Critical Analysis on Government Contracts: An Introduction

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Government Contracts are nothing but legal agreements between two governments or between government and a private party. The government may be either central government or state government outlining the terms for provision of goods or services or with reference to immovable property also. Article 298 of Indian Constitution is dealing with Government Contracts. It must be in the format prescribed by Article 299 and in case the agreement is not in the prescribed format, it is not enforceable in the court of law. It stated that the agreement should be entered by the officer of the Government on behalf of Union or State Government and in the name of President of India or Governor of the State. Article 298 of the Indian Constitution of India confers the power to the Union as well as the State to carry out trade, or acquisitions, hold and dispose of property, and further make contracts for any purpose.

Article 299 prescribes the following conditions:

a) The concerned authority should enter the contract as an agent of the president of the union or by the governor of the State.

b) The contract must be in writing.

c) It must be entered on behalf of Union of India or on behalf of any State Government.

d) Agreements must be expressed in writing and executed by a person duly authorized by the President or the Governor on their behalf.

e) President or the Governor cannot be personally held liable for contract, it does not grant immunity to the government from the legal provisions of the contract.

It was held that a Government Contract has to comply with the provisions of Article 299 in addition to the requirements of Indian Contract Act, 1872. The contractual liability of the Government is the same as that of any individual under the ordinary law of the contract. (State of Bihar v. Majeed AIR 1954 SC 245).

When an agreement is not signed in the name of the Governor of a State and the name of the Governor is not mentioned in the deed, it was held that it was not valid and binding on the Government. (Mrs. Aliakutty Paul v. The State of Kerala and Ors AIR 1995 Ker 291).

Reasonableness and Fairness:

Every action of the Government must be informed with reason and should be free from arbitrariness. This is the very essence of the rule of law and its bare minimal requirement. (Roman Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC)

Public Interest:

When an award of contract may not be causing any loss to the public exchequer manifestly, it may still be liable to quash for being unfair, unreasonable, discriminatory and violative of the guarantee contained in Article 14. (Shri Sachindanand Pandey v. State of West Bengal AIR 1987 SC 1109).

Equality, Non-Arbitrariness:

The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omni-presence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14. (Menaka Gandhi v. Union of India AIR 1978 SC 597).

Contractual Liability:

Article 299 (2) provides immunity to the President or Governor or any Officer entered into agreement with third party in case of breach of contract by the Government. At the same time it did not provide immunity to the Government. The Government liability is practically the same as that of a private person, subject of course, to any contract to the contrary. (State of Bihar v. Abdul Majid AIR 1954 SC 245)

Government Contract and Section 70 of Indian Contract Act, 1872:

Even though the contract is not in the prescribed format, in case the contract is executed by the third party and the government derives any benefit, the Government is liable to compensate the third party under quasi contracts. The quasi contracts are called implied contracts and these contracts are based on the principles of justice, equity and good conscience and no person should become rich at the cost of others.

Mandatory nature of Article 299:

It is a settled law that Article 299 is a mandatory provision, and not directory one. It was confirmed in number of judgments of the Supreme Court, more specifically specified in State of West of Bengal v. B.K. Mondal & Sons (AIR 1962 SC 779). As already discussed, non-compliance with the provision would result in invalidation of the contract entered into by the government. It is not possible to seek waiver of compliance. (Prakash Baldev Krishan v. State of Punjab AIR 1988 SC 2149).

Principle of Unjust enrichment:

Despite the invalidation of a government contract, it is possible for a third party to enforce the contract against the government in the court of law on some other legal principles. Some of the principles are, ratification of any irregularity and promissory estoppel. Supreme Court in Chatturbhuj (AIR 1954 SC 236) observed that there was nothing to prevent ratification of the contract by the government, especially if such ratification were for its benefit. A right under estoppel would usually be triggered if the government makes some statements to a third party who then acts on reliance upon such statement so as to alter its position.

Restitution:

In case of non compliance of Articles 298 and 299, the third party can rely on Section Sections 64 or 65 or 70 of the Indian Contract Act, 1872 when the government enjoyed the benefits of the contract. The Supreme Court applied section 70 of the Contract Act in BK Mondal case, (AIR 1962 SC 779) when the following conditions are satisfied:

i) That a contracting party must lawfully do something or deliver something;

ii) That, in doing so, the party must not be acting gratuitously; and

iii) That the beneficiary of the act or beneficiary enjoy the benefit thereof.

Law Relating to Government Tenders:

Government tenders in India are regulated by contract law, procurement rules and guidelines. The core principles include transparency, fairness and value for money with a focus on preventing corruption.

What is tender:

A tender is an offer in writing to the contractors/suppliers to execute some specified work or supply some material within a fixed time. It is also called Request for Proposal contains the quantity which has to be supplied, specifications of the work to be carried out, time frame in which the work has to be completed, conditions of contract, plans and drawings.

Tender Laws and Policies:

Article 53 of the Indian Constitution conferred executive power of the Union of India to the President. In turn the President confers these powers on Ministry of Finance. These powers are delegated to the subordinate authorities under General Financial Rules, 1947 which were revised in 2005 and then again in the year 2017. Again each State and Union Territory has its own rules, guidelines or legislation relating to government procurement contracts, based on broader principles of GFR 2017. In addition to the GFRs, the Manual for Procurement of Goods, 2024, Manual for Procurement of Services, 2017 and Manual for Procurement of Works, 2019 serve as broad guidelines.

In the case of conflict between the manuals for procurement and any other past instructions issued by the DoE, the General Instructions on Procurement and Project Management, 2021 issued by the Ministry of Finance shall prevail. In addition to the above, tenders are governed by Indian Contract Act, 1872, Sale of Goods Act, 1930. Some States also have their own legislations on Public Procurement such as: the Rajasthan Transparency in Public Procurement Act, 2013; the Punjab Transparency in Public Procurement Act, 2019; the Karnataka Transparency in public procurement Act, 1999; and The Tamil Nadu Transparency in Tenders Act, 1998.

Notice Inviting Tender:

It is a formal announcement, typically published by a any organization, Government or any entity inviting bids for a specific project, service or supply of goods are services. In India, Government Contracts and tenders are primarily dealt by the Indian Contract At, 1872 and Sale of Goods Act, 1930. A tender is an invitation to offer or inviting bids or quotes from the other party for the supply of goods or services or for construction of buildings.

In N.G. Projects Ltd., v. M/S Vinod Kumar Jain & Ors (2022) 6 SCC 127, it was held that the State cannot reject a bid on the ground of minor deviations or discrepancies that do not affect the substance of the bid or the competitiveness of the tender process.

In Michigan Rubber Ltd., v. State of Karnataka (2012) 8 SCC 216, the Supreme Court upheld the decision of the High Court which dismissed a writ petition filed by a bidder who challenged his disqualification technical grounds.

In Balaji Ventures Pvt., Ltd., v. Maharashtra State Power Generation Company Ltd., (2022) Live Law SC 295 It was held that a bidder who participates in a tender process with full knowledge of its terms and conditions is bound by them and cannot later complain about them. In Afcons Infrastructure Ltd., & anr v. Nagpur Metro Rail Corporation Ltd., & Ors (2016) 16 SCC 818 It was held that the State has the authority to negotiate a price reduction with the lowest bidder and that such a negotiation does not constitute a modification of the tender document or a departure from the tender process.

In Utflex Ltd., v. Govt. of Tamil Nadu & Ors 2021 SCC Online SC 738 The Supreme Court held that interference with government tenders makes the State and its citizens suffer twice, as it delays the execution of public projects and increases their cost.

Earnest Money Deposit and Security Deposit:

In tendering, both EMD and Security Deposit serve as financial safeguards, but they differ in their purpose and timing. EMD demonstrates a bidder's serious intent and commitment to a tender, while the security deposit ensures performance and compliance with the contract terms. In case of breach by the bidder, the owner can forfeit the EMD. With reference to the Security Deposit it should be adjusted towards the loss.

Conclusion:

Like any other party Government is also liable to pay damages to the third party in case of breach of contract and third party is also liable to pay damages to the Government in case breach is committed by third party.