

Introduction To Public Procurement

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Scope of Presentation

- Evolution of Public Policy Procurement
- Contract Act (1872)
- General Financial Regulations
- Role of the Supreme Court
- Make in India, Transparency As Thrust Areas

Evolution of Public Procurement

- MoF as Sole Repository of Financial Powers (GFR)
- Delegation of Financial Powers (1978)
- DGS&D as the central agency for repetitive purchases: R& R Contracts
- Product Reservation, Price & Purchase Preference
- Government e-marketplace
- Creation of Central Procurement Portal
- Transparency & Digitization
- Promote MSMEs
- Atma Nirbhar Bharat: Import Substitution

PROVISION IN THE CONSTITUTION

- Article 298: Executive Power of Union and State make a contract
- Article 299: Contracts in the name of the President and executed by authorized persons
- Article 299(2): No Personal Liability, either of President, Governor, or Delegated
- Article 300: Government may sue or be sued

Administrative Guidelines

- GFR (2017): 1947, 1963, 2005
- DFPR (1978)
- MSME Orders
- DGS&D Manual(1999)
- MoD, Railway, and P&T Manuals
- CVC Guidelines

Statutory Provisions

- Contract Act 1872
- Sale of Goods Act 1930
- Arbitration & Conciliation Act 1996
- Prevention of Corruption Act 1988
- Prevention of Money Laundering Act 2002
- Public Procurement Act?

OVERSIGHT AGENCIES

- CVC
- CAG
- CBI
- CCI
- Courts

CONTRACT ACT: 1872

Essential elements for a valid contract

- Agreement: Offer to be definite, meaningful, and duly communicated
- Acceptance to be absolute, unconditional, and duly communicated
- Legitimate Consideration: Section 23
- Capacity of parties: Minor, mentally unsound, disqualified (S11)
- Free Consent, Coercion, Undue Influence, Fraud, Misrepresentation (S20)
- Lawful Object

Guidelines for Procurement

- Publication of TE on CPPP
- National Security Items exempt from e-publication
- LTF: Up to 25 lakhs to all registered suppliers, >3 firms;
Beyond 25 lakhs: Demand is urgent, Not in the Public Interest,
and Sources of supply are definitely known
- Two bid system: High-value P& M, complex
- Technical bids & financial bids in one bid
- Technical bids are first to be evaluated
- Financial bids of technically acceptable to be opened
- Two Stage Bidding: Not possible to firm up Technical Specifications, Prebid Meeting
- Final Bid Price of Technically Acceptable Bids

PROCUREMENT OF G&S

- Government e-marketplace (Ge M) (2016):
For common-use goods and services
- Use of Central Procurement Portal(CPP)
- Reasonability analysis by using BAL
- No splitting to avoid going to higher CFA
- Reserved items: KVIC, ACASH
- Encourage MSMEs: 25% of Procurement
- No quotation up to Rs.25000/-
- 25000 – 2 lakh by Purchase Committee
- Preferred Mode of Purchase: OTE

CONTENTS OF BIDDING DOCUMENT

1. Instruction to Bidders
2. Conditions of Contract: Standard, Legal & Financial Advice for Deviations
3. Schedule of Requirement
4. Specialisation and Technical Details
5. Price Schedule
 - Bid security: EMD except MSMEs
 - Performance Security: Successful bidder 5-10% of value of contract, DD or FDR
 - Valid for a period of 60 days beyond completion of all contractual obligation

TRANSPARENCY, COMPETITION, FAIRNESS

- Text of bidding DOC: Self-contained and unambiguous
- Prior turnover and prior experience to be relaxed for start-ups
- Description and spec(s), quality, time, and place of delivery
- Criteria for eligibility and minimum experience, technical capability, manufacturing facility, and financial position
- Criteria for evaluation of bids
- Essential terms of procurement contract
- Provision for settlement of disputes
- Bids to be opened in public

GENERAL FINANCIAL RULES, 2017

Standards of Financial Propriety

- Same vigilance as a person of ordinary prudence for his own money
- Not more than occasion demand
- No exercise of power to directly/indirectly benefit
- Not for benefit to a particular person or section of people

GENERAL PRINCIPLES OF CONTRACT

- Terms must be precise, definitive without any ambiguities
- Terms should not involve an uncertain or indefinite liability, except in case of Cost Plus contract or where there is price variation clause
- Standard forms of contract should be adopted
- If not standard form, obtain legal and financial advice
- Cost plus contract to be ordinarily avoided
- Price variation clause in long term contract, beyond 18 months
- Base year price, Government indices

Standard & Cost Plus

- Standard Terms
- Cost Plus: Cost + Mark Up : New Products
- Terms to be Precise : Fork Lift Case: Cost Increase Based on Cost of Operation
- Time is Essence Of Contract: L/D: .5% subject to Maximum 5-10%
- Delay Attributable To Contractor; Token L/D
- Consequential Damage

Other Important Clauses

- Repeat Order: After Contract Completion: 25-50%: No downward Price Trend
- Option Clause: 50%: Within Currency of Contract: No Downward Trend
- PVC: Beyond 18 Months
- $P_1 = P_0 (X + .3 * L_1 / L_0 + .6 M_1 / M_0)$

PUBLIC PROCUREMENT (MAKE IN INDIA) ORDER 2017

- Increase local content through partnership, JVs
- Purchase preference: ≤ 50 lakh (local supplier)
- ≥ 50 lakh: Local supplier to match L_1
- Minimum local content 50%
- Verification of local content: Self certification
- > 10 crore: Certification from statutory auditor/
cost auditor
- False declaration will be a breach of code of integrity
- WTO (TRIM)

WORLD BANK BIDDING DOCUMENTS

- Patent Rights – Indemnify purchase against third party claim of infringement of patent
- Instruction- Right to inspect and test goods without extra cost
- Transportation- FOB, CIF, or CIP
- Warranty- No defect arising for design, material or workmanship
- Valid for 12 months under notice; repair or replace within reasonable speed
- Assignment- Permission of purchaser
- Sub Contract- Liability with supplier
- L/D- As specified in SCC, 0.5% per week, max 10%
- Force majeure: War or revolution, fire, floods, epidemics, freight, Embargo, Quarantine Restriction
- Arbitration: UNCITRAL Arbitration Rules, ICC, London Court of International Arbitration

WORLD BANK GUIDELINES FOR P&M

- Operating and Maintenance cost
- Price of recommended spare part not to be considered
- Award criteria: Substantially responsive and lowest Evaluated bid
- Corrupt Practice: offering, giving, receiving or soliciting
- Fraudulent practice: Misrepresentative of facts to influence a procurement process
- Completion of guarantee
- Applicable rate of L/D: 0.5%, 10% maximum
- Applicable bonus for early completion
- Settlement of Disputes
- UNCITRAL (76), ICC Rules, London Court of Arbitration, Arbitration Institute of Stockholder Chamber of Commerce

WORLD BANK GUIDELINES FOR P&M

- Pre Bid Meeting
- Amendment to bidding Doc(s) before bidding of submission,
- Extend deadline
- Preliminary examination of bidding: Discrepancy between word and figures, words will prevail
- Substantially responsive bid: Confirm to all terms and conditions and specification of the bidding doc(s) without material deviation, objection, conditionality or reservation
- Technical Evaluation: Not meeting Minimum Acceptable standard of completeness to be rejected
- Achievement of performance criteria
- Long term availability of mandatory and recommended spare parts
- Commercial evaluation; price of deviations
- Cost of DP extension beyond minimum deliver period