

Law of Contracts: Government Contracts*

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Online session

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Dispute Resolution,

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How different?

- Standard form
 - Enables uniformity in dealing
 - Audit easy
 - Interpretation easy
 - Policy guidelines from time to time
 - Respond to decisions of courts
- Formality required
- Absence of real negotiations
- Empowers government to order changes
- Subject to public law
- Elaborate boilerplate

Formation

- Tender procedure – offer-acceptance
- Formal document not necessary.¹
- Many documents

(h) "Contract" shall mean and include the Agreement of Work Order, the accepted Schedule of Rates or the Schedule or Rates of Railway modified by the tender percentage for items of works quantified, or not quantified, the Standard General Conditions of Contract, the Special Conditions of Contracts, if any; the Drawing, the Specifications, the Special Specifications, if any and Tender Forms, if any.

Substantive validity

- Competency

Constitution of India

298. The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose

* Reference in this presentation is to clauses from the Indian Railways Standard General Conditions of Contract, November 2018

¹ *UOI v Rallia Ram* AIR 1963 SC 1685

- Consent
- Consideration

That in consideration of the payment to be made by the Railway, the Contractor will duly perform the works set forth in the said Work Order and will complete the same ... in accordance with the said specifications and said drawings (if any) , AND the Railway ... hereby agree that if the Contractor shall duly perform the said work in the manner aforesaid and observe and keep the said terms and conditions, the Railway will pay ... to the Contractor for the said works on the completion thereof the amount due in respect thereof at the rates specified above.

- Not void

Formalities

- Art 299 of Constitution
 - o Requirements

Constitution of India

299. (1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

AGREEMENT FOR ZONE CONTRACT

CONTRACT AGREEMENT No.....DATED ARTICLES OF AGREEMENT made this day of between the President of India acting through the, Railway hereinafter called the "Railway" of the one part and hereinafter called the "Contractor" of the other part.

- o Which contracts
 - Those made in exercise of executive powers
 - Not statutory contracts.²
- o Purpose
 - Safeguard government from liability for unauthorised contracts.
 - Contracts must show on their face that they are made on behalf of the State.
- o Writing –
 - Correspondence
 - Formal document not required
- o No implied contract³
 - Mandatory

² *Karamshi v State of Bombay* AIR 1964 SC 1714

³ *K.P. Chowdhury v State of M.P.* AIR 1967 SC 203

- Authorised person
Rules, general order, special order, particular contract
- Liability – President, officer

Constitution of India

299 (2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

- No personal liability of officer as agent under Sec 230(3) of the Indian Contract Act.⁴

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal : In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Presumption of contract to the contrary: Such a contract shall be presumed to exist in the following cases-

... ..

(3) where the principal, though disclosed, cannot be sued.

- Effect of non-compliance: Void.
- Cannot be ratified.⁵
- Section 65 of Indian Contract Act: Contractor bound to return money advanced by government under an agreement that violated Art 299.⁶

65. Obligation of person who has received advantage under void agreement, or contract that becomes void

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it.

- Section 70 of Indian Contract Act

70. Obligation of person enjoying benefit of non-gratuitous act

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such another person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

⁴ *State of Uttar Pradesh v. Murari Lal* AIR 1971 SC 2210

⁵ *State of Uttar Pradesh v. Murari Lal* AIR 1971 SC 2210

⁶ *State of Orissa v Rajballav Mishra* AIR 1976 Ori. 19

Pre-formation

- Pre-formation – scrutiny
- Purpose:
"the government is not and should not be as free as an individual" in the matter of entering into contracts
"whatever its activity, the government is still the government"⁷
- Article 14 – application
Principle of non-discrimination

No government can award contracts in an arbitrary or discriminatory manner:
(1) The government does not have an open and unrestricted choice in the matter of awarding contracts to whomsoever it likes.
(2) The government must exercise its discretion in conformity with some reasonable and non-discriminatory standards or principles.
(3) The government is bound by the standards it has laid down.
(4) The government can depart from these standards only when it is not arbitrary to do so and the departure is based on some valid principle which in itself is not irrational, unreasonable or discriminatory.⁸

- Invite public tenders or bids
Fair opportunity to compete for contract
Select best person
Norms for eligibility
Proper publicity
Not to alter terms and conditions of tenders
- Judicial review – extent
Not of terms of tender
Not of decision
Only of the process
- Government has freedom of play in the joints⁹

in contracts having commercial elements, some more discretion has to be conceded to authorities
so that they can enter into contracts with persons, keeping an eye on the augmentation of revenue;
they have the liberty to assess the overall situation for the purposes of deciding to whom the contract shall be awarded and on what terms; and
the court must grant a measure of freedom of 'play in the joints' to the executive

Once contract made, like a private party

- other provisions of the general law of contract are applicable to Government contracts¹⁰

⁷ *Eurasian Equipment & Chemicals Ltd. v. State of West Bengal* AIR 1975 SC 266

⁸ *Ramana Dayaram Shetty v. International Airport Authority* AIR 1979 SC 1628

⁹ *Sterling Computers Ltd v M & N Publications Ltd* AIR 1996 SC 51

¹⁰ *Bareilly Development Authority v Ajay Paul Singh* AIR 1989 SC 1076; *UOI v Syndicate* AIR 1976 SC 879

- Intervention only of public matter involved¹¹

Remedy of writs

- Writ generally against arbitrariness or discrimination pre-contract
- Civil court : can investigate facts
Breach of contract
Interpretation

Statutory contracts

- Terms of contract made by statutory body fixed by statute.¹²
- Art 299 does not apply

Contract law remains default rules

- Only provision applicable sec 37 and control of court under section 74
- Complete provisions about all aspects of contract – performance, breach, consequences of breach

Aspects

Who must perform

- Sub-contracting
- Assignment and sub-letting

7. Assignment or Subletting of Contract: The Contractor shall not assign or sublet the contract or any part thereof or allow any person to become interested therein any manner whatsoever without the special permission in writing of the Chief Engineer. Any breach of this condition shall entitle the Railway to rescind the contract under Clause 62 of these Conditions and also render the Contractor liable for payment to the Railway in respect of any loss or damage arising or ensuing from such cancellation; provided always that execution of the details of the work by petty Contractor under the direct and personal supervision of the Contractor or his agent shall not be deemed to be sub-letting under this clause. The permitted subletting of work by the Contractor shall not establish any contractual relationship between the sub-contractor and the Railway and shall not relieve the Contractor of any responsibility under the Contract.

¹¹ *Sterling Computers Ltd v M & N Publications Ltd* AIR 1996 SC 51; *Common Cause, a Registered Society v. Union of India* AIR 1999 SC 2979

¹² *India Thermal Power Ltd v State of Madhya Pradesh* AIR 2000 SC 1005

Time of performance (time of essence)

- Consequences of delay – comprehensive
- Rights enumerated

17–A Extension of Time in Contracts: Subject to any requirement in the contract as to completion of any portion or portions of the works before completion of the whole, the Contractor shall fully and finally complete the whole of the works comprised in the contract (with such modifications as may be directed under conditions of this contract) by the date entered in the contract or extended date in terms of the following clauses:

(i) Extension due to Modification: If any modifications have been ordered which in the opinion of the Engineer have materially increased the magnitude of the work, then such extension of the contracted date of completion may be granted as shall appear to the Engineer to be reasonable in the circumstances, provided moreover that the Contractor shall be responsible for requesting such extension of the date as may be considered necessary as soon as the cause thereof shall arise and in any case not less than one month before the expiry of the date fixed for completion of the works.

(ii) Extension for Delay not due to Railway or Contractor: If in the opinion of the Engineer, the progress of work has any time been delayed by any act or neglect of Railway's employees or by other Contractor employed by the Railway under Sub-Clause (4) of Clause 20 of these Conditions or in executing the work not forming part of the contract but on which Contractor's performance necessarily depends or by reason of proceeding taken or threatened by or dispute with adjoining or to neighbouring owners or public authority arising otherwise through the Contractor's own default etc. or by the delay authorized by the Engineer pending arbitration or in consequences of the Contractor not having received in due time necessary instructions from the Railway for which he shall have specially applied in writing to the Engineer or his authorized representative then upon happening of any such event causing delay, the Contractor shall immediately give notice thereof in writing to the Engineer within 15 days of such happening, but shall nevertheless make constantly his best endeavours to bring down or make good the delay and shall do all that may be reasonably required of him to the satisfaction of the Engineer to proceed with the works. The Contractor may also indicate the period for which the work is likely to be delayed and shall be bound to ask for necessary extension of time. The Engineer on receipt of such request from the Contractor shall consider the same and shall grant such extension of time as in his opinion is reasonable having regard to the nature and period of delay and the type and quantum of work affected thereby. No other compensation shall be payable for works so carried forward to the extended period of time; the same rates, terms and conditions of contract being applicable as if such extended period of time was originally provided in the original contract itself.

(iii) Extension for Delay due to Railways: In the event of any failure or delay by the Railway to hand over the Contractor possession of the lands necessary for the execution of the works or to give the necessary notice to commence the works or to provide the necessary drawings or instructions or any other delay caused by the Railway due to any other cause whatsoever, then such failure or delay shall in no

way affect or vitiate the contract or alter the character thereof or entitle the Contractor to damages or compensation therefor, but in any such case, the Railway may grant such extension or extensions of the completion date as may be considered reasonable.

17-B Extension of Time for delay due to Contractor:

(i) With liquidated Damage (LD): The time for the execution of the work or part of the works specified in the contract documents shall be deemed to be the essence of the contract and the works must be completed not later than the date(s) as specified in the contract. If the Contractor fails to complete the works within the time as specified in the contract for the reasons other than the reasons specified in Clause 17 and 17-A, the Railway may, if satisfied that the works can be completed by the Contractor within reasonable short time thereafter, allow the Contractor for further extension of time (Proforma at Annexure-VII) as the Engineer may decide. On such extension the Railway will be entitled without prejudice to any other right and remedy available on that behalf, to recover from the Contractor as agreed damages and not by way of penalty for each week or part of the week, a sum calculated at the following rates of the contract value of the works.

For the purpose of this Clause, the contract value of the works shall be taken as value of work as per contract agreement including any supplementary work order/contract agreement issued. Provided also, that the total amount of liquidated damages under this condition shall not exceed 5% of the contract value or of the total value of the item or groups of items of work for which a separate distinct completion period is specified in the contract.

S.No.	Duration of extension of time under Clause 17-B	Rate of Penalty
(i)	Up to Twenty percent of original period of completion including period of extension of DOC granted under Section 17A(i)	As decided by Engineer, between 0.01% to 0.10% of contract value for each week or part of the week
(ii)	Above Twenty percent but upto Thirty percent of original period of completion including period of extension of DOC granted under Section 17A(i)	0.20% of contract value for each week or part of the week
(iii)	Above Thirty percent but upto Forty percent of original period of completion including period of extension of DOC granted under Section 17A(i)	0.30% of contract value for each week or part of the week
(iv)	Above Forty percent of original period of completion including period of extension of DOC granted under Section 17A(i)	0.50% of contract value for each week or part of the week

Provided further, that if the Railway is not satisfied that the works can be completed by the Contractor and in the event of failure on the part of the contractor to complete the work within further extension of time allowed as aforesaid, the Railway shall be entitled without prejudice to any other right or remedy available in that behalf, to appropriate the contractor's Security Deposit and rescind the contract under Clause

62 of these Conditions, whether or not actual damage is caused by such default.

Securing performance

- Retention
- Set-off

52. Withholding and Lien in Respect of Sums Claimed: Whenever any claim or claims for payment of a sum of money arises out of or under the contract against the Contractor, the Railway shall be entitled to withhold and also have a lien to retain such sum or sums in whole or in part from the security, if any, deposited by the Contractor and for the purpose aforesaid, the Railway shall be entitled to withhold the said cash Security Deposit or the Security if any, furnished as the case may be and also have a lien over the same pending finalization or adjudication of any such claim. In the event of the security being insufficient to cover the claimed amount or amounts or if no security has been taken from the Contractor, the Railway shall be entitled to withhold and have a lien to the extent of the such claimed amount or amounts referred to supra, from any sum or sums found payable or which at any time thereafter may become payable to the Contractor under the same contract or any other contract with this or any other Railway or any Department of the Central Government pending finalization or adjudication of any such claim.

It is an agreed term of the contract that the sum of money or moneys so withheld or retained under the lien referred to above, by the Railway will be kept withheld or retained as such by the Railways till the claim arising out of or under the contract is determined by the arbitrator (if the contract governed by the Arbitration Clause) or by the competent court as the case may be and that the Contractor will have no claim for interest or damages whatsoever on any account in respect of such withholding or retention under the lien referred to supra and duly notified as such to the Contractor. For the purpose of this clause, where the Contractor is a partnership firm or a company, the Railway shall be entitled to withhold and also have a lien to retain towards such claimed amount or amounts in whole or in part from any sum found payable to any partner / company, as the case may be whether in his individual capacity or otherwise.

52-A Lien in Respect of Claims in other Contracts:

(i) Any sum of money due and payable to the Contractor (including the Security Deposit returnable to him) under the contract may be withheld or retained by way of lien by the Railway, against any claim of this or any other Railway or any other Department of the Central Government in respect of payment of a sum of money arising out of or under any other contract made by the Contractor with this or any other Department of the Central Government.

(ii) However, recovery of claims of Railway in regard to terminated contracts may be made from the Final Bills, Security Deposits and Performance Guarantees of other contract or contracts, executed by the Contractor. The Performance Guarantees submitted by the Contractor against other contracts, if required, may be withheld and

encashed. In addition, 10% of each subsequent 'on-account bill' may be withheld, if required, for recovery of Railway's dues against the terminated contract.

(iii) It is an agreed term of the contract that the sum of money so withheld or retained under this Clause by the Railway will be kept withheld or retained as such by the Railway till the claim arising out of or under any other contract is either mutually settled or determined by arbitration, if the other contract is governed by Arbitration Clause or by the competent court as the case may be and Contractor shall have no claim for interest or damages whatsoever on this account or on any other ground in respect of any sum of money withheld or retained under this Clause and duly notified as such to the Contractor.

- Bank guarantees
- Black-listing

Impossibility

- Events, effect, consequences
- Force majeure clauses

17. Force Majeure Clause: If at any time, during the continuance of this contract, the performance in whole or in part by either party of any obligation under this contract shall be prevented or delayed by reason of any war, hostility, acts of public enemy, civil commotion, sabotage, serious loss or damage by fire, explosions, epidemics, strikes, lockouts or acts of God (hereinafter, referred to events) provided, notice of the happening of any such event is given by either party to the other within 30 days from the date of occurrence thereof, neither party shall by reason of such event, be entitled to terminate this contract nor shall either party have any claim for damages against the other in respect of such non-performance or delay in performance, and works under the contract shall be resumed as soon as practicable after such event has come to an end or ceased to exist, and the decision of the Engineer as to whether the works have been so resumed or not shall be final and conclusive, PROVIDED FURTHER that if the performance in whole or in part of any obligation under this contract is prevented or delayed by reason of any such event for a period exceeding 120 days, either party may at its option terminate the contract by giving notice to the other party.

Changes

- Variation clause

42.(1) Powers of Modification to Contract: The Engineer on behalf of the Railway shall be entitled by order in writing to enlarge or extend, diminish or reduce the works or make any alterations in their design, character position, site, quantities, dimensions or in the method of their execution or in the combination and use of materials for the execution thereof or to order any additional work to be done or any

works not to be done and the Contractor will not be entitled, to any compensation for any increase/reduction in the quantities of work but will be paid only for the actual amount of work done and for approved materials supplied against a specific order.

42.(2) (i) Unless otherwise specified in the special conditions of the contract, the accepted variation in quantity of each individual item of the contract would be upto 25% of the quantity originally contracted, except in case of foundation work.

(ii) The Contractor shall be bound to carry out the work at the agreed rates and shall not be entitled to any claim or any compensation whatsoever upto the limit of 25% variation in quantity of individual item of works.

(iii) In case an increase in quantity of an individual item by more than 25% of the agreement quantity is considered unavoidable, then same shall be executed at following rates ...

Damages

- Exclusion
- Limits on losses that can be claimed
- Limits on liability

Liquidated damages

- Different amounts for different breaches

26A.1 The Contractor shall also employ qualified Graduate Engineer or qualified Diploma Engineer,

26A.2 In case the Contractor fails to employ the Engineer, as aforesaid in Para 26A.1, he shall be liable to pay penalty at the rates, as may be prescribed by the Ministry of Railways through separate instructions from time to time for the default period for the provisions, as contained in Para 26A.1.

Termination / rescission

- Comprehensive

62.(1) Determination of Contract owing to Default of Contractor:

If the Contractor should:

- (i) Becomes bankrupt or insolvent, or
- (ii) Make an arrangement for assignment in favour of his creditors, or agree to carry out the contract under a Committee of Inspection of his creditors, or
- (iii) Being a Company or Corporation, go into liquidation (other than a voluntary liquidation for the purposes of amalgamation or reconstruction), or
- (iv) Have an execution levied on his goods or property on the works, or
- (v) Assign the contract or any part thereof otherwise than as provided in Clause 7 of these Conditions, or

- (vi) Abandon the contract, or
- (vii) Persistently disregard the instructions of the Engineer, or contravene any provision of the contract, or
- (viii) Fail to adhere to the agreed programme of work by a margin of 10% of the stipulated period, or
- (viii) Fail to Execute the contract documents in terms of Clause 8 of the Regulations for Tenders and Contracts.
- (ix) Fails to submit the documents pertaining to identity of JV and PAN in terms of Clause 18.11 of Tender Form available in the Regulations for Tenders and Contracts.
- (x) Fail to remove materials from the site or to pull down and replace work after receiving from the Engineer notice to the effect that the said materials or works have been condemned or rejected under Clause 25 and 27 of these Conditions, or
- (xi) Fail to take steps to employ competent or additional staff and labour as required under Clause 26 of the Conditions, or
- (xii) Fail to afford the Engineer or Engineer's representative proper facilities for inspecting the works or any part thereof as required under Clause 28 of the Conditions, or
- (xiii) Promise, offer or give any bribe, commission, gift or advantage either himself or through his partner, agent or servant to any officer or employee of the Railway or to any person on his or on their behalf in relation to the execution of this or any other contract with this Railway.
- (xiv) (A) At any time after the tender relating to the contract, has been signed and submitted by the Contractor, being a partnership firm admit as one of its partners or employee under it or being an incorporated company elect or nominate or allow to act as one of its directors or employee under it in any capacity whatsoever any retired Engineer of the gazetted rank or any other retired gazetted officer working before his retirement,, or
- (B) Fail to give at the time of submitting the said tender:
 - (a) The correct information as to the date of retirement of such retired Engineer or retired officer from the said service ..., or
 - (b) The correct information as to such Engineers or officers obtaining permission to take employment under the Contractor, or
 - (c) Being a partnership firm, the correct information as to, whether any of its partners was such a retired Engineer or a retired officer, or
 - (d) Being in incorporated company, correct information as to whether any of its directors was such a retired Engineer or a retired officer, or
 - (e) Being such a retired Engineer or retired officer suppress and not disclose at the time of submitting the said tender the fact of his being such a retired Engineer or a retired officer or make at the time of submitting the said tender a wrong statement in relation to his obtaining permission to take the contract or if the Contractor be a partnership firm or an incorporated company to be a partner or director of such firm or company as the case may be or to seek employment under the Contractor.
 - (f) Submits copy of fake documents / certificates in support of credentials, submitted by the tenderer

Then and in any of the **said Clause**, the Engineer on behalf of the Railway may serve the Contractor with a notice (Proforma at Annexure-IX) in writing to that effect and

if the Contractor does not within seven days after the delivery to him of such notice proceed to make good his default in so far as the same is capable of being made good and carry on the work or comply with such directions as aforesaid of the entire satisfaction of the Engineer, the Railway shall be entitled after giving 48 hours' notice (Proforma at Annexure-X or XII, as the case may be) in writing under the hand of the Engineer to rescind the contract as a whole or in part or parts (as may be specified in such notice) and after expiry of 48 hours' notice, a final termination notice (Proforma at Annexure-XI or XIII, as the case may be) should be issued.

Note: Engineer at his discretion may resort to the part termination of contract with notices (Proforma at Annexure- IX, XII and XIII), only in cases where progress of work is more than or equal to 80% of the original scope of work.

62.(2) Right of Railway after Rescission of Contract owing to Default of

Contractor: In the event of any or several of the courses, referred to in Sub-Clause(1) of this Clause, being adopted:

(a) The Contractor shall have no claim to compensation for any loss sustained by him by reason of his having purchased or procured any materials or entered into any commitments or made any advances on account of or with a view to the execution of the works or the performance of the contract and Contractor shall not be entitled to recover or be paid any sum for any work thereto for actually performed under the contract unless and until the Engineer shall have certified the performance of such work and the value payable in respect thereof and the Contractor shall only be entitled to be paid the value so certified.

(b) In the contract which has been rescinded as a whole, the Security Deposit already with railways under the contract shall be encashed/ forfeited and the Performance Guarantee already submitted for the contract shall be encashed. The balance work shall be got done independently without risk & cost of the failed Contractor. The failed Contractor shall be debarred from participating in the tender for executing the balance work. If the failed Contractor is a JV or a Partnership firm, then every member/partner of such a firm shall be debarred from participating in the tender for the balance work in his/her individual capacity or as a partner of any other JV /partnership firm.

Further the authorized representative of failed Contractor cannot be accepted as authorized representative in new contract.

(c) In the contract rescinded in part or parts,

(i) The full Performance Guarantee for the contract shall be recovered. No additional Performance Guarantee shall be required for balance of work being executed through the part terminated contract. The contract value of part terminated contract stands reduced to the balance value of work under the contract.

(ii) The Security Deposit of part terminated contract shall be dealt as per clause 16(2) of GCC.

(iii) The defaulting Contractor shall not be issued any completion certificate for the contract.

(iv) The balance work shall be got done independently without risk & cost of the failed Contractor. The failed Contractor shall be debarred from participating in the tender for executing the balance work. If the failed Contractor is a JV or a Partnership firm, then every member/partner of such a firm shall be debarred from participating in the tender for the balance work in his/her individual capacity or as a partner of any other JV /partnership firm.

- (v) Further the authorized representative of failed Contractor will not be accepted as authorized representative in new contract.
- (d) The Engineer or the Engineer's Representative shall be entitled to take possession of any materials, tools, implements, machinery and buildings on the works or on the property on which these are being or ought to have been executed, and to retain and employ the same in the further execution of the works or any part thereof until the completion of the works without the Contractor being entitled to any compensation for the use and employment thereof or for wear and tear or destruction thereof.
- (e) The Engineer shall as soon as may be practicable after removal of the Contractor fix and determine ex-parte or by or after reference to the parties or after such investigation or enquiries as he may consider fit to make or institute and shall certify what amount (if any) had at the time of rescission of the contract been reasonably earned by or would reasonably accrue to the Contractor in respect of the work then actually done by him under the contract and what was the value of any unused, or partially used materials, any constructional plant and any temporary works upon the site. The legitimate amount due to the Contractor after making necessary deductions and certified by the Engineer should be released expeditiously.

Interpretation

- Strict interpretation, it being standard form contract

Enforcement

- Self-enforcement
- Arbitration
- Civil suit
- Writ petitions?
