

GOVERNMENT CONTRACTS

A comprehensive guide on government contracts





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Preface



A contract to which the central government or a state government is a party is called a 'government contract'. All the government contracts are made in the name of the President of India. The need for government contracts is to make the functioning of the state smoother and more accountable. Government comes into contract with so many national and international parties for the development of the nation, so it becomes necessary to have a contract in the name of the government rather than any specific person.

The Government of India, both, at the centre as well as at the state level make several contracts for various purposes such as construction, management, maintenance, repairs, manpower supply, IT-related projects, etc. as government also runs public companies and carries out various function. While an ordinary contract is governed by the Indian Contract Act, 1872 but in case of a government Contract some additional provisions have been provided under the Indian constitution, thus the formation of government contract is done in a different manner as compared to an ordinary contract.

It has been observed that government tenders in India are given more priority as compared to private tenders for various reasons. Although the clearance of funds in government organisations are late in comparison to private ones but it is assured that funds will be cleared at any cost while there is always a dilemma in the private organisations when it comes to clearance of funds and money processing's.

A contract is an agreement which is made between at least 2 people in which both of them agree to perform an act or abstain from doing the act in return for some consideration. Section 2(h) of the Indian Contract Act has defined a contract as an agreement which is enforceable by law. Thus, when an agreement is not against the provisions of law it is a contract.

Governing Rules and Regulations

Along with the requirements given under the Indian Contract Act of 1872, for a contract to be enforceable, government contracts need to fulfil the provisions for its formation laid under the Indian constitution. Under article 298 of the Indian Constitution, the power of the union and the state government to carry on any trade or business has been provided. For the formation of a government contract the requirements under Article 299 have to be fulfilled and if they have fulfilled a contract can be enforced against the government.



As per Article 299, all the contracts which are made under the executive power of the union, or the state should be made in the name of the President or the Governor respectively. If a contract is not made under the President's or Governor's name, such a contract will not be considered as a government contract. Further, all the terms of the contract should be enforced on their behalf a person who has been authorized to act on their behalf.

According to Article 299(1), contracts must be expressed in writing and executed by a person duly authorized by the President or the Governor on their behalf. Under Clause 2 of Article 299, the President or the Governor cannot be held personally liable for the non-performance of the contract. Thus, they are immune to any personal liability for the breach of contract because the contract is made in their name only but they themselves do not perform the contract.

In case the Government has derived any benefit from a person by an agreement which does not fulfil the requirements under Article 299, the government will be held liable for compensating the other party under Section 70 of the Contract Act and such a contract will be deemed to be a quasi-contract to the extent the Government gets the benefit. This has been provided to protect an innocent party from suffering loss.

Under Section 70 of the Indian Contract Act, 3 conditions have been provided:

- A person should do something lawful for another or the person should deliver something to another person.
- Such an act should be done without the intention of doing it gratuitously.
- The person for whom such an act has been done or something has been delivered, should enjoy the benefit from such act or delivery.

This view has been adopted because the modern Government performs many functions and in carrying out these functions many petty contracts are also entered into as a result of which strict compliance with Article 299 is not observed in many cases. If the act done by the other person is for the benefit of the government and except for compliance with article 299 and all the other aspects of the contract are proper then, section 70 should be applied.

Section 70 also applies to any organisation which has derived any benefit from the government under such contracts, the government also has the right to sue that person. In the case the government has made a void contract then it has the right to recover the benefits given by it from the other party under section 65 of the Indian Contract Act.



Licenses and Registrations

In essence, the term “tender” refers to a procedure that helps an individual or organization invite bids for a specific work. Thus, government tenders are a similar type of process, helping people acquire government-related bids. However, unlike the normal tenders, government-based ones are much more liability-protected. Therefore, to acquire it, the bidder will need to provide documentation and fulfil the required eligibility criteria of the government tenders as well. The following are some details that might help you to have an idea about it.

1. Registering Under the E-Procurement Module

Before applying for the government tenders, every bidder need to register them under the e-procurement module. To do so, go to the official government e-tender website and log in there. For filling up the enrolment form, one will need –

- An active mobile number and official e-mail ID
- Details of the contact person (name, date of birth, title, designation, etc.)
- Information about the tender-receiving organization (TAN/PAN number, name, registered address, registration number)
- Once done, provide a valid Digital Signature certification as well. It needs to have both the signature as well as the encryption code. They will require it for validation purposes.



2. Technical Criteria

Under the technical criteria of the government tenders, bidders will need to provide the following documents.

- Details regarding manufacturing capacity
- Turnover information
- Credentials of the organization
- Assurance about the quality control system
- Performance in the market
- Usage of machinery and equipment
- Documentation about the financial background



3. Monetary Criteria

The monetary criteria of the government tenders deal with capital. Here, the tenderer will ask for a specific amount of quotes with which he/she is comfortable. The buyer has to pay the same amount of cash to complete the tendering process or buy it from the tenderer. Usually, the tenderer who is offering their tender at the lowest price will get the nod over others. However, in some cases, the price of government tenders also depends on quality.

4. Other Criteria

Aside from all these, there are some additional documents that needs to be submitted. These are –

The tenderer will need to provide a registration document under several applicable laws and liabilities, such as ESI, income tax, service, goods tax, SPF, etc. You will need to proffer a photocopy of the same while filling up the government tender's forms.

The tenderer will need to provide a solvency report, which can be acquired from the banker.



Dispute Resolution

The delay in payments by government organisations has been a long-standing issue. This is seen across all departments of both central and state governments. Government resources are always stretched and this invariably results in delays in payment. There are penal provisions in the contracts for delays in payment which are not fully or partly adhered to and this again leads to disputes.

Arbitration has of late become one of the most viable means of dispute resolution in disputes between government entities and private parties. Invariably the government contracts provide for arbitration evidently due to its relative advantages in terms of speedy disposal and technical knowledge of the adjudicators. According to Section 28 of the Indian Contract Act, contracts are void if it places absolute restraint on legal proceedings. However, if a contract has provision for arbitration mechanism it continues to be valid. Arbitration in contracts involving Indian parties is mostly under the Arbitration and Conciliation Act, 1996, which is based on the United Nation Commission on International Trade Law model law. It provides the framework for legally binding arbitration awards with limited grounds for challenge in a time bound manner.

In Para 67 of the Union Budget Speech, Smt. Nirmala Sitharaman had announced that:

To settle contractual disputes of government and government undertakings, wherein arbitral award is under challenge in a court, a voluntary settlement scheme with standardized terms will be introduced. This will be done by offering graded settlement terms depending on pendency level of the dispute.



The Government has appreciated that special efforts are required to clear the backlog of old disputes and litigation. Such cases are not only holding back fresh investment but are also reducing the ease of doing business with the government. Therefore, after due study of the past cases, the government intends to bring one time settlement scheme called “Vivad se Vishwas II (Contractual Disputes)” to effectively settle pending disputes.

- The scheme will apply to disputes where one of the parties is either the Government of India
- Only disputes involving above entities where the claim for proceedings (either to Court or for Arbitration or Conciliation) were submitted by the contractor on or before 30.09.2022 and Arbitral Tribunal/ Committee for Conciliation etc. for the specific case has been already notified by the procuring entity shall be eligible for settlement through this scheme.
- Disputes, where claims are raised against procuring entities as above along with some other party (State Government or private party), shall not be eligible under the scheme.
- Disputes having only financial claims against the procuring entities will be settled through this scheme.
- The Scheme will be applicable to all contractors/ suppliers who wish to participate. In case Central Public Sector Enterprises (“CPSEs”) etc. are the contractors/ suppliers in a particular contract, they are also eligible to submit their claims under the scheme.
- The Scheme proposes a graded settlement terms depending on pendency level of the dispute.
- It is proposed to cover only for cases involving domestic arbitration and cases under international arbitration are not eligible to be settled under this scheme.

The scheme will be implemented through Government e-Marketplace (“GeM”), which shall provide an online functionality for the same. The draft scheme document also provides a broad functionality that the GeM portal shall provide to implement the scheme.

The draft scheme also contains a draft settlement agreement between the litigating parties to bring finality to the contractual dispute settlement.

How we can help?

Our team has gained decades of experience while practicing in the field of government contracts and have gathered ample of understanding and repute in this area. Our team have been actively advising businesses involved in government contracts and assisting them throughout the process of contract.

Our team has excellent legal acumen and experience in handling matters related to government contracts. Our professionals diligently assess the requirements or issues of the clients and then provide them with viable solutions which best serve the interest of the client.

Our team stand with our clients throughout the process and provide them continuous counsel and assistance till the completion of assignment. Our services are not only limited to dispute resolution, but we also provide pre and post dispute resolution and till the client needs are met.

Our service in this area includes:

- Providing advice on government contracts
- Representing business corporations before court in matters related to government corporations.
- Filing complaints and appeals on the behalf of clients.



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