

Government Contracts In India

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INTRODUCTION

The Government Contract has been assumed great importance in the modern times. As we all know that at present the state is the source of wealth and the state is in the nature of the welfare state. Government's economic activities are expanding as the government is increasingly assuming the role of the dispenser of the large number of benefits. In the current scenario large number of individuals and business organizations are enjoying government contract such as license, quota, mineral rights etc. This raises the possibility of exercise of power by the government to dispense largess in an arbitrary manner. It is axiomatic that government or any of its agencies ought not to be allowed to act arbitrarily and confer benefits on whomsoever they want therefore. There is necessity to develop some norms to regulate and protect individual interest in such wealth. Thus structure and discipline the government discretion to confer such benefits. Therefore, to prevent arbitrary acts by the government and its agency, the constitutional obligations under the constitution. A contract is known as an agreement between two or more parties that is enforceable by law. In order for a contract to be legally binding, there must be an offer and acceptance, it must be expressed or implied, there must be a valid consideration, etc. However, in the case of government contracts, one party to the contract is either the Central or state government.

The subject of government contracts has assumed great importance in the modern times. Today the state is a source of wealth. In the modern era of a welfare state, government's economic activities are expanding and the government is increasingly assuming the role of the dispenser of a large number of benefits. Today a large number of individuals and business organizations enjoy largess in the form of government contracts, licenses, quotas, mineral rights, jobs, etc. This raises the possibility of exercise of power by a government to dispense largess in an arbitrary manner. It is axiomatic that the government or any of its agencies ought not to be allowed to act arbitrarily and confer benefits on whomsoever they want. Therefore there is a necessity to develop some norms to regulate and protect individual interest in such wealth and thus structure and discipline the government discretion to confer such benefits. Government contracts are the kinds of contracts that are executed by the government for a variety of purposes such as construction, management, manpower supply, maintenance and repairs, IT-based projects, etc. When the central government or the state government gets involved in a contract it is known as a government contract. The party who executes the contract on the behalf of the government is referred to as a contractor.

Meaning of Contract

A contract is an agreement enforceable by law which offers personal rights, and imposes personal obligations, which the law protects and enforces against the parties to the agreement. The general law of contract is based on the conception, which the parties have, by an agreement, created legal rights and obligations, which are purely personal in their nature and are only enforceable by action against the party in default. A contract means, "An agreement enforceable by law"¹.

The word 'agreement' has been defined as 'every promise and every set of promises, forming consideration for each other'².

A contract to which The Central Government or a State Government is a party is called a 'Government Contract'. Government contracts are those contracts in which one of the parties is either state or the central government. That's why all government contracts are made in the name of the President or the Governor in the case of the central and state government, respectively.

Contract to which the Central Government or State Government as case may be is a party is called a "Government Contract" the Indian Contract Act does not prescribe any form for entering into contract .A contract may be oral or in writing it may be express or implied from of circumstances of the case and the conduct of the parties³.

The contractual liability of the State under the contract is the same as that of an individual person under the general contract. The present constitution has not brought any change in the legal status related to this matter and the state liability is exactly the same like the East India Company before 1858.

¹ Section 2(h) of the Indian Contract Act, 1872.

² Section 2(e) of the Indian Contract Act, 1872.

³ Pollock & Mulla, "Indian Contract Act", Allahabad Law Agency, 1996, p.312

Constitutional Provisions of Government Contract

It is true that in respect of Government Contracts the provisions of Article 299(1) must be complied with, but that does not mean that the provisions of the Indian Contract Act have been superseded.

The Constitution of India recognizes the contractual liability of the Central and state governments. Article 298 of the Constitution clearly lays down the power of the Central and state governments to carry out any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose. It is the executive power of the Union and the states⁴.

Article 299 of the Constitution of India reads; "All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise⁵."

Thus according to Article 299 the requirements of valid government contracts which need to be fulfilled are:
All the contracts must be expressed to be made by the President in the case of the Central Government and the Governor in the case of state governments.

All the government contracts must be executed on behalf of the President of India or the Governor of the states, depending on the situation.

All the contracts must be executed by the President or the Governor depending on the situation.
The use of the word "executed" in the Article means that the government contract must be in writing. An oral agreement between the government and the other party would not be valid for the purposes of Article 299⁶.

"It may be noted that like other contracts, a Government Contract is also governed by the Indian Contract Act, yet it is distinct a thing apart. In addition to the requirements of the Indian Contract Act such as offer, acceptance and consideration, a Government Contract has to comply with the provisions of Article 299. Thus subject to the formalities prescribed by Article 299 the contractual liability of the Central or State Government is same as that of any individual under the ordinary law of contract."

As regards the interpretation of contract, there is no distinction between the contracts to which one of the parties is the Government and between the two private parties.

Though there is hardly any distinction between a contract between private parties and Government contract so far as enforceability and interpretation are concerned yet some special privileges are accorded to the Government in the shape of special treatment under statutes of limitation.

Some privileges are also accorded to Government in respect of its ability to impose liabilities with preliminary recourse to the courts. This probably is because of doctrines of executive necessity and public interest⁷.

Requirements for Government Contracts:

- The contract must be expressed to be made by the Governor or the President.
- It must be executed in writing.
- The execution should be done by persons and in a manner directed or authorized by the Governor or the President.

What is Article 299 of the Constitution?

Article 299 of the Constitution deals with the manner and form of contracts made by or on behalf of the government of India or any state government. The government had been entering into contracts even in the pre-

⁴ Power to Carry on Trade, etc.

The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purpose:

Provided that--

(a) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State; and

(b) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament.

⁵The Indian Constitution, 1950

⁶ M.P.Jain, Indian Constitutional Law, Leis Nexus, 2018

⁷ T.K. Mukharjee, "Law of Contract: special reference to Government Contracts, Tenders and Auctions", Primer Publishing Company, 2008

independence era. The Crown Proceedings Act of 1947 played a role in shaping Article 299. The Crown Proceedings Act specified that the Crown could not be sued in court for a contract it entered.

- **Purpose and Object:**
 - Article 299 outlines the manner in which contracts made in the exercise of the executive power of the Union or a State shall be expressed and executed.
 - It aims to establish a specific procedure to safeguard public funds and prevent unauthorized or illegitimate contracts.
- **Expression and Execution:**
 - 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.
- **Immunity of the President/Governor:**
 - While Article 299(2) states that the President or the Governor cannot be personally held liable for contracts, it does not grant immunity to the government from the legal provisions of the contract.
 - The government (Union or states) in India can be sued for torts (civil wrongs) committed by its officials⁸.

The SC Court's Ruling

Glock Asia-Pacific Limited⁹ filed an application against the Centre regarding the appointment of an arbitrator in a tender-related dispute. The government objected to the appointment of a retired Delhi High Court judge as the arbitrator, citing a tender condition that required an officer from the Law Ministry to act as the arbitrator. The Supreme Court held that the arbitration clause, allowing a government officer to resolve the dispute as an arbitrator, conflicted with Section 12(5) of the Arbitration and Conciliation Act, 1996¹⁰.

The Judgements Related to Article 299

- **State of Bihar v Majeed**

SC ruled that a Government Contract has to comply with the provisions of Article 299 in addition to the requirements of the Indian Contract Act, such as offer, acceptance, and consideration. The contractual liability of the Central or State Government is the same as that of any individual under the ordinary law of contract, subject to the formalities prescribed by Article 299¹¹.

- **Mrs. Aliakutty Paul vs The State of Kerala and Ors**

A tender of the contract for construction of a bridge was accepted by the Executive Engineer, but he did not sign it in the name of the Governor, it cannot be said that there is a valid contract in conformity with Article 299 of the Constitution. The decision explains the rationale and scope of Article 299 of the Constitution and emphasizes that its provisions are enacted for safeguarding the government against unauthorized contracts¹².

Principle for Government Contracts

Reasonableness, fairness

The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is projected by Article 14 and it must characterize every State Action, whether it be under the authority of law or in exercise of executive power without making of law. The state cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. The action of the Executive Government should be informed with reason and should be free from arbitrariness. It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege¹³.

⁸ Retrieved From: <https://www.drishtiiias.com/daily-updates/daily-news-analysis/article-299-of-the-constitution-government-contracts, 20-02-2024, 2.00p.m>

⁹ Glock Asia Pacific Ltd. Vs. Union of India, Arbitration Petition no.51, 2022

¹⁰ Section 12(5) of the Act provides that notwithstanding anything in prior agreements to the contrary, a person would be ineligible to be appointed arbitrator if he/she has any relationship with either party to the dispute or their counsels in terms of the Seventh Schedule of the Act, except without written consent of.

¹¹ AIR 1954 SC 245

¹² AIR 1995 KER291

¹³ Ramana Dayaram Shetty v International Airport Authority of India,(1979)3 SCC

Public Interest

Tate owned or public owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. public interest is the paramount consideration. There may be situations where there are compelling reasons necessitating the departure from the rule, but there the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism. The consideration to weigh in allotting a public contract are and have to be different than in case of a private contract as it involves expenditure from the public exchequer. The action of the public authorities thus have to be in conformity with the standards and norms which are not arbitrary, irrational or unreasonable. And whenever the authority departs from such standard or norms, the Courts intervene to uphold and safeguard the equality clause as enshrined in Article 14 of the Constitution and strike down actions which are found arbitrary, unreasonable and unfair and prone to cause a loss to the public exchequer and injury to public interest. Therefore, even when an award of contract may not be causing any loss to the public exchequer manifestly, it may still be liable to quashment for being unfair, unreasonable, discriminatory and violative of the guarantee contained in Article 14¹⁴.

Equality, Non- Arbitrariness

From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belonging to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is violative of Article 14. 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 omnipresence and the procedure contemplated by Article 21 must answer the test of reasonableness in order to be in conformity with Article 14¹⁵.

Contractual liability

Article 299(2) immunizes the President, or the Governor, or the person executing any contract on his behalf, from any personal liability in respect of any contract executed for the purposes of the Constitution, or for the purposes of any enactment relating to Government of India in force. This immunity is purely personal and does not immunize the government, as such, from a contractual liability arising under a contract which fulfils the requirements under Article 299(1).

The governmental liability is practically the same as that of a private person, subject, of course, to any contract to the contrary¹⁶.

In order to protect the innocent parties, the courts have held that if government derives any benefit under an agreement not fulfilling the requisites of Article 299(1), the Government may be held liable to compensate the other contracting party under S.70 of the Act, on the basis of quasi-contractual liabilities, to the extent of the benefit received. The reason is that it is not just and equitable for the government to retain any benefit it has received under an agreement which does not bind it. Article 299(1) is not nullified if compensation is allowed to the plaintiffs for work actually done or services rendered on a reasonable basis and not on the basis of the terms of the contract¹⁷.

Categories of Government Contract

Fixed-price contracts

In these kinds of contracts, the payment amount is not dependent on the resources used or the time expended. It is a contract where the predetermined value of the goods or services is already mentioned in the contract. In the contract, several provisions like contract change, economic pricing, or defective pricing are sometimes included.

The purposes of these contracts are to create agreements for the contractual parties that set a firm price for the goods or services provided. They provide certainty to both parties.

Cost reimbursement contract

Contrary to the fixed-price contracts, cost-reimbursement contracts are the type of contract where the contractor gets the reimbursement for the cost incurred while carrying out the work as per the contract and receives an additional fixed fee from the company/owner. Therefore, in this type of contract, the contractor can secure the labourer and the materials required for the project without having to fit all of it into a tight pre-fixed budget. This contract guarantees that the contractor will not only be paid solely for the costs but also any additional payments made by him. Cost-plus a

¹⁴ Shri Sachidanand Pandey v State of W.B., AIR 1987 SC 1109

¹⁵ Maneka Gandhi v Union of India, AIR 1978 SC 597

¹⁶ State of Bihar v Abdul Majid, AIR 1954 SC 245: 1954 SCR 786

¹⁷ Retrieved from: <https://blog.ipleaders.in/understanding-government-contracts/>, 21.02.2024 12:30p.m

percentage of cost is a type of cost-reimbursement contract, where the buyer pays the seller the cost incurred plus a percentage of the cost.

Incentive contracts

These kinds of contracts were presented to motivate the contractors in executing their work, by awarding them with monetary incentives. Here one party promises the other party additional remuneration only if the other party executes the task with outstanding performance. Incentive contracts enable the contractor to put their best efforts to maximise the results and it also prevents inefficiency on part of the contractor. Types of incentive contracts are fixed-price incentive contracts, cost plus award fee contracts, delivery incentives, performance incentives, multiple incentive contracts, and cost-plus incentive contracts.

Indefinitely delivery contract

In this type of contract, the duration to perform the task stated in the contract is known but the exact time of delivery is unknown. This contract ensures the supply of an indefinite quantity of services mentioned in the contract within a fixed period of time. The government enters into this type of contract when the quantity of services is unknown and hence it is difficult to complete the contract within a stipulated period. Types of indefinite-delivery contracts are definite quantity contracts, indefinite-quantity contracts and requirements contracts.

Time and materials contract

It is the last type of government contract. It is carried out when there is the absence of a thorough knowledge of the duration or the cost to be incurred. In this kind of contract, government surveillance is required to monitor the work process and to observe that the parties adhere to the terms laid down in the contract. This type of contract is only used when there is no scope to employ any other contracts. Like fixed-price contracts, time and materials contract also includes a sealing price that the contractor exceeds only at his own risk¹⁸.

Pros of Government Contract

There are many benefits to government contracting for small businesses, including:

Steady and reliable revenue: Government contracts can provide a stable and predictable source of revenue for small businesses, which is especially important during times of economic uncertainty.

Access to a large market: The government is the world's largest buyer of goods and services, providing small businesses with access to a vast market that might otherwise be difficult to tap into.

Competitive advantage: Becoming certified as a government contractor can give small businesses a competitive advantage over non-certified competitors, as certified businesses may be given priority when it comes to awarding contracts.

Credibility and trust: Working with the government can enhance a small business's reputation and establish it as a credible and trustworthy partner.

Opportunities for growth: Government contracts can provide small businesses with opportunities for growth and expansion, allowing them to take on larger and more complex projects.

Long-term relationships: Winning a government contract can lead to long-term relationships with the government, providing ongoing revenue and growth opportunities¹⁹.

Cons

While there are undoubtedly many benefits to government contracting, there are also some potential drawbacks to consider:

Lengthy and complex process: The process of becoming certified as a government contractor can be lengthy and complex, requiring significant time and resources to navigate.

High competition: The competition for government contracts can be intense, with many businesses vying for the same opportunities.²

High compliance requirements: Government contracts often have strict compliance requirements, which can be time-consuming and costly.

¹⁸ Retrieved from: <https://www.indiafilings.com/learn/different-types-government-contracts/>, 22.02.2024, 13:29

¹⁹ Retrieved From:<https://governmentservicesexchange.com/the-pros-and-cons-of-government-contracting/>, 22.02.24, 13:42

Delayed payments: Payments for government contracts can be slow and delayed, creating cash flow challenges for small businesses.

Risk of protests and disputes: Government contracts are subject to protests and disputes, which can create uncertainty and delay in the contract award process.

Dependency on government contracts: Small businesses that rely heavily on government contracts may be vulnerable to changes in government spending priorities, which could impact their revenue and profitability.

Overall, government contracting can be a complex and challenging process, and small businesses should carefully weigh the potential risks and benefits before pursuing this avenue of growth²⁰.

CONCLUSION

In order to be a valid government contract, all the requirements laid down in Article 299, must be met; such as a written contract, executed by an authorised person, expressed in the name of the President or the Governor as the case may be. Therefore, a government contract becomes valid and enforceable when all the provisions of Article 299 are complied with. Moreover, because of the advantages and the active role played by the judiciary in protecting the interest of the parties in accordance with the provisions stated under Article 299 of the Indian Constitution we can see the growing importance of government contracts.

²⁰ Retrieved From: <https://governmentservicesexchange.com/the-pros-and-cons-of-government-contracting/>, 22.02.2024