

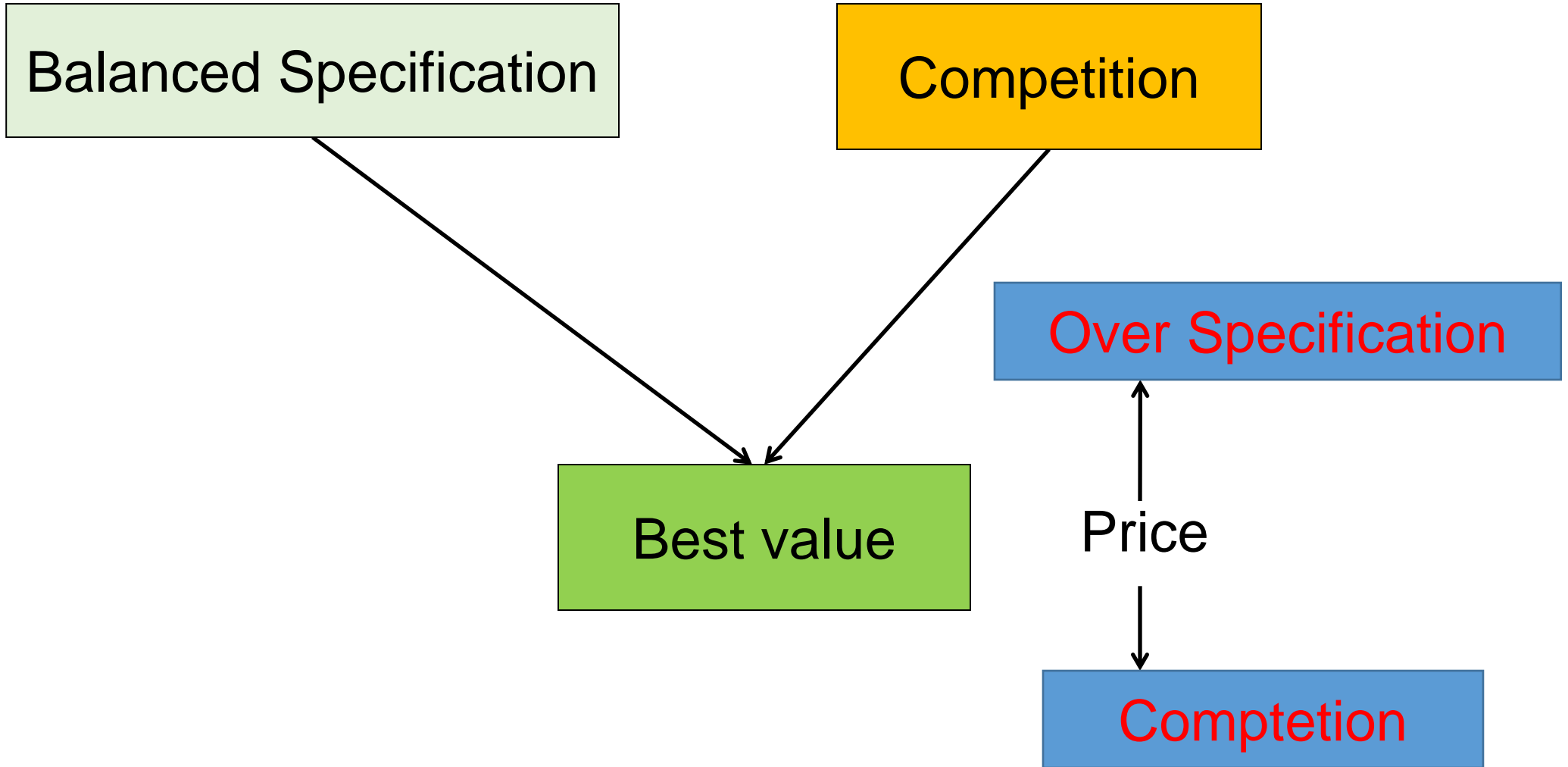
# Contract management

# How do contracts touch our lives?

You make a contract every time you:

- Select something to buy and pay for it.
- Engage someone to help you in your work.
- Agree to provide or receive goods & services.
- Order or lease a piece of office equipment.

# Best value



# Procurement stages

1. Assessment of need: In case of projects have project feasibility report / DPR
2. Procurement planning
3. Bid invitation
4. Bid evaluation
5. Contract award
6. Contract management
7. Dispute resolution
8. Audit / Settlement of court case, if any
9. Record of the documents as per retention schedule

# Avoid

1. A steel central public sector enterprise (CPSE) processed a case for procurement and installation of an equipment under its scheme for renovation and upgradation of one of its units. After appropriate tendering process, an agreement was entered into with the vendor. Supply order was issued. The vendor initiated to fulfil his part of the obligations under the agreement. In the meantime, it was decided by the CPSE to drop its proposal to renovate and upgrade its unit.
2. In a Port Trust, it was decided to replace the existing wharf cranes of 3 tonnes and 6 tonnes capacity with 10 tonnes capacity cranes. An analysis of past few years' cargo handling indicated that most of the cargo was within 3 tonne capacity.

# Elements of contract

1. Offer and Acceptance
2. Intention to create legal relationship
3. Lawful consideration
4. Competency of parties
5. Free consent of parties
6. Lawful object
7. Certainty and possibility of performance
8. Legal formalities

# Contract

- A promise or set of promises between the parties which the law will enforce.
- Offer + Acceptance = Agreement
- Contract = legally enforceable agreement
- All contracts are agreements, but all agreements are not contracts

# A question

- Is Notice Inviting Tender or Request for Proposal an offer?



# Legal aspects of contract

## Offer and Acceptance

- A contract results from an offer and acceptance
- Until there is an agreement either party may withdraw from the incompletely formed transaction
- Once acceptance is made, no new terms and conditions can be introduced
  - unless mutually agreed

# Legal aspects of contract

## Consideration

- Consideration is an essential element of contract
- It must move at the desire of promisor
- It may move from promisee or any other person
- It may be past, present or future
- It must be something of value

# Legal aspects of contract

- **Intention to create legal relationship:** There must be an intention to create legal relations. In commercial arrangements, this is evident. The intention is tested by whether a reasonable man would consider that the parties intended to create legal relations.
- **Competency:** This refers to age, ie attainment of age of majority, sound mind and not suffering any disqualification from contracting by any law. S-11

# Legal aspects of contract

- **Free consent:** This is said to be caused when it would not have been given but for the existence of coercion, under influence, fraud, misrepresentation or mistake. S-13
- **Lawfulness of object:** The object of the agreement must be lawful, if it is to be a valid contract.  
- S. 24

## A couple of question

1. What is the link between risks and the contract?
2. As buyer would you not want the vendor to be fully liable?
3. As a vendor would you not want maximum exemptions?
4. How will one reconcile (2) and (4)?

## The contracts and the risks

- Whereas buyers want suppliers to be fully liable, sellers generally want maximum exemption. The key is to find a sensible balance.
- Consider the risks you can reasonably foresee
- Consider who is best placed to deal with it or to insure each risk
- Define in the contract which party takes which risks and to what extent

# Contract management

- Process of systematically and efficiently managing contract creation, execution and analysis **for maximising operational and financial performance and minimising risk.**
- Is when someone takes on the responsibility of managing contracts for employees or vendors or other parties

# Elements of successful contract management

1. The expected business benefits and financial returns are being realized.
2. The supplier is cooperative and responsive to the organization's needs.
3. The organization encounters no contract disputes or surprises.
4. The delivery of services is **satisfactory to both parties.**



# Stages of contract management

- 1. Initial requests:** begins by identifying contracts and pertinent documents to support the contract's purpose
- 2. Authoring contracts:** model contracts or template of contracts are available. Be careful while drafting a contract from such 'copy – paste' sample contracts.
- 3. Negotiating the contract:** Upon completion of drafting the contract, employees should be able to compare versions of the contract and note any discrepancies to reduce negotiation time.
- 4. Approving the contract:** most bottlenecks occur at this stage

# Stages of contract management..

5. **Execution of the contract**
6. **Obligation management:** This requires a great deal of project management to ensure deliverables are being met by key stakeholders and the value of the contract is not deteriorating throughout its early phases of growth.
7. **Revisions and amendments:** Gathering all documents pertinent to the contract's initial drafting is a difficult task. When overlooked items are found, systems must be in place to amend the original contract.
8. **Auditing and reporting:** Contract management does not simply entail drafting a contract and then pushing it into the filing cabinet without another thought. Contract audits are important in determining both organizations' compliance with the terms of the agreement and any possible problems that might arise.

# What is Force majeure?

- This phrase is generally used in place of 'Act of God' or Powerful Entity which is beyond the control of parties
- The aim is to say that **it won't be a breach** if a party cannot perform on time or does not perform at all due to events outside their control
- The clause may also give the chance to either party to exit the contract if the event is likely to continue indefinitely or if the resultant delay is likely to affect either party badly

## Force Majeure clause in a contract

- The clause, generally, enlists certain events which are beyond the control of parties and states that in the event of occurrence of any of such events, delay in performance under the contract shall be excused and
- In case such event is likely to continue indefinitely, either party can terminate the contract, giving an intimation to the other party

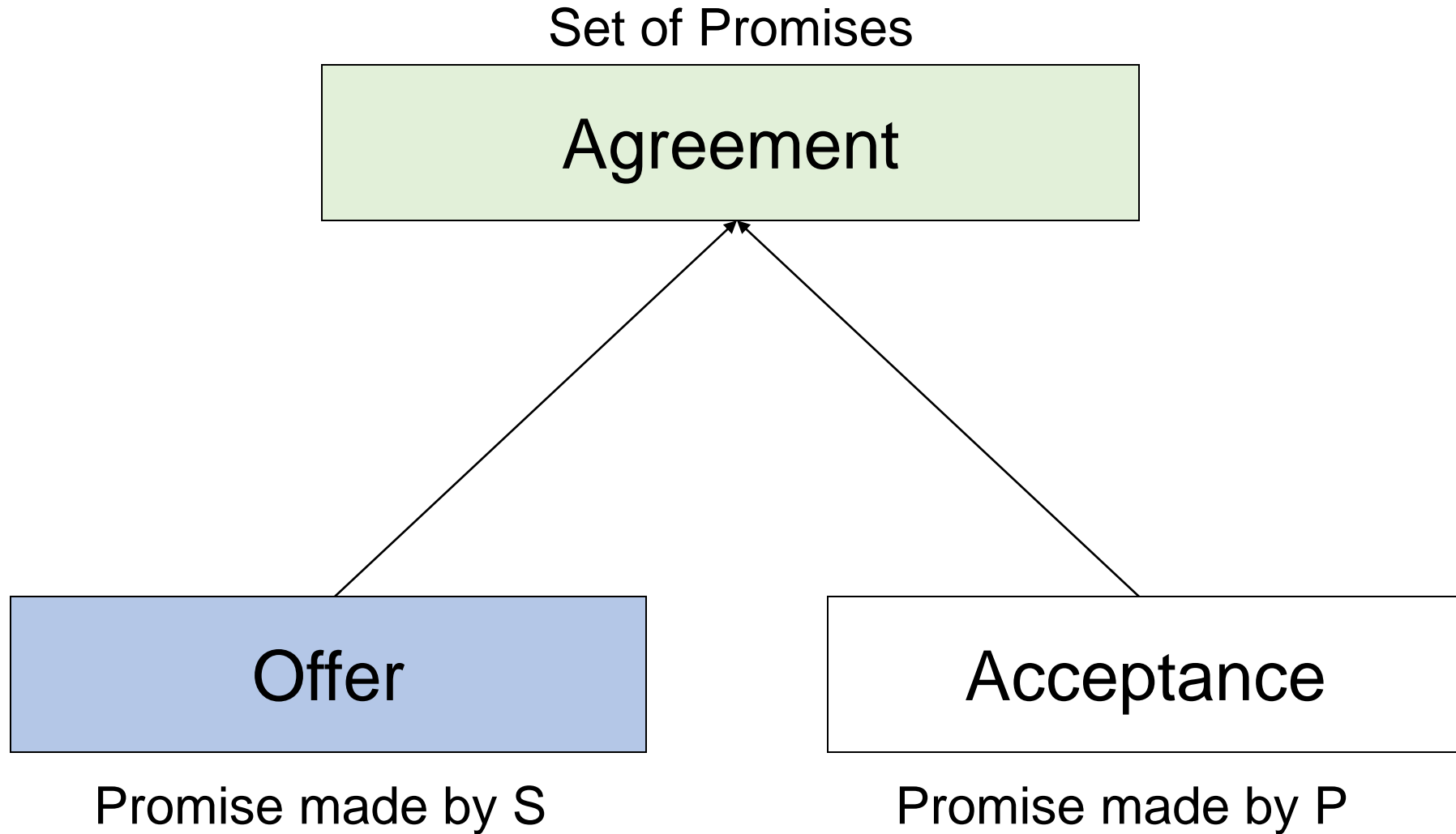
## Letter of Intent

- LOI – The purchaser intends to place order for... stores, qty ..., unit price ..., total price., inclusive of ..., DP..., as per technical details of your tender No..., dt... and subsequent letters..., and as per our (Dept's) standard terms incorporated in our tender invitation No.. Dt...

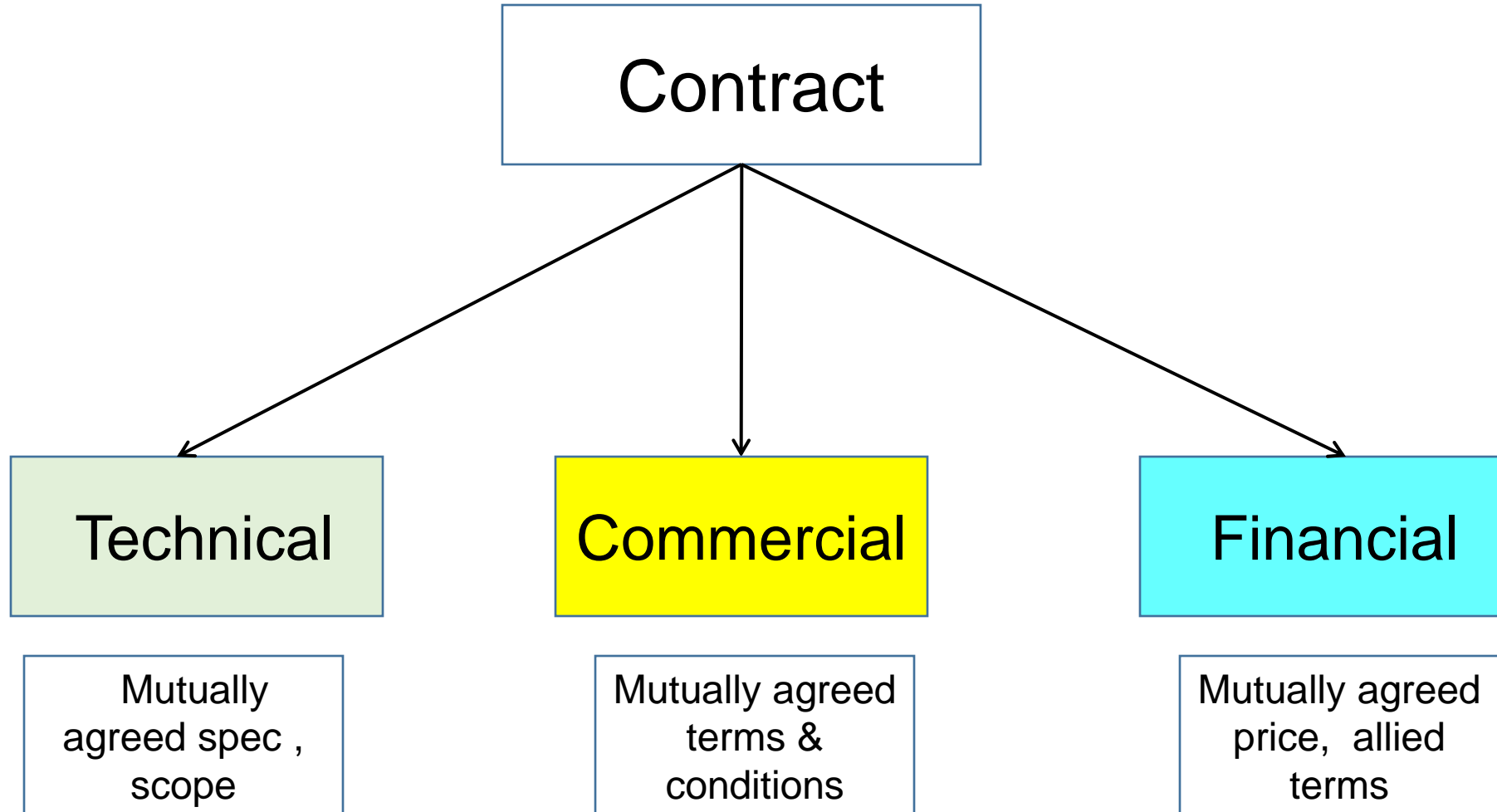
## Letter of Acceptance

- LOA – The purchaser intends to place order for... stores, qty ..., unit price ..., total price., inclusive of ..., DP..., as per technical details of your tender No..., dt... and subsequent letters..., and as per our (Dept's) standard terms incorporated in our tender invitation No.. Dt... This concludes the contract. The detailed contract follows

# What makes an agreement?



# Segments of contract





## Case Study- Contract Specification

- A Project Contract specified that
- “The contractor will perform the work ‘abc’ and the work ‘xyz’ in accordance with the specification ‘S’.
- The contractor performed the work ‘xyz’ as per the spec. But in the case of work ‘abc’, there were some deviations wrt the specification ‘S’. The deviations were minor in nature
- What is ‘minor in nature’?

## Case Study- Price

- While accepting the deviations, purchaser imposed a price reduction, which was not accepted by contractor.
- The contractor contended that unilateral imposition of price reduction was not justified.
- This resulted in a dispute. The contractor approached the court.

# Price and Payment

- Stipulate the unit and total price
- State clearly the liability regarding taxes/ duties
- Incorporate PV clause with base indices & time-lag
- Stipulate the timings for payment
- Enlist the documents for release of payment
- State whether LD to be deducted from each invoice for belated supplies
- Specify the rights of the buyer to recover payments made

## Price Variation clause

$$P_1 = P_0 \left( F + a \frac{M_1}{M_0} + b \frac{L_1}{L_0} \right) - P_0$$

- Where  $P_1$  is the adjustment amount payable
- $P_0$  is the Contract Price at the base level
- $F$  is the Fixed element
- $a$  is the assigned percentage to the material element
- $b$  is the assigned percentage to the labour element
- $L_0$  and  $L_1$  are the wage indices at the base month and year and at the month and year as stipulated in the contract
- $M_0$  and  $M_1$  are the material indices at the base month and year and at the month and year as stipulated in the contract

## Case Study- Deliver period or LD clause

- In a high value tender (Rs 100 crs approx), the supplier had offered a firm delivery period as per tender invitation ( Global Tender).
- In the delivery clause of the contract, it was stipulated that “Supplies will be completed by May 31, 2017.” It was incorporated in the delivery clause itself that in case the supplier fails to adhere to this date, liquidated damages will be levied at the rate of 2% per month or part thereof of delayed period subject to a maximum of 10% of contract value.

## Delivery schedule

- Specify when and at what rate the goods are required to be delivered or services to be performed
- Specify the date of commencement and completion
- In severable contract, indicate the date of completion for each installment
- Emphasize 'Time is the essence of contract'
- **Don't refer to LD provision in the Delivery clause**

## Case Study

- The supplier failed to make any supply by May, 2017. They did not make any request for extension to deliver period.
- The purchaser wrote thrice to the supplier to deliver without further delay. The purchaser then cancelled the contract in Aug, 2017 and claimed damages alleging breach of contract by the supplier.
- The matter was referred to arbitration.

# Terms of Delivery

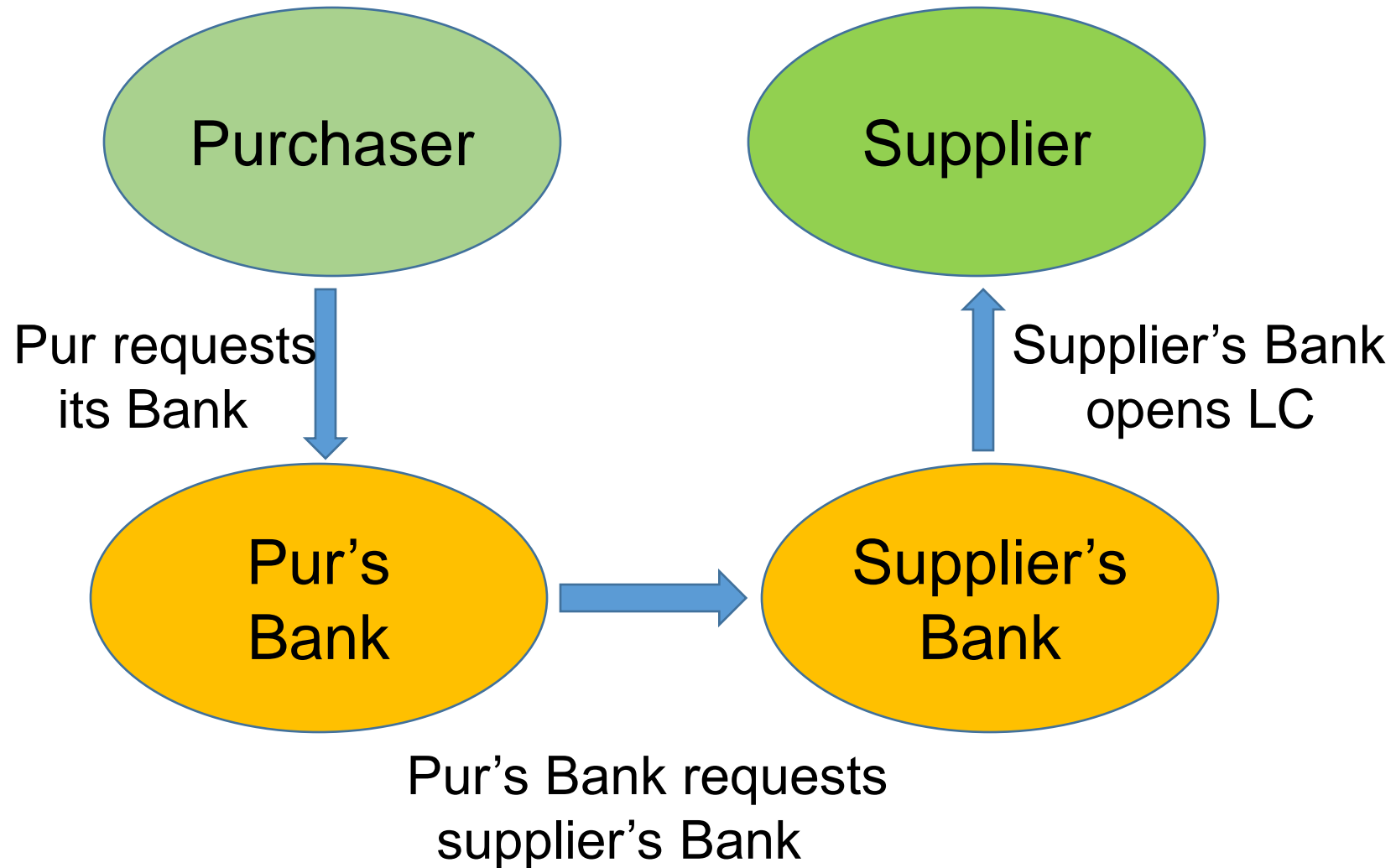
- Specify the terms of delivery
- Specify the packaging and preservation requirements
- Specify the transportation medium
- Make it clear where lies risk loss or damage to the goods till they reach the destination



## Liquidated Damages clause in a contract

- The clause, usually, states that in the event of delay in performance under the contract, liquidated damages shall become leviable at the rate of  $\frac{1}{2}$  % per week or part thereof of delay subject to a ceiling of 10% contract value.
- In some cases, the rate specified is 2% per month or part thereof of delay with a ceiling of 10 %
- In some cases, no ceiling is fixed

# Letter of credit



# Ingredients of public procurement process (9.9.2)

## Tender documents:

1. Notice Inviting Tender (NIT)
2. Instructions to Bidders (ITB)
3. Additional Instructions to Bidders (AITB) (instead of modifying ITB, it is better to have information specific to a procurement as a separate section)
4. Eligibility and qualification criteria
5. Schedule of requirements
6. Technical specifications (including Drawings) and Quality Assurance (Inspections and Tests)

# Ingredients of public procurement process (9.9.2)

## Tender documents (Continued):

7. General Conditions of Contract (GCC)
8. Special Conditions of Contract (SCC)
9. Standard formats, including Bid Cover letter, price schedules, bank guarantees and contract format

# Ingredients of public procurement process (9.9.2)

## Contract agreement (including Letter of Acceptance):

1. What the contractor has to do
2. When, where & to whose satisfaction
3. What the procurement entity has to do
4. Payment to whom, method & the basis
5. Competent authority to permit variation / modification
6. Method of settling dispute
7. Procuring entity's right to cancel (must be fair & equitable)
8. Legality of person signing the contract

# A question

- Which of the two parties will be responsible for unforeseen events that result in delayed delivery:
  1. the vendor or
  2. both the vendor and the buyer or
  3. Neither of the parties?
- How is this resolved?

# Force Majeure

- The listed events are:
  1. Acts of God, Flood ( Earthquake)
  2. War, Hostility, Acts of public enemy, Epidemics, Civil commotion, Sabotage, Fire, Explosion, Strikes, Lockouts
  3. Quarantine restrictions, (Acts of Sovereign Government)

## Notice under Force Majeure

- Notice regarding happening of the event duly evidenced with supporting documents is required to be given within 10 days from the occurrence of the event
- In that case, delivery period may be suitably re-fixed or contract can be terminated without any financial repercussions



# A question

1. A vendor fails to deliver complete or part of the goods or the services.
2. What does the procurement authority do?
3. Will this provision applicable on the total quantity?

## Liquidated Damages (LD)

- If the seller fails to deliver any or all of goods / services within original or refixed delivery,
- Becomes liable to pay Liquidated Damages for the delay, unless covered under Force Majeure conditions
- Levied @ 0.5% per week or part of the week of delayed period as pre-estimated damages not exceeding **5%** of the contract value.

# LD

- Liquidated damages is a penalty imposed on the vendor for the delay in delivery or completion period
- Right?

## Purchaser's right to inspection

- Has the right to inspect the goods at Mfr premises and/ or Consignee's site

## Termination for default

- If the seller does not fulfill their contractual obligations, the same would constitute the breach of the contract and
- The purchaser has the right to cancel the contract
- In such cases, performance security of the bidder shall be forfeited in whole or in part as applicable apart from their downgraded rating or debarment from GeM.

## Resolution of disputes

- May be referred to arbitration nominated by the Purchaser
- Jurisdiction at the place from where contract has been placed by the Purchaser.
- GeM disputes would not be referred to Consumer Forum or Facilitation Council.

## Closure of transaction

- After satisfactory completion of all the obligations under the contract,
- No demand certificate would be digitally signed and issued on line in the GeM
- This will be taken as final settlement of all dues of the contract and treated as repository and archived in the GeM.

## Measures to be taken as a purchaser

- Stipulate Liquidated Damages clause
- Incorporate warranty clause
- stipulate a suitable indemnity clause
- Incorporate a suitable restricting clause
- Stipulate a Fall clause in long term contract
- Stipulate a termination clause reserving right to claim damages
- Incorporate choice of law and jurisdiction of courts



## Measures to be taken as a supplier

- Liquidated damages clause with a ceiling
- Insist on inclusion of Force Majeure clause
- Offer warranty for a shorter period
- Exclude liability for consequential loss
- Limit liability for direct loss and any other forms of loss not specifically excluded
- Request for your home law to be applicable and jurisdiction of courts also

# Procurement authority's obligations

- Provide data
- Approve plans, advance sample
- Provide access to premises
- Arrange clearances
- Provide materials, equipment, utilities
- Provide facilities
- Inspect goods / works

## Contract Management- Inspection & Delivery

- Monitor progress in supply /performance
- Keep watch on delivery period
- Take prompt decision on request for extension of delivery period
- Extend delivery period with LD clause
- Inspect stores within delivery period
- Arrange prompt clearance at Port of entry
- Inspect stores / works at site

# Contract Management- LD and Payment

- Issue Consignee Receipt certificate promptly to supplier
- Settle P V & LD claim quickly
- Ensure timely payments
- Release performance security in time

**Thank You!**