DISSERTATION REPORT

On

Contract Management in Supply Chain Management

Submitted By:

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Program: Regular MBA in Supply Chain Management
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Submitted To

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Letter of Transmitta

Date: May 14, 2022
To
Amir Husen
Assistant Professor
Department of Business Administration Sonargaon University
Subject: Submission of dissertation report on Contract Management in SCM

Dear Sir,

With humble honor and respect, I am submitting my Dissertation report on Contract Management in SCM. I have written this report based on my experience in " Best Tex International Limited" as per partial accomplishment of the requirements for the RMBA degree, this thesis has been carried out under the supervision of you.

This report is an integral part of our academic courses in completion of the RMBA program which has given me the opportunity to have an insight into the Managing Contract in SCM. I hope this report reflects on the contemporary issues on the risk management that are being Practiced by organizations in our country.

In completing the report I tried my best to blend all my knowledge, experience and imparted every available detail and also attempted to avoid unnecessary amplification of the report. I humbly request you to accept this report for your kind evaluation.

Sincerely yours,

Ms. Afsana sarmin
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Student Declaration

I hereby solemnly declare that the work presented in this research Monograph entitle Contract Management in SCM has been carried out by me under supervision of **Amir Husen,** Assistant Professor, Department of Business Administration, Sonargaon University.

I also declare that it has not been previously submitted as a whole for any other degrees at Sonargaon University or at any other institution.

.....
Ms. Afsana Sarmin
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Letter of Authorization

This is to certify that the Dissertation report titled Contract Management in SCM for the partial fulfillment of RMBA Program from Sonargaon University (SU) has been carried out by **Ms. Afsana Sarmin,** ID: RMBA2003021004 , under my supervision and guidance.

This report has been prepared under my guidance & close supervision and is a record of the bonafide work carried out successfully.

Supervisor

_ _ _ _ _ _ _ _ _ _ .

Amir Husen

Assistant Professor
Department of Business Administration
Sonargaon University

Acknowledgement

First I would like to thank Almighty Allah for making it possible for us to complete our work properly within the given time. Most importantly I would like to thank my dissertation supervisor Amir Hosen. Who was always ready to guide me and solved all the difficulties that I faced during preparing my report.

I would like to mention some people with due respect and honor who assisted me. Without any hesitation to complete our dissertation report within the due time. Therefore, I would like to thank them all from the bottom of my heart.

Sincerely,

_____

Ms. Afsana Sarmin
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Executive Summary

The core objective of the Dissertation is to fulfill the requirement of the RMBA program as prescribed by the SU. I have been working as a Key Sales Manager professional of Best Tex International Limited since Nine years. The main objective of the Dissertation is to get the hands-on experience of the real-world organization. The Dissertation was completed with the objective of getting practical knowledge in the Supply Chain department of Best Tex International Ltd.

Managing contract in Supply Chain is one of the major parts of my work responsibilities. I have to prepare a lot of contract of the organization. I realized that I was successful to gather a lot of significant learning experiences which would be helpful in my future career. The Supply chain department of BTIL offered me ample space and opportunities, not only to learn but also to exhibit my skills as a part of supply chain department. I could use my theoretical knowledge of contract management in real practice while participating in many discussions. I was actively involved in the department meetings where I shared my knowledge and views regarding contract management of BTIL.

I also attempted to gather more information on basic job functions of other departments to have better understanding of the relation between them and the Supply chain department. It was commendable to see how wholeheartedly they welcomed, acknowledged and appreciated new ideas and knowledge. I have provided few recommendations based upon my understanding and knowledge.

I successfully completed all the assigned duties and handed them over to the senior supervisor at the end of the Dissertation. I thoroughly enjoyed the challenges that came along every single day. I could also bring some minor improvisations during my professional life which were able to leave their marks. These lessons that I have learned will be a valuable one for my future endeavours as well.

List of Acronyms

BTIL	Best Tex International Limited
SCMD	Supply Chain Management Department
HR	Human Resource
RMBA	Regular MBA in Supply Chain Department
FIDIC	International Federation of Consulting Engineers
SU	Sonargaon University
BDT	Bangladeshi Taka
FFP	Firm Fixed Price
FPIF	Fixed Price Incentive Fee
FPEPA	Fixed Price with Economic Price Adjustments
CPFF	Cost Plus Fixed Fee
CPIF	Cost Plus Incentive Fee
CPAF	Cost Plus Award Fee
T&M	Time and material contracts
ABG	Advance Bank Guarantee
LD	Liquidated Damages
T&Cs	The terms and conditions

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Chapter -1

1. Fundamentals of Contract Management

1.1 Introduction

We, human beings, hate to stay alone. That‟s because we cannot survive alone, regardless of our individual intelligence, physical strength, academic degrees, leadership skills etc. We need help, support, and contribution of our fellow humans to survive. Therefore, we come together and form a society and start interacting with each other with the need to satisfy our individual and collective needs. We seek values from others and in return we need to offer values to others as well. This is how the entire world works. It is a „give and take" universe we live in and all civilized „give and take" occurs through mutual agreements.

An agreement happens when two individuals with certain needs and certain value proposition come face to face to discuss what they can to offer each other and what they want in return and then agree on the exchange. For example, the rickshaw puller offers you the value of transportation from your home to office and in return you offer him the value of 30 taka. When you both agree on the exchange – an agreement happens. Though there is no pen, paper, ink, stamp papers and signature, this understanding of two individuals is an agreement.

When you make an agreement formally and under the umbrella of Law, then such an agreement becomes a Contract. This section contains discussions on the definition of agreement and contract in the light of Law and tries to focus on the elements of contracts that make it valid. Then it discusses the necessity of the contracts and help to understand when a company should go for a contract.

1.2 Definition

We follow the „THE CONTRACT ACT, 1872“ in Bangladesh. Reference link given below. The Contracts Act states:“2. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context: -

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal:

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted becomes a promise:

(c) The person making the proposal is called the "promisor" and the person accepting the proposal is called the "promise":

(d) When, at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise:

(e) Every promise and every set of promises, forming the consideration for each other, is an agreement:

(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises:

(g) An agreement not enforceable by law is said to be void:

(h) An agreement enforceable by law is a contract:”

The link is given below for quick access:

http://bdlaws.minlaw.gov.bd/pdf_part.php?act_name=&vol=&id=26

It a rather complicate definition. We may simplify it as follows: “When a person makes a proposal to another person and the other person accepts such proposal and agrees to do something for the first person then an agreement happens. If such agreement is enforceable by Law, then it becomes a contract.”
In a simpler form: “A contract is an agreement creating and defining legal obligations between the parties”.

A contract needs to have at least a proposal, an acceptance and a consideration. Let us study the below example:

Person A made a proposal to person B that A wants to sell his flat for 1 crore taka to B. B accepts the proposal and agrees to take the flat and in return agrees to pay 1 crore taka to A. Such 1 crore taka is called the consideration.

1.3 Elements of a Valid Contract

Someone with an intent to obtain a precious gem may hire a top-class thief to pick that up stealthily from a museum and prepare a draft contract that includes all the necessary elements such as proposal, acceptance and consideration to document the understanding between him and the sophisticated thief. However, such a document will not be considered as a contract for obvious reasons.

The Act states:

> "10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void."

Therefore, a contract needs to fulfill some criteria to become a valid one from Legal perspective. Those criteria, in general, are:

1. Free Consent: the parties should freely come to each other to form the contract without any external influence or force. It should be based on free and independent will. If a person forces another person to enter into a contract, then such contract is not valid.
2. Proposal and Acceptance: there must be a proposal and an acceptance to form a contract. Person A cannot accept the proposal of person B in the absence of a proposal from person B.
3. Legal Consideration: the consideration of the contract must be legal. A bag full of illegal gold bar cannot be a consideration of a contract.
4. Capacity to Contract: the parties entering into the contract must be legally capable of entering into the contract. A contract cannot be made with a 9 month old child or a mentally insane person.

5. Certainty and Clarity: the contract cannot be on a vague or uncertain proposal, acceptance and consideration. “Person A will give person B „that“ if person B provides the services for „this“ on „some“ Friday” – this cannot be a contract.
6. Possibility of Performance: the „actions“ envisaged in the contract must bepractically doable. A contract cannot be made that gives responsibility to a person to produce mangoes in a jackfruit tree.
7. Not Contrary to any Law: the essence of the contract must be legal. A contract to rob a bank cannot be made.

1.4 Why do we need Contracts

One of the key reasons of preparing a contract is to ensure proper documentation of the roles and responsibilities of the involved parties. It is important to write down the mutual understanding between the parties clearly and take signature from them to eliminate the chance or risk of any confusion in future. People are forgetful, especially when it comes to giving money or doing a job. A contract provides a solution for exactly such issues.

For example, A and B enters into a contract where A agrees to provide a flat to B and B agrees to pay 1 crore BDT for the flat after handover of the same. The contract between A and B must clearly mention the location and specification of the flat in detail. The amount of payment and time of payment must be mentioned without ambiguity. In case A dies after handing over of the flat (extreme example, just for the sake of getting the point across), the contract will serve as a valid and legal document for the heirs of A to claim the money from B for the flat.

Large and complex contracts have multifarious action items, division of responsibilities (DOR) and rights, roles and responsibilities among many parties. The contract serves as a reference document to which every concerned party comes back to understand what was agreed.

An example of the DOR:

		Party A	Party B	Party C	Start Date	End Date
1.	Land Development	x			1 Apr 19	30 Jun 19
2.	Laying Brick Road		x		1 Jul 19	31 Jul 19
3.	Construct Drains		x		1 Jul 19	15 Jul 19
4.	Erection of lamp posts			x	1 Jul 19	10 Jul 19
5.	Electrical Connection			x	1 Jul 19	15 Jul 19

Table 1 Sample Division of Responsibility

The contract documents the payment amounts as well:

		Party A	Party B	Party C
1.	Land Development	50 $/m^2		
2.	Laying Brick Road		30 $/m	
3.	Construct Drains		70 $/m	
4.	Erection of lamp posts			80 $/pc
5.	Electrical Connection			500 $

Table 1 Sample Compensation or Payment Schedule

The terms and conditions of the contract will define the roles and responsibilities of the concerned parties. The signed contract will stand a written confirmation of the agreement between the parties and such confirmation ensures that each party will play their part of the game.

The contract does not only define the terms and conditions of the deal but also gives provision for remedy in case the rights of any party are not fulfilled. Each party needs to agree how each of them will be compensated in case the contract obligations are not addressed by its counterpart. Let us study the below example:

> A and B has entered into a supply contract through which A will supply a gas turbine to B on or before 30 April 2019. B will construct a power plant with that gas turbine. B will suffer a significant amount of monetary losses in case the gas turbine is not delivered on time. Therefore, B needs to make sure A delivers the gas turbine on time and in doing so B needs to insert a liquidated damage clause as follows:
>
> "In case the gas turbine is not delivered on or before 30 April 2019 to B, then A will have to compensate B as liquidated damage the amount

> equivalent to 5% of the value of the gas turbine per week for each week of delay in delivery, or a fraction thereof, after the above mentioned date, subject to a liquidated damage cap of 20% of the value of the gas turbine. In case the gas turbine is not delivered on or before 31 May 2019 to B, then B shall have the right to terminate this Contract unilaterally by serving a one day notice to A without any further obligation towards A."

Therefore, B now has his losses or risks covered, to some extent at least. On the other hand, A will be serious in fulfilling his promises towards B.

Now what happens if the delay in delivery was caused by some events beyond the reasonable control of A? Suppose, A had every arrangement ready to deliver the gas turbine on time but there was an earthquake that rendered his plans unsuccessful. To cover himself from the risk of such unpredictable and uncontrollable events (Force Majeure), A should include a clause in the contract as follows:

> "In case the delay in delivery under this Contract is caused by an event beyond the reasonable control of A, such as any natural calamities, riots, wars, political embargo; then A will be relieved from the paying the liquidated damage to B as mentioned in the above clause."

Therefore, in brief, a contract is required to:

a) Document the understandings between the parties in a written form to make sure everyone knows the right, roles and responsibilities of the parties and there is no scope of confusion.
b) Cover the risks of both parties.

In the simplest form: a contract is required to minimize the risk.

1.5 When to have a Contract (corporate perspective)

A company needs to carry out many works to run the business. Each department performs its job, however, there may be some jobs that may require external assistance.

When the company wants to decide whether to use external vendors or its own employees to carry out the job, the following points need to be taken into consideration:

1. Can the existing employees and assets (machine/ equipment) do the job?
2. Are the costs/ risks of doing the job by the company assets more than the costs/ risks of doing the job through a contractor?

Let us study a case:

A large telecommunication company whose main business is to sell voice and data services has a marketing department that designs advertisements to promote its business. The marketing department has nearly 20 employees (who are specialized in various marketing skills) such as Digital Marketing Specialist, Designer, Content Writer, Market Analyst etc. Suppose, the company wants to put a billboard at Mohakhali DOHS entry gate that will show one of their new internet packages.

For what services the company should go for a contract?

a. Designing of the billboard and putting apt content
b. Crafting the billboard
c. Setting the billboard in the desired location

The answer is obvious, the company has the skilled Designer who can design the billboard and the Content Writer can easily draft the content for the billboard and therefore it does not have to engage a contractor for such activities. However, the actual crafting and placement of the billboard is the job of a carpenter and per hour salary of the telecom company employees are far above the threshold value for such jobs. Therefore, for b and c, the company should look for a contractor through a contract.

On the other hand, if the risk of doing a job is significant, then such job should be contracted to another party. For example,

A large oil and gas company wants to make a tunnel through a rocky mountain. It has skilled engineers who can design the job, i.e. where to dig, how to dig, what explosives to be used etc. The company also has the

people who can carry out similar jobs. However, the mountain is situated in a risky zone that is prone to earthquake and the job itself is a quite risky one. Should the company do the tunneling itself or should it engage a contractor?

The answer is quite simple. The company should not take the risk on itself.

In a nutshell, when the costs and risks of doing a job by itself are high, a company should go for a contract.

2. Types of Contracts

Types of contracts can be various from the below perspectives:

2.1 Nature of Deliverables

Service Contracts and **Supply Contracts** are the two most broad categories under which almost all contracts may fall. The contractor provides „services" under the service contract that may entail the following:

a. Installation and Commissioning Contract: where the contractor installs and commissions an equipment or facility. Example: erection and commissioning of turbines and generators.
b. Operation and Maintenance Contract: where the contractor operates and maintains an equipment or facility. Example: O&M for power plants, gas plants, chemical plants etc.
c. Consultancy Services Contract: where the contractor provides consultancy services. Example: preparation of feasibility studies, social impact assessment and environmental impact assessment studies, market analysis, organizational improvement recommendations etc.
d. Transportation Services Contract: where contractor provides transportation along with drivers. Example: almost all big companies have transportation services through which they provide staff transportation.

e. Catering Services Contract: contractor prepares food for customer under such contracts.
f. Training Services Contract: contractor provides technical or any other types of skill building services for the customer under such contracts.
g. Professional Services Contract: Lawyer, Architect etc. provides professional services under such contract.
h. Cleaning Services Contract: Office maintenance and washroom cleaning.

This list is not exhaustive, there may be innumerable types of services contracts.

As opposed to services contracts where contractors deliver intangible value for customers, the contractors provide tangible goods, equipment, products, materials under supply contracts. Supply contracts can be of infinite varieties depending on the products to be supplied. It can be supply of sands, stones, mangoes, turbines, generators, cables – innumerable examples can be given.

A combination of Supply Contracts and Services Contracts can become a „Supply + Services" Contract. In such contracts, the contractor supplies the product and/ or equipment and the contractor also provides the services associated with the products/ equipment. For example, under the supply and erection contract of a turbine, the contractor supplies the turbine to customer and the same contractor deploys technical advisors and technicians to install and commission the delivered turbine.

2.2 Pricing Method

Based on the pricing methods, the contracts may be divided into two broad categories: (A) Fixed-Price Contracts or (B) Cost-Reimbursable Contracts. There may be a third type of contract as well which is a combination of the two types and it is called the Time and Materials Contract.

Let us discuss one by one:

i. Fixed Price Contracts: When the requirements of the contract are well defined and no significant change to the scope are expected during the term, then fixed price contracts should be used where a fixed total price is set for a defined product, service or a combination of the two. The fixed-price contracts can be of three types:

a. Firm Fixed Price (FFP): FFP is the most common contract format. The product or service is well defined and the parties agree on a firm price. The buyers always like to enter into such contracts as it is less complex and less risky from commercial point of view.

   Example: Build a cement block of length 5m, breadth 5m, height 4 m. Use cement grade xx. Get 5000 BDT.

b. Fixed Price Incentive Fee (FPIF): This is also a fixed price contract; however, it has an option for additional payment or incentive in case the contractor can perform better or quicker. When the buyer is in hurry, s/he prefers such contracts.

   Example: Contract value is 200,000 Euro and duration is 16 months. Additional 1000 Euro will be given for each month the contractor can save out of 16 months.

c. Fixed Price with Economic Price Adjustments (FPEPA): When the term of the contract is considerably long, fixed price contract becomes an injustice for the seller or both parties. In such cases, the FPEPA contracts are used where a special provision exists allowing preset adjustment method of the contract price considering changed conditions, such as inflation changes or cost variances for specific commodities.

   Example: The contract is for 16 years; there are some set prices of equipment to be delivered and service to be provided during these 16 years and an escalation of prices of 1.25% is allowed (compound basis) on such prices + the inflation rate as declared by ABC bank.

ii. Cost Reimbursable Contracts: As opposed to the fixed price contracts, cost reimbursable contracts have provision for payment to the seller for all legitimate actual costs incurred for completed works and it also allocates a markup or fee (seller profit). When the scope of work is expected to change significantly during the execution of the contract, such contracts should be used. Costs reimbursable contracts can be of three types:

a. Cost Plus Fixed Fee (CPFF): This contract is used for well-defined scope and contractor gets payment for all legitimate costs on actual basis. In addition, contractor gets a specific fixed percentage of the costs as markup, which signifies his profit.

Example: the contractor will be paid based on actual costs of product + 10% of such costs.

b. Cost Plus Incentive Fee (CPIF): The contractor gets payment for all his legitimate costs under the contract on actual basis. In addition, the contract sets some performance goals for the contractor and if the contractor meets such goals, then s/he gets incentive payments as well. If the final costs are less or more than the original estimated costs, then both parties share the result based on a pre-set formula. For example, an 80-20 split can be set between the parties.

c. Example: Contract target cost is $800,000. Target fee is $20,000.

d. The share of all profit or loss between the buyer and seller will be 80%: 20%.

e. Cost Plus Award Fee (CPAF): The contractor gets payment of his legitimate costs on actual basis, just like the above two methods. In addition, there is a provision for an

f. „award" for the contractor and such award is given based on the subjective evaluation of the buyer. If the buyer is satisfied with the performance of the contractor, then such award is given.

Example: Contract value is $ 100,000; The buyer will give award to seller based on some subjective criteria. Award ceiling is $30,000.

ii. Time and material contracts (T&M): When the contractual structure becomes complex, the combination of different types of fixed fee and cost reimbursable contracts is used. For example, if the contractor is responsible for supply, transport, erection, commission and maintenance of an equipment, then one single type of payment method can not be used. The supply part will have fixed fee elements, transport part will have costs reimbursable elements, erection part will have cost + incentive fee elements and maintenance part will have cost + award or cost + incentive elements.

3. Components of Contracts

In addition to the mandatory Legal elements of the contract covered in Section 1.3 above, a contract should contain the following items to be fit for purpose:

3.1 The scope

The scope of work must be clearly defined. The scope shall expressively denote „what" are to be delivered/ done by each party and „how" and „when" those are to be delivered/ done under the contract. The action items of the parties are to be mentioned in a clear and obvious manner to eliminate any future confusion. The scope should also include the standards of the work, quality requirements, list of deliverables, specifications, project schedule, delivery schedule, special conditions, division of responsibility etc.

Example:

Off-shore Supply			
SL No	**Activity**	**Deadline**	**Responsible Party**
1	Submission of design, drawing and data sheets of Transformers (4 no)	By July 27, 2018	Contractor
2	Approval of design, drawing and data sheets of Transformers (4 no)	By August 1, 2018	Purchaser
3	Shipment of Transformers (4 no) on FOB basis by Sea Freight, Port of Export- Shanghai China.	By October 31, 2018	Contractor
4	Delivery of Transformers (4 no) on CFR basis by Sea Freight, Port of Import- Chattogram, Bangladesh	By November 15, 2018	Contractor
5	Custom Clearance and Inland transportation of Transformers (4 no) up to site.	By December 02, 2018	Purchaser
On-shore Supply			
SL No	**Activity**	**Deadline**	**Responsible Parties**
1	Delivery of Indigenous Supply for Transformers Package at site.	By November 15, 2018	Contractor

Table 1: Example of SOW (brief)

3.2 The Price and Payment Terms

The contract must include the agreed prices of the supplied items or services to be rendered. The method of calculating the payment or compensation should be stipulated. The currency of payment and the method of payment must be clearly outlined. The contract should also mention the payment terms, i.e. how and when and under which condition the payment will be made.

Price Schedule for Transformers
(off-shore supply item)

Item No:	Description	QTY	Price in Foreign Currency (USD)		
			FOB Price	Ocean Freight & Marine	CFR price
	(1)	(2)	(3)	(4)	(5) = (3) + (4)
A	Gas Turbine Generator Step up Transformer (GT-GSUT)-150MVA	1 No	100	50	150
B	Steam Turbine Generator step up Transformer (ST-GSUT)-85MVA	1 No	200	30	230
C	Unit Auxiliary Transformer (UAT)-14MVA	2 Nos	100	10	110
D	Operation and maintenance Spares	1 Lot	80	20	100
	TOTAL (A)+(B)+(C)+(D)				**590**

(On shore Supply Items)

Item No.	Description	Qty.	Unit	Total Price in BDT (For Site)
1.0	Local Supply for transformer package	1	Lot	**170**

Table 1: Example of Price Schedule (brief)

Payment Terms:

a. Payment shall be made through irrevocable and at sight „Letter of credit" on pro rata basis. The L/C will be established within 40 (forty) days from the Effective Date of the Contract, provided that the Contractor furnishes Proforma Invoice by 20 (twenty) days of Contract signature.

b. Following documents to be furnished by the Contractor in connection with payment through L/C mode:

   i. Original Bill of lading
   ii. Certificate of Country of origin
   iii. Commercial Invoice
   iv. Packing list
   v. Test Certificate issued by Supplier/Contractor
   vi. Inspection Certificate issued by Purchaser/Purchaser"s representative in case of pre-dispatch inspection by the purchaser

c. 10% advance payment will be made against submission of Advance Bank Guarantee (ABG) of equivalent amount valid up to 165 days from the date of Contract signature.

d. Balance 40% payment progressively through L/C upon the submission of Bill of Lading.

e. Balance 40% payment progressively through L/C upon the submission of post landing inspection report, it should be mentioned here that the post landing inspection report should be provided by Purchaser within 5 working days after equipment arriving at site.

f. Balance 10% payment shall be made after successful commissioning.

3.3 Liquidated Damages

Liquidated Damages (LD) ensure both parties remain serious about their commitment and deliver as per agreed time, quality and manner. This clause also sets the method of calculation of compensation or remedy for one party in case the other party fails to adhere to the contractual obligations.

Examples:

a. Liquidated Damage (LD) for delayed delivery will be calculated as 1% of total Contract Price for each week of delay or part thereof with respect to FOB delivery milestone, subject to maximum ceiling of 10% of total Contract Price.
b. Liquidated Damage (LD) for non-performance of Transformers will be calculated as per below:
c. For No Load Losses: USD 100 per KW
d. For Load Losses: USD 50 per KW
e.

3.4 Other Terms and Conditions

The terms and conditions (T&Cs) of the contract may vary depending on the product or services envisaged to be delivered. However, general T&Cs may include:

Definitions	TAX/ VAT Provisions	EHS Rules
Effective Date and Term	Export/ Import Rules	Compliance
Termination	Insurance	Warranty and Guarantee
Indemnities	Governing Law	Order of Precedence
Liabilities	Force Majeure	Assignment
Subcontracting	Notices	Survey/ Inspection
Confidentiality	Changes/ Variations	Intellectual Property Rights
Dispute Resolution	Amendment Procedure	Severability

A good contract needs to include these terms and conditions to be effective. The terms and conditions have their own merit and they become useful when placed thoughtfully in a contract and contribute in mitigating risks for the concerned party.

4. Default Management

The world is not an ideal or perfect place. The future cannot be predicted here with cent per cent accuracy. Regardless of how minutely a hypothetical scenario is analyzed, envisaged and projected before it actually happened, the real-life scenario will never fail to surprise. Therefore, a contract can never be drafted to give protection against all sorts of hazards that may occur in future. There will be hiccups during contract implementation and each party will start passing the blame-ball to the other to cover their own back. Sometimes, there will be none to blame, but fate or nature. A good contract therefore should have some overall default management clauses to protect both parties (and more importantly the project itself) against such odds.

Default means the failure to perform a contractual obligation. The failure can happen due to innumerable reasons ranging from negligence to force majeure events. Whatever the reason is, failure under a contract is a potential risk (foreseeable and unforeseeable) and it can be minimized through the following ways:

4.1 Prequalification and Due Diligence

Before entering into a contract, one should always assess the other party from various perspectives such as Legal, Financial, Technical, Environmental etc. A pre qualification and due diligence process should be established to ensure that the party is ok to be entered into a contract with.The legal status of the party is to be checked to ascertain that it has the necessary Legal clearance and approval to conduct such a business. If a company is not registered under The Companies Act (1994) then it is not wise to do business with that company. The financial strength is also to be checked; a company with a 1000 crore BDT liability is not likely to be a potential partner in an upcoming 100 crore BDT project. A company with no technical experience of erecting and commissioning even a 50 MW turbine will have a high tendency to fail a project of erecting and commission a 200 MW turbine. A company with a poor environmental compliance history will make its partner suffer in an important project that has significant environmental impact. A contract should not be made with a party that has a history of non-performance in similar projects.

Therefore, before entering into a contract with a party, one must check the overall „health" of the party to ensure a healthy relationship.

4.2 Mitigating Performance Risks

Operational and performance risks are to be identified as much as possible beforehand and remedial measures should be placed in the contract to minimize the overall negative impact on both parties to ensure a win-win situation..

Let us try to understand what could possibly go wrong under a supply contract (the list is not exhaustive):

a. The delivery schedule may get extended due to vendor,
b. the quality of product may not meet the specification,
c. fault may occur within a very short period after delivery.

On the other hand,

d. the freight ship may drown due to a cyclone,
e. there could be an earthquake that may render the port unusable,
f. there could be a labor strike,
g. there could be a case of product hijack etc.

The contract should have the below clauses to cover the above risks to avoid contractual default:

a. LD clauses to minimize loss of buyer in case of delayed delivery
b. Provision of Inspection clauses to ensure products meet agreed specification and/ or Replacement clauses to ensure free of cost replacement of non-compliant products
c. Warranty clauses to set a time (1 year) within which the faulty product will be repaired or replaced by the seller free of costs
d. to g. - Force manure

On the other hand, a service contract may face the below problems (the list is not exhaustive):

a. The contractor personnel did not appear on time
b. The contractor personnel were not fit for the job
c. The contractor personnel could not perform the job
d. The performed works failed after 3 months
e. The contractor personnel damaged site assets
f. The contractor personnel caused fatal injuries
g. The contractor personnel died in accident

The contract should have the below clauses to cover the above risks to avoid contractual default:

a. The contractor personnel will be considered as „absent" and will not get paid
b. The contract needs to set the minimum required qualification for the contractor personnel. The contractor personnel will be selected with the consent of owner. The contractor will replace the unfit personnel within 1 day after notice from owner, free of cost.
c. The contractor will send another team of personnel to re-do the job free of costs
d. There should be 1 year warranty
e. Proper insurance clauses should be there in the contract. The insurance will acknowledge the owner as additionally insured. The contractor will repair the damaged assets.
f. Proper insurance clauses should be there in the contract. The contractor will pay compensation.
g. Sound EHS clauses should be present in the contract and EHS practices should be implemented and documented regularly. Proper insurance clause should cover such incidents.

Step by step corrective action strategy should be included in the contract as a guideline to tackle the performance defaults. Communication protocol and response time should be set and maintained. The affected party needs to raise the issues through formal notices to the other party in time to seek remedy.

4.3 Mitigating Legal Risks

The business environment has become very competitive and hence volatile and it will get more volatile by the years. Frequent merger, liquidation, change of ownership, bankruptcy, sanctions etc. will keep happening. The contract needs to provide exit avenues for the other party with corresponding reliefs. The cautious party will prefer to have a „termination for convenience" to keep a safe exit ready in case it can smell danger beforehand. However, in most of the cases, the termination for convenience cannot be incorporated in a contract where leverage is on the other side. Therefore, the termination, indemnity and limitation of liability etc. should be prepared keeping in mind the above situations and both parties need to agree on the remedial procedure.

4.4 Mitigating External Risks

There will be some external risks for which neither party is responsible. For example, the contractor has entered into a contract with the owner for supplying steel for the next 3 years with some set prices. After two years, the price of steel sky-rocketed due to some reason beyond any control of either party. Then the contractor should have the option to place change orders claiming additional payment to cover his losses.

The contract needs to have proper change order management process that ensures justice for both parties. It should be made clear in the contract that the affected party will have the right to renegotiate the price or other terms in the contract provided he is actually affected and the adverse situation was really out of his reasonable control. We need to remember that contract establishes a relationship between the parties and the essence of any relationship is trust and justice. The contract should have necessary clause to make it a balanced one to ensure rights and remedies of all concerned. Regular documentation and periodic notification is the key to success in this regard as well.

A contract can never be a perfect one and it can never cover all the risks. There can be disputes among the parties regardless of their utmost good intention. Therefore, though the contract may have almost all the mitigation procedures available, there will be the requirement of Dispute Resolution and let us focus on that in the next section.

5. Dispute Resolution

Interpretation of a contract is a tricky job to do. Same clause can be interpreted in different ways and all the interpretations may seem valid. When there is a dispute between two parties, both believe and try to prove that their respective interpretation is right. Then they negotiate with each other to come to a common ground. In many cases, they cannot. Both opt to stick to their own stance. However, two opposing interpretations or stands cannot be right at the same time. Therefore, verdict of a neutral referee becomes necessary to resolve the stalemate. That is where dispute resolution comes into picture. Dispute resolution can be carried out in an „amicable" way or an „adjudicative" way. No party wants to knock the door of adjudicative dispute resolution before exploring other friendly avenues as adjudicative processes are costly; in terms of time, energy and money. The amicable dispute resolution can be done in two ways: Mediation and Conciliation.

5.1 Mediation

Mediation refers to the intervention of a third party in a dispute with an intention to resolve the bottleneck. When both parties to a contract cannot agree on some points during the term of the contract then they go to an expert of the subject matter and that person is called the mediator. The mediator sits with the parties, either together or separately to understand the point of views and perspectives of the parties. He tries to get into the core of the matter to get a 360 degree idea. Then he analyzes the situation and helps the parties to negotiate with each other to reach a win-win situation. The mediator remains neutral and give suggestions to both parties. The parties then discuss with each other in presence of the mediator and agree with each other about the next course of actions. It is a friendly way to settle the disputes and the parties take the help of the mediator to explore the various solutions to find one which can satisfy both.

5.2 Conciliation

Conciliation is awfully close to mediation; both parties go to a neutral third party to resolve their dispute and the third party, the „conciliator", who is an expert of the subject matter, gets into the detail of the matter and resolves the dispute. The difference is: the

conciliator gives non-binding recommendation to the parties and proposes solutions himself and the parties agree to that. On the other hand, the parties themselves resolve the dispute with the help of the mediator during mediation. The conciliator is kind of a person who gives instructions that the parties follow and the mediator discusses with the parties and explores many avenues and the parties themselves decide the solution.

On the other hand, adjudicative dispute resolution can be done in two ways: Arbitration and Litigation.

5.3 Arbitration

The world is, sometimes, not a friendly place. It becomes impossible for some parties in some situations to sit with each other with a friendly attitude and calm demeanor. They prefer to challenge each other and engage in „fight" to claim what they think is valid. In such situation, they go for a private tribunal system called arbitration. The process of arbitration should be clearly stated in the contract so that both parties can follow the same agreed path.

Let us see what a standard contract (such as FIDIC) provides for:

a. The dispute resolution board may consist of one or three arbitrators, suitably qualified
b. Each party will select one arbitrator, the two arbitrators will jointly select the third one
c. The remuneration of the arbitrators will be borne equally by the parties
d. Either party can refer any dispute to the dispute board, with notice to the other party
e. Both parties will provide all details and documents to board when requested
f. The laws of SIAC will be applicable
g. The decision of the board will be binding on the parties

5.4 Litigation

When you are too angry (!) with the other party to your contract, then you need to go for litigation, which is direct suing the other party in the court of law for breaching the contract. This is a lengthy way and should not be adopted unless it is unavoidable. The court will follow its own discretion to give the verdict and the parties will have to follow the court orders.