



TENDERS AND GOVERNMENT CONTRACTS

By
A.P.Suresh
Advocate High Court of Telangana

PART – I

Tenders & Contracts.



Introduction ..Contd

- The Law governing Tenders is largely drawn from the provisions of the Contract Act, 1982 and the jurisprudence that evolved from the Courts.
- Governments (State or Union) every year undertake several projects (viz. irrigation (316 billion INR), railways (2.4 Lakh Crores), roads (2.2 trillion INR) & buildings, infrastructural development (122 billion USD), housing projects (25 billion INR), space technology (8% of Indian Budget), Defence (13.8% of Indian Budget) and floats tenders inviting parties to execute the project works.
- On the other hand, with the expansion of global trade, the private players have been spending huge amounts of monies in establishing world class infrastructural facilities and issue out contracts to builders & development.



Tender Process

- **Tender:** It is an invitation to apply for participating in a bid for a Contract or otherwise understood as an invitation to offer a Contract.

- **Procedure for floating a Tender for a Contract:**
 - ❖ Notice/Tender/Advertisement/Bid called for
 - ❖ Eligibility
 - ❖ Application for participating in the Bid
 - ❖ Evaluation & Opening of Bids (Technical & Financial Bids)
 - ✓ **Technical Bid:** Whether the Bidder possess the requisite qualifications?
 - ✓ **Financial Bid:** Whether the Bidder holds requisite finance to execute the Contract?
 - ❖ Contract negotiating and Award of Bid.



➤ **Different kinds of Tenders:**

- ❖ Public Tenders: Tenders called for by the State or its Corporations or its instrumentalities (Sealed & Competitive Bids)
- ❖ Private Tenders: Tenders called by the Private entities (Open bids & Negotiated Bids)

-

➤ **Contract:**

- ❖ An Agreement between the Parties which creates an obligation to perform or not to perform a particular duty.
- ❖ A Contract gets executed once the Lowest bidder is declared.

Who are the players in the Tender?



- ❖ State/Governments
- ❖ Individuals
- ❖ Corporations (Private & Public Companies)
- ❖ Foreign entities

Guidelines issued by the Government of India with regard to Public Works contracts



- To ensure transparency and to circumvent any form arbitrariness the Central Vigilance Commission of India, issued various guidelines for the State organizations to adopt while executing the Public Works contracts. These guidelines are published in Manuals in the year 2022 and they are updated from time to time.
- Some of these guidelines as follows:
 1. Manual on procurement of goods
 2. Manual on procurement of Works
 3. Manual on procurement of consultancy & other services.
- The Supreme Court observed that the Guidelines notified by CVC are advisory and legal credence shall be placed to them while executing public related works.

PART – II

**Breach of Contract, Claim for damages,
Legal Frame Work governing Contracts &
Dispute Resolution**



➤ **Breach of Contract:**

- ❖ Failure to discharge the obligations of the Contract;
- ❖ Part performance of the Contract

➤ **Claim for damages:**

Instant reliefs:

- ❖ Forfeiture of earnest money/advance payments/Security Deposit
- ❖ Invocation of Guarantee/Bank Guarantee/Letter of Credit

What kind of damages can be sought by the aggrieved party:



- ❖ **Quantified damages**
- ❖ **Interest on the dues till realization**
- ❖ **Penalty for breach**
- ❖ **Loss of business and loss of opportunity**
- ❖ **Mental agony costs**

Challenges:



- ❖ **Rescinding of the Contract & Wrongful rescinding of the Contract**
- ❖ **Disputed liability**
- ❖ **Limitation of Liability by contract:**
- ❖ **Exemptions: Doctrine of Frustration (Section 56 of ICA) or impossibility of performance;**
- ❖ **Vis Major or Force Majeure;**

Legal Frame Work: The Tenders and the Contracts executed in furtherance thereof are governed by various laws in India.



Some of the Important legislations as follows:

➤ **Civil Laws:**

- ❖ The Indian Contract Act, 1872,
- ❖ The Sale of Goods Act, 1930
- ❖ The Hire-Purchase Act, 1972
- ❖ The interests Act, 1978
- ❖ The Registration Act, 1908
- ❖ The Indian Stamp Act, 1899
- ❖ The Civil Procedure Code, 1908
- ❖ The Specific Relief Act, 1963
- ❖ The Limitation Act, 1963
- ❖ The Arbitration & Conciliation Act, 1996



Legal Frame work ..Contd

➤ Criminal Prosecution:

- ❖ Indian Penal Code, 1860
- ❖ Criminal Procedure Code, 1973
- ❖ Indian Evidence Act, 1872
- ❖ The prevention of Corruption Act, 1988
- ❖ Central Vigilance Commission Act, 2003

Dispute Resolution:



- **Judicial review of tenders, (some important and recent judgment)**
- ❖ Where there is an obligation on part of the State to pay the admitted bill amounts, the Contractors can seek its enforcement by filing Writ Petitions Article 226 of the Indian Constitution (Writ of Mandamus)
- **Court room legal recourse:** Filing of Civil Suits/Commercial Disputes: Civil Procedure Code, 1908 and Commercial Courts Act, 2015 (See Section 2 (c) to under what is termed as commercial dispute to invoke the Commercial Courts Act, 2015

Dispute Resolution:



- **National Company Law Tribunal:** Insolvency Bankruptcy Code, 2016
 - ❖ Pecuniary Jurisdiction to invoke NCLT is Rs 1 Crore & above
 - ❖ Territorial jurisdiction is drawn from the situs of the Litigation Party/Company's registered office.

- **Arbitration, Mediation & Conciliation:** Arbitration & Conciliation Act, 1996: Governs arbitration & Conciliation proceedings adopted by the parties to resolve their disputes – deals with appointment of arbitrations – calls for transparency & impartiality of the arbitration proceedings – provides judicious recourse to impugn the orders of the arbitrator and provides for enforcing the arbitral awards and lays down the procedure to conduct conciliation proceedings.

International Commercial Disputes resolution:



- ❖ International Court of Arbitration, promoted by International Chamber of Commerce;
- ❖ ICSID (International Centre for Settlement of Investment Disputes) an arm of the World Bank Group;
- ❖ Singapore International Arbitration Centre, 1991
- ❖ London Court of International Arbitration, founder in 1892
- ❖ American Arbitration Association and International Center for Dispute Resolution founded in 1926;
- ❖ Indian Council for Arbitration, 1965 (Not a successful institution due to constant interference from the Courts in India;
- ❖ Permanent Court of Arbitration, 1899 originates from Hague Convention: Provides ADR on international arbitrations involving states and state-like entities.
- ❖ Swiss Chamber's Arbitration Institution: Established in the year 2004 by the Swiss Chamber of Commerce
- ❖ **World Intellectual Property Organization, 1994**
- ❖ Vienna International Arbitral Centre, 1975

THANK YOU

