board in 1992 as well as the check list to those instructions are also with the intent of ascertaining the credentials of the agents so that there is no leakage of foreign exchange and violation to FERA.

10. The committee has after review made the following recommendations which have been accepted by the Board and these should govern all imports involving payment of agency commission:

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a) An agent provides services to the principal. It is therefore, correct that the principal should evaluate these services in financial terms.

b) There would be a situation where the principal would find it more economical to outsource certain services to their agent instead of using their multinational resources which would be much costlier. It would, therefore, not be in the interest of the buyer to insist that no agent should be involved. Further, for effective communication with the foreign principal, presence of an agent invariably helps in settlement of terms and conditions of the contract to the mutual benefit of both the parties.

c) As long as the total price is competitive, the acceptable quantum of agency commission need not be separately assessed.

d) The agency commission cannot be determined in quantifiable terms with reference to the country of origin and the nature of goods to be imported.

e) It would not be workable/feasible for the purchaser to go into the transactions between the principal and the agent at any stage for determination of agency commission through negotiations without any method to arrive at a percentage which the purchaser may consider reasonable. This is also relevant in view of the current CVC guidelines on negotiations where the intent is to slowly switch over to “no negotiation regime” in the near future.

f) The market forces would govern the price and the principal is expected to optimize all cost including agency commission while submitting a competitive offer.

11. The committee has, therefore, recommended that agency commission up to 5% can be payable subject to following conditions:

i) The amount of Agency commission payable to the Indian Agent will not be more than what is specified in the Agency agreement between the tenderer (i.e. the foreign principal) and the Indian agent. A certified photocopy of the Agency commission agreement must be submitted along with the offer.

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ii) The amount of Agency commission should not, normally, be more than 5% of the FOB value of the contract. In exceptional circumstances, an amount higher than 5% may be permitted provided the tenderer furnishes suitable justifications supported by proper documents towards such higher Agency commission. For tenderer up to JAG/SG level in the Zonal Railways/PUs, acceptance of Agency commission beyond 5% will be by AGM with concurrence of FA&CAO/Stores and recommendation of COS. For tenderers at HOD/CHOD/PHOD level, the acceptance level will be GM with concurrence of FA&CAO.

iii) The Indian agent will be required to submit a certificate, along with their Agency Commission Bill, confirming that the amount claimed as Agency commission in the bill has been spent/will be spent strictly to render services to the foreign principal, i.e., M/s……(i.e. the contractor) in terms of agency agreement. The purchaser or their authorized agencies and/or any other authority of Govt. of India shall have rights to examine the books of the Indian Agent and defect or misrepresentation in respect of the afore indicated confirmation coming to light during such examinations will make the foreign principal (i.e., the contractor) and their Indian Agent liable to be banned/suspended from having business dealing with Indian Railways, following laid down procedure of such banning/suspension of business dealings.

iv) Railway should make suitable provision in the tender conditions to reflect (i) & (iii).

12. Wherever prices have to be negotiated, the reduction of agency commission and consequential reduction in the total prices should be specifically discussed by the tender committee with the tenderer. However the acceptability of the total price (reasonable) will be the criteria for decision. Annexure-I appended to the 1992 letter stands replaced with the Revised Annexure-I.

13. The above guidelines have the approval of Board and are issued with the concurrence of Finance Directorate of Ministry of Railways.

[Signature]
(Trilok Kothari)
Director Railway Stores(1C)
Railway Board

Contd...6/-
No. 89/RS(G)/779/6

New Delhi, dated: 22-01-2009

Copy to:

1. FA&CAOs, All Indian Railways & Production Units.
2. The ADAI(Railways), New Delhi (with 10 spares copies)
3. The Director of Audit, All Indian Railways.

for Financial Commissioner / Railways

No. 89/RS(G)/779/6

New Delhi, dated: 22-01-2009

Copy to:

1. The COSs, All Indian Railways & PUs including NF(C).
2. The COS, Metro Railway, Kolkata.
3. The COS, COFMOW, New Delhi.
4. The COS, CORE, Allahabad.
5. The COS, Konkan Railway Corporation Ltd., Belapur Bhavan, 4th Floor, Sector-11, CBD, Belapur, Navi Mumbai-400614.
6. The COS, Mumbai Rail Vikas Corporation, 2nd Floor, Church Gate station Building, Mumbai-400020.
7. The Directors-
   a. Indian Railway Institute of Sig. Engg. & Telecom, Secunderabad.
   d. Sr.Prof. (Material Management), Railway Staff College, Vadodara.
   e. Indian Railway Institute of Civil Engg., Pune.
   f. Indian Railway Institute of Logistics & Materials Management, IDA House, Sector IV, R.K.Puram, New Delhi
8. CPM, CRIS, Chanakya Puri, New Delhi.
9. GM(Proj)-V, CRIS, Chanakya Puri, New Delhi.
10. Dy.CMM / Workshop Projects organisation, 1st Floor, Chamber Bhawan, J.C. Road, Patna -800001.

(Trilok Kothari)
Director Railway Stores(IC)
Railway Board
ANNEXURE-I to Letter No: 89/RS(G)/779/6 dated 22-01-2008
(in lieu to annexure-I appended to Board's letter No. 89/RS(G)/779/6 dated 13-11-1992)

Check List

(i) Have you submitted the authorization letter authorizing your agent to quote on this tender? Yes/No.

(ii) Have you indicated the complete name and address of the agents and details of the services to be rendered by the agents? Yes/No

(iii) Is the agent going to render after sale service? Yes/No

(iv) In case the answer to (iii) is yes, confirm that the agent has necessary infrastructure and competent staff to render the same. Yes/No

(v) Have you submitted a copy to your agreement with your Indian agent? Yes/No

(vi) Manufacturer or their sole selling agents may note that an agent can represent only one firm in a tender and any manufacturer cannot submit two offers against a tender through different sole selling agents or one directly and one through sole selling agent. In such a situation both the offers will be rejected. Noted

(vii) Have you indicated your Indian Agent's Income Tax Permanent Account number? Yes/No

(viii) Are you aware that any payment against the contract, if placed, to your Indian agent directly by you in currency other than in Indian rupee is against the Indian Laws? Yes/No

(ix) Are you aware that failure to disclose the full amount of remuneration/agency commission payable to your Indian Agents shall render the contract void? Yes/No

[Signature]
22/01