

M.A. (Security and Defence Laws)

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Defence Tenders & Bidding

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Preamble

- ❖ Agreement between two parties (Buyer & Seller)
- ❖ Rights of the buyer to manufacture locally
- ❖ Definition of terms:
 - Contract
 - Deliverables
 - Total contract price and base contract price
 - Patent & latent defects (one which could/couldn't be seen by ordinary inspection)
 - INCOTERMS
 - Transshipment

Preamble

- ❖ Order of Preference (in case of disputes)
 - Present contract & other documents referred to in the contract (Present Contract)
 - Between the Articles (the relevant article)
 - Between Articles and Annexures (Article)
 - Between Annexures and Appendices (Annexure)

Article 1: Scope of Contract

- ❖ The contracted item as per the technical specifications mentioned in Annexure IIA, price, quantity and payment stages mentioned in Annexure I and AMC/CMC/PBL/LCSC at Annexure IIB
- ❖ Total Contract Price, TCP (including taxes & duties)
- ❖ Base Contract Price (BCP) (excluding taxes, duties and AMC/CMC/PBL/LCSC)
- ❖ Advance Payment Bank Guarantee (APBG), Additional Bank Guarantee (ABG) w.r.t. BCP
- ❖ Performance cum Warranty Bank Guarantee (PWBG) w.r.t TCP
- ❖ Additional PBG for AMC/CMC/PBL/LCSC w.r.t. contract amount for these
- ❖ Foreign Seller (BG from reputed international bank vetted by SBI or Indian Public sector or private scheduled commercial bank
- ❖ Indian seller (Indian Public sector or private scheduled commercial bank

Article 2: Effective Date of Contract (EDC)

- ❖ EDC is date of contract signing (performance, supplies linked to EDC)
- ❖ Date of delivery reckoned from the date of release of advance payment, provided the seller submits documents within 45 days of the contract signing); in case of delay in submission, the said period is excluded
- ❖ Obligations of the Buyer & Seller:
 - Seller: APBG, PWBG, Export License, Addl. BG (EP-B): 2.2 (a)
 - Buyer (End User Certificate, EUC within 30 days): 2.2 (b)

Article 3: Advance Payment Bank Guarantee

- ❖ Article 3A: Advance Payment Bank Guarantee (Foreign Sellers)- Annexure IV
- ❖ Article 3B: Advance Payment Bank Guarantee (Indian Sellers) – Annexure IV
- ❖ Article 3C: Advance Payment Indemnity Bond (Nominated/An-initio single vendor (AISV))
- ❖ Article 3D: Additional Bank Guarantee for Essential Parameter-B (Foreign Seller)- Annexure IV (B)
- ❖ Article 3E: Additional Bank Guarantee for Essential Parameter-B (Indian Seller)- Annexure IV(B)

Article 4: Performance cum Warranty Guarantee

- ❖ Article 4A: Performance cum Warranty Bank Guarantee (FS)
 - 5% of TCP-Annexure IV(A)
 - Validity: 3 months beyond the Warranty period
 - Any encashment (part or full) to be made good by the seller within 30 days by addl. BG, or next stage payment will be adjusted till the amount is made good
- ❖ Article 4B: Performance cum Warranty Bank Guarantee (I.S.)-5% of TCP-Annexure IV(A) – other conditions as mentioned earlier
- ❖ Article 4C: Performance cum Warranty Indemnity Bond (Nominated/AISV)-Annexure IV(C)
- ❖ Article 4D: Performance Bank Guarantee for AMC/CMC/PBL/LCSC (FS)
 - 5% of total price of AMC/CMC.PBL/LCSC; Format at Annexure IV (A); 03 Months validity
- Article 4E: Performance Bank Guarantee for AMC/CMC/PBL/LCSC (IS)-Annexure IV(A)
- Article 4F: Performance Indemnity Bond for AMC/CMC/PBL/LCSC (nominated/AISV)

Article 5: Payment Terms

❖ Article 5A: Foreign Vendor

- Payment schedule at Annexure I
- Advance payment X% of BCP within 30 days of receipt of documents from seller
- On Dispatch: Y% of TCP (excl. AMC etc) through LC (Annexure X)
- On Delivery: Z% of the TCP through LC on completion of JRI/Certified Receipt Voucher(CRV)
- On Finance Acceptance & Installation/Commissioning: Remaining amount within 30 days after date of Acceptance Certificate and CRV
- AMC/CMC/PBL/LCSC Payment: Payment to be made by PCDA/CDA through DBT on submission of User Clearance Certificate

❖ Article 5B: Indian sellers in non-‘Buy (Global)’

- Advance Payment; On Dispatch; On delivery; On final acceptance

➤ Article 5C: Indian Sellers in ‘Buy (Global)’

- Options between LC and DBT transfer

Article 6: Monitoring of Project Based on Contractual Milestone

- New article include in DAP-2020
- The buyer has the right (but no the obligation) to monitor the progress of projects based on contractual milestones
- Project Monitoring Meeting to take place at regular interval; and Seller to submit reports to the buyer

Article 7: Specifications

- Seller's guarantee to meet specifications as per Annexure-II and statement of work as per Annexure-III
- To incorporate modifications to the existing design as per Annexure-V

Article 8: Quality

- ❖ Quality as per specifications and agreed-to modifications, if any
- ❖ Deliverables to be latest manufacture i.e. manufactured after contract is signed with unused components/assemblies etc having 100% defined life
- ❖ Documentation to confirm interchangeability along with the changed part Nos
- ❖ Quality assurance as per Acceptance Test Procedure (ATP)
- ❖ No repetition of QA tests in PDI ad JRI

Article 9: Pre-Despatch Inspection (PDI)

- ❖ PDI to be included if specified in ATP
- ❖ PDI will lead to sign & issue of Certificate of Conformity (CoC) – Annexure VI
- ❖ 45 days of advance notice & day-wise schedule to the buyer for PDI
- ❖ Buyer has the right not to attend PDI or request a delay
 - ❖ Buyer not attending PDI: Seller will sign CoC and Acceptance Test Report

Article 10: Preservation, Packing & Marking

- ❖ To ensure against damages during land, sea and air transportations
- ❖ Packing & preservations as per standards mentioned in the RFP

Article 11: Delivery

- ❖ Delivery in accordance to schedule laid down in Annexure III
- ❖ 6 weeks of advance intimation about the anticipated date of delivery

Title & Risk of Loss

- ❖ Transfer of title of the equipment after acceptance of documents (JRI/User Acceptance/Delivery to Ultimate Consignee, as the case may be)
- ❖ Transfer of title does not end seller's responsibility w.r.t. defects, quality and performance

Article 13: Transportation

- ❖ Stores to be delivered as Delivered Duty Paid (DDP) (as per INCOTERMS 2020)
 - Seller assumes all responsibilities and costs for delivering the goods to the named place of destination. The seller must pay both export and import formalities, fees, duties and taxes
- ❖ JRI certificate and Certified Receipt Voucher (CRV) proof of date of delivery

Article 14: Airlift

- ❖ Buyer may decide to airlift all or some of the stores
- ❖ Buyer to intimate the seller

Article 15: Liquidated Damages (LD)

- ❖ Seller's failure to supply the stores, perform services, conduct trials, install etc., Buyer may withhold cost of the specific lot/batch, or 1% of the project cost, whichever is higher
- ❖ LD, for delay in delivery attributable to seller, subject to maximum 10% of delayed stores/services
 - 1/100 of the delay% of the Base contract price of delayed/undelivered stores for every week of delay

Article 16: Denial Clause

- ❖ Insulates the buyer from increase in statutory increase in duties, exchange rate fluctuations during the extended delivery period
- ❖ Any decrease in statutory duties or due to favourable exchange rate will be passed on to the buyer

Article 17: JRI in India

- ❖ JRI to be completed within 120 days (armament/ammunition)/30 days (others)
- ❖ JRI to be confined to quantitative checks, except where check proof is required
- ❖ Seller can opt out of JRI
- ❖ JRI leads to Acceptance Certificate

Article18: Warranty Clause

- ❖ Warranty for a period of X months/years/operational hours
- ❖ Warranty period begins from the date of JRI/Installation/Commissioning
- ❖ In case of defect: Provision for replace or repair within certain days of notification
- ❖ Spares and consumables for warranty repairs to be provided by seller free of cost
- ❖ Warranty to be extended by downtime period
- ❖ Seller to repair defects due to buyer's failure at a agreed cost
- ❖ Cumulative downtime period not to exceed certain period of warranty period
- ❖ Provision of replacement of complete item/component/sub-component in case of recurring problems
- ❖ Provision to associate QA personnel of the Buyer during warranty repair
- ❖ Guarantee that the items will conform to temperature and humidity conditions

Article 19: Indigenous Content (IC)

❖ Mandatory IC as required under various categories

Prioritized Category	IC (%)
Buy (Indian -IDDM)	$\geq 50\%$ and indigenous design
Buy (Indian)	$\geq 50\%$ if indigenous design; else $\geq 60\%$
Buy & Make (Indian)	$\geq 50\%$ IC in 'Make' portion
Buy (Global-Manufacture in India)	$\geq 50\%$
Buy (Global)	Nil for foreign; $\geq 30\%$ for Indian

Article 20: Claims

- Claims can be presented either on:
 - Quantity of Stores not matching with the packing (within 45 days of JRI)
 - Quality of Stores (within 45 days of JRI; During Warranty period: immediately and not later than 45 days after the warranty period)
- Seller has to settle quantity claims within 45 days of receiving the claims
- Claims can be settled against BG or by making payment to the buyer

Article 21: Taxes and Duties

- ❖ All taxes, levies and charge for the contracted item would be paid by parties in their respective countries.
- ❖ Indirect taxes & duties paid by seller in India to be reimbursed at actuals or as quoted by the seller (**whichever is lower**)
- ❖ Any change in tax structures/duties by the Indian Govt will be adjusted without making any change in the contract.

Article 22: Termination

- Termination for default in delivery or meeting milestones by the seller -
Termination notice to the seller prior to termination date
- Risk purchase: Gives rights to the buyer to source from alternative sources at the seller's risk, cost and responsibility
- Termination for Convenience

Article 23: Law

❖ Contract to be governed by Indian laws

Article 24: Arbitration

❖ Arbitration: For Foreign Sellers

- Dispute and disagreement can be referred to 3-member Arbitration Tribunal after intimating the other party
- One member to be nominated by each party within 60 days; and third member by the two nominated members within 90 days; Provision for President of International Chamber of Commerce (ICC), Paris to appoint the 3rd member
- Arbitration to be governed by Indian Arbitration and Conciliation Act, 1996 and enforceable in Indian Courts only
- Majority Arbitration decision is final and binding on parties

❖ Arbitration: For Indian Private Sellers

- ❖ Same as applicable to foreign seller; except for ICC nomination

❖ Arbitration: for Central & State PSEs

- One member arbitrator nominated by the Dept of Public Enterprises;
- Arbitration and Conciliation Act, 1996 not applicable
- Final decision by the Law Secretary, Govt. of India

- For DPSUs: Arbitrator to be appointed by the Defence Secretary; decision final

Article 25: Penalty for use of Undue Influence

- ❖ Undue influence, directly or indirectly, can lead to cancellation of contract, imposition of penalty, and forfeiture of BG and refund of amounts already paid
- ❖ Chapter IX of Indian penal Code, 1860
- ❖ Prevention of Corruption Act, 1988

Article 26: Agents

- ❖ Declaration by the seller that he has not appointed anybody else (including his agents already intimated to the MoD) to influence the contract.
- ❖ Violation of the Article can lead to:
 - Recovery of gift, reward fee, commission with interest rate of 2% above LIBOR rate
 - Contract to be put on hold or cancelled
 - Recovery of payment already made
 - Seller subject to putting on hold, suspension and debarment

Article 27: Force Majeure

- Allows non-fulfilment or delayed fulfilment if affected party informs other party
- Fire, flood, natural disaster and other act that are unanticipated or unforeseeable
- Acts of Govt. or state parties of the seller not part of force majeure

Article 28: Non-disclosure of Contract Document

- Either party will not disclose the contents of the contract other than to ones which need such contents for the purpose of performing the obligations under the contract

Article 29: Notices

- All notices to be written in English language and sent by FAX, Email, speed post, registered post or registered pre paid airmail to the last known address of the party

Article 30: Transfer and Sub-Letting

- Debars the seller from allowing others to take benefit from the contract
- Except in case of merger, acquisition or change in control of the company (requires prior permission)
- Seller may utilise its wholly owned subsidiary in India to provide product support

Article 31: Patents and other Industrial Property Rights

- Contract price covers for use of patents, copyrights, registered charges, trademark and payments for any other industrial property rights
- Seller to indemnify the buyer against all such claims from third party

Article 31A: Buyer's Right to Optimisation of LCC and System Enhancements

- ❖ Not applicable if D&D is funded by the Govt.
- ❖ Seller's IPR is acknowledged
- ❖ Buyer's Rights: Buyer has the right to substitute with own-procured items by :
 - Sharing Interface/Fitment details with industries
 - Seeking seller's assistance-Competition Act of India, 2002 if seller charges undue amount
 - Collaboration between seller and Indian industries
 - D&D
- ❖ Seller's Rights:
 - Seller may deny the warranty during warranty period
 - Deny maintenance liability outside the warranty period

Article 32: Amendments

- ❖ No part of the contract shall be amended except by an instrument in writing made after the contract date and signed by both parties

Article 33: Product Support

- ❖ Binds the seller to provide product support for the stores/assemblies, fitments, consumables, etc for a minimum of X years
- ❖ Requires seller to give at least 2 years of notice before closing of product line
- ❖ Seller to inform the buyer about any improvement in the sold item
- ❖ Seller to provide Engineering Support Packages
- ❖ Codification: Either the NATO Stock Number (NSN) or basic technical characteristics for codification in consultation with Buyer

Article 34: Training

❖ Seller to provide:

- Operator Training (Indian/abroad)
- Repair and Maintenance Course

Article 35A: Option Clause for Indian Vendors

- ❖ Provision to buy upto 50% additional quantity within the contract period
- ❖ Price variation clause, FERV (if applicable in the original contract) may be extended to the option buy

Article 35A: Option Clause for Foreign Vendors

- Upto 50% additional quantities as per the cost, terms and conditions of the original contract
- Price to remain same till a defined period agreed by both parties

Article 36: Buyer Furnished Equipment (BFE)

- ❖ Allows the buyer to buy and supply to the seller a set of equipment

Article 37: Engineering Support Package (ESP)

- ❖ Repair Philosophy: 'O' Level (Unit & Field Repairs), 'I' level (Workshop, Dockyard, BRD level) & 'D' level (major repairs)
- ❖ Accompanied Accessories/ User Replacement Parts/Expendables: The list of items to be incorporated with Adequacy Clause
- ❖ Spares: Upto component level to be provided- List to be prepared by the Buyer after MET
- ❖ Special Maintenance Tools, Special Test Equipment and Test Jigs (SMTs/STEs/Test Jigs)- List to be finalised by the buyer after MET
- ❖ Technical Literature
- ❖ Adequacy Clause: Seller to give guarantee that the accessories, spares, SMTs, etc are adequate to repair upto (X) level; Additional spares to be bought; buy back spares rendered surplus

Article 38: Access to Book of Accounts

- In case the buyer feels that the seller has engaged agents or paid commission, the buyer, on demand, shall have rights to see the necessary financial and other documents
- The authorised reps of the seller needs to be authorised by the Board of Directors of the Seller's company

Article 39: Survival after Termination or Expiration

- ❖ The following article to survive the termination or expiration of this contract
 - Non-Disclosure of Contract Documents
 - Title and Risk of Loss
 - Warranty
 - Law
 - Penalty for Use of Undue Influence
 - Patents and Other Industrial Property Rights

Post-Contract Management (PCM)

PCM: Objective & Responsibilities

- ❖ To ensure compliance with the terms & conditions of the contracts, managing contractual amendments, quality assurance, timely payment and deliveries and resolving claims and disputes
- ❖ SHQ: Contract administration (preparation and distribution of contract document) and contract management (timely payment and deliveries, management of guarantees, quality assurance, extensions and contract amendments, contract closure/termination, arbitrations, etc)
- ❖ MoD (Acquisition): Post contract monitoring. SHQ to submit quarterly report to DG (Acq.)

First Off Production Model (FoPM)

- ❖ Timeline for FoPM as per the RFP/Contract
- ❖ Delay in FoPM:
 - VCOAS/VCNS/DCAS/CISC/DGICG- Upto maximum 25%
 - DG (Acq.)- Upto 50%
- ❖ Delay in FoPM due to Vendor: Delay period to be deducted from the time schedule of first log of deliveries

Inspection – Pre-Dispatch Inspection (PDI) and Joint Receipt Inspection (JRI)

- ❖ ATP to be executed as per contractual terms
- ❖ Cost of PDI and JRI to be borne as per contract provisions; PDI to be repeated till buyer is satisfied
- ❖ PDI committee and its charter defined
- ❖ Delay PDI attributable to the seller- LD
- ❖ Inspection done at PDI will not be repeated during JRI, to the extent possible
- ❖ Deficiency found at JRI to be rectified by the seller within the delivery period free of cost

Packing and Dispatch

- ❖ Packaging as per contract conditions
- ❖ In case of deviation: PWBG to be retained till QA certifies no adverse effect on consignment

Change of Name of Vendor

- ❖ Detailed guidelines at Appendix K to Chapter-II to be followed
- ❖ All the responsibility/liability of the vendor transferred to the new company

Bank Guarantees (BGs) Management

❖ IPBG, BG for Advance Payment, PWBG, ABG for EP-B

Sl. No	BG No.	Milestone as per Contract	BG Amount	Issued Bank	Issued Date	Expiry Date	Remarks

❖ Encashment of BG, Return as per the detailed guidelines

End Use Certificate (EUC)

- ❖ EUC to be issued by the buyer within 30 days of signing of the contract
- ❖ Issued by designated one-star level officer from the concerned SHQ

Payment Terms and Conditions

❖ Payment terms to be governed by contractual terms; In general for non-LC payment involves:

For Indian Vendors	For Foreign Vendors
a) Ink-signed copy of Seller's bill b) The relevant Transport Receipt. c) Inspection Acceptance Certificate of Buyer's QA agency demonstrating compliance with the technical specifications of the contract. d) Packing List e) Certificate of Origin. f) Claim for statutory and other levies to be supported with requisite documents/proof of payment, as applicable. g) Exemption certificate for taxes/duties, if applicable.	a) Clean On-Board Airway Bill/Bill of Lading (Original). b) Commercial Invoice (Original). c) Certificate of Conformity d) Acceptance Test Certificate at PDI. e) Certificate of Origin, duly stamped from Seller's Chamber of Commerce. f) Certificate of Quality and current manufacture from OEM. g) Dangerous Cargo Certificate. h) Phyto-sanitary / Fumigation Certificate. i) Packing List. (Insurance and freight documents. j) Training certificate by the Buyer.

❖ Payment is released by PCDA/CDA (within 30 days)

Non-Availability of Buyer Furnished Equipment (BFE)/Platform/Infrastructure

❖ Contract to specify the timelines for BFE; in case of delay:

➤ BFE from the resources already available with the SHQ

- Delay to be notified to the seller at least 60 days; Delivery schedule to be amended accordingly; payment as per contract terms

❖ When BFE is to be procured from other vendor

➤ Timelines for procurement to be planned at RFP stage

➤ Status report and timelines to be mentioned while obtaining CFA approval

Terms of Delivery

- ❖ Milestones as defined in the contract to be monitored and report to be submitted to the Acq. Wing.
- ❖ Any issues encountered during the contract to be brought to the notice of Acq. Wing
- ❖ Failure to deliver within the Delivery Period:
 - Issue a performance notice
 - Extend the delivery date with imposition of LD & Denial Clause
 - Cancel the contract
 - Initiation of punitive action as per the terms and conditions of the contract
- ❖ Deciding the Course of Action in the Event of Failure of Supply
 - Extension of DP with or without LD to be brought to the notice of DG (Acq.), Def Sec and RM for delays of 6-10 months
 - Extension to be given by DG (Acq) and Vice Chiefs (delegated powers)

LD & other Post-Contractual Issues

- ❖ LD as per the ceiling provided in the contract
- ❖ Contract amendment procedure provided at Appendix B to Chapter-XI (DAP-2020)
- ❖ Alteration /Obsolescence Management / Upgradation of the Equipment Post Signing of Contract
 - In case of cost involved, Professional Officers' Valuation (POV) to be set up
 - Limited Validation Trials of the upgrades/alterations
- ❖ Verification of IC
 - Computation of IC as per Annexure-I to Appendix B of Chapter-I
 - Verification of IC by a committee headed by Advisor/Director (Cost)
 - Committee constituted by DG (Acq.)
- ❖ Buy Back of Spares
 - Buyer has the right to alter MRLS (Man. Recommended List of Spares) within a defined period post Warranty. Seller to buy back

Other Post-Contractual Issues

- ❖ Claims as per Article 20 of SCD
- ❖ Arbitration: As per Article 24 of SCD (Decision to be moved on file for acceptance by RM or Vice Chiefs (Delegated))
- ❖ Procedure for Termination: SHQ to submit the proposal with justification for approval of CFA for termination of contract

THANKS