E NEWS Letter

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From the Desk of Chairman

IIMM Delhi Branch is a leading branch of IIMM and has organsied Workshops, EDPs, Seminars, webinars and Conventions on many relevant themes related to supply chain management and has helped in the development of profession and professionals.

Seminar on Public Procurement by IIMM Delhi is a much awaited event by professionals. Keeping in view the same, IIMM Delhi Branch is organizing a seminar on **"Public Procurement – A Paradigm Shift Policy Initiatives, GeM, Govt. and PSU Procurement" on June 29, 2024 at Hotel Le-Meridien, Windsor Place, Janpath, New Delhi.**

The seminar will be highly beneficial to professionals in the field of SCM on this occasion particularly those working in the field of public procurement. IIMM is bringing out a compilation of articles from eminent practioners, which will be useful to procurement professionals.

I wish the seminar on "**Public Procurement – A Paradigm Shift Policy Initiatives, GeM, Govt. and PSU Procurement**" a great success and hope that there will be many takeaways from this seminar.

(Sanjay Shukla)
Chairman, IIMM Delhi
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REPORT ON
Seminar on "Public Procurement - A Paradigm Shift: Policy Initiatives, GeM, Govt. and PSU Procurement" on 29th June 2024 at Hotel Le-Meridien, New Delhi.

Indian Institute of Materials Management, Delhi Branch Hosts Seminar on "Public Procurement - A Paradigm Shift: Policy Initiatives, GeM, Govt. and PSU Procurement" on June 29th 2024 at Hotel Le Meridien, New Delhi, focusing on pivotal shifts in public procurement policies, with an emphasis on Government e-Marketplace (GeM) and procurement by Public Sector Undertakings (PSUs). The seminar, titled "Public Pro - A Paradigm Shift: Policy Initiatives, GeM, Govt. and PSU Procurement," brought together esteemed experts, government officials, and public procurement professionals to discuss contemporary challenges and of innovative solutions in the realm of public procurement. The seminar was attended by about 200 delegates including many seminar officers of GM and above from Govt. and PSU's.

IIMM led by Mr. H.K. Sharma, Immediate Past President of IIMM, organized the seminar on this relevant issue with the dedicated support of Mr. Sanjay Shukla, Chairman of IIMM Delhi, along with Mr. Sanjeev Kr Bhatia, Co-Chairman of the seminar and Senior Vice President from Indraprastha Gas Limited (IGL), Shri Himanshu Vashishtha from SPMCIL , New Delhi, Shri Ram Gopal, NC Member, Shri D K Singh, NC Member and other EC members including Shri Narendra Kumar, Shri Umesh Mittal , Shri Rahul Bhatia, Shri Srideb Nanda and Shri Nikhil Gaur.

Shri Sanjay Shukla, Chairman Delhi Branch welcomed the participants and mentioned about activities of Delhi Branch, particularly the programmes on public procurement.

Shri Sanjeev Kumar Bhatia, Sr. Vice President, Indraprastha Gas Limited and Vice Chairman Delhi Branch talked about IIMM and its activities and

international linkages and educational programmes and was master of ceremony.

Shri H K Sharma, Immediate Past President and Seminar Chairman highlighted the role of Public Procurement, its National and International importance, current trends in public procurement and paradigm shift in public procurement.

The distinguished Chief Guest, **Lt. Gen. B S Sandhu, AVSM, VSM (Retd), Former Director General of Supplies & Transport, Army HQrs. Ministry of Defence,** delivered the inaugural

address, highlighting the strategic importance of efficient procurement practices in enhancing national security and economic vitality. The Guest of **Honour, Sh. S J Ahmad, Executive Director of Steel Authority of India Limited (SAIL),** emphasized the role of PSUs in driving economic growth through robust procurement strategies. Shri Ram Gopal, Former ED, SAIL proposed the vote of thanks for inaugural programme.

Eminent speakers included **Mr. Sanjay Agrawal, Advisor from the Procurement Policy Division, Ministry of Finance,** who discussed the

latest policy initiatives of government including Quality and Cost Based Selection (QCBS) in project procurement and selection of consultants alongside incentives for domestic manufacturing and SME participation. **Mr. Shailendra Singh, Chief Technical Examiner** from the Central Vigilance Commission, addressed vigilance issues crucial to modern public procurement practices, underscoring transparency and integrity.

Insights were provided by **Mr. K K Sharma, Former Director General of the Competition Commission of India,** and head of K K Sharma Law Offices,

New Delhi who explored competition law implications in public procurement, ensuring fair market practices and promoting healthy competition. Mr. Rajesh Kumar, Director of Government e-Marketplace (GeM), elaborated on, latest changes in GeM, recent technological integrations and incident management policy aimed at enhancing efficiency and accountability in procurement processes.

Mr. Rohit Madan, Executive Director (Head - MIND) of Oil & Natural Gas Corporation Ltd. (ONGC), and **Mr. B C Sharma,** Chief General Manager (Materials Management) from the same

organization, shared perspectives on the procurement challenges and strategies from the perspective of a major PSU.

Mr. Prakhar Deep, Principal Associate at Shardul Amarchand Mangaldas, provided insights into dispute

resolution mechanisms in contract procurement, focusing on issues such as liquidated damages and other contractual liabilities.

Vote of thanks & summing up of the proceedings of seminar was done by Mr. **Himanshu Vashishtha, Manager**, SPMCIL.

After the seminar, an interview about public procurement and IIMM has given to STv National Channel by Mr. H K Sharma, IPP and Mr. G K Singh, Past President and was telecast by the channel.

The programme highlights were also telecast by Channel Vartman Yug in Hindi and on YouTube.

There were highly positive feedbacks from participants about seminar.

LEGAL ASPECTS OF PUBLIC PROCUREMENT

D.K.SINGH, EX. DEPUTY DIRECTOR GENERAL, DGHS

Introduction: A Procurement Contract, besides being a commercial transaction, is also a legal transaction.

There are a large number of laws that may affect various commercial aspects of Public Procurement Contracts. A public procurement professional is expected to have a working knowledge of the following basic laws for procurement. However, he is not expected to be a legal expert. Other laws will be discussed in subsequent modules.

1. Indian Contracts Act, 1872
2. Sale of Goods Act, 1930 and
3. Arbitration and Conciliation Act, 1996

If standard contract forms are used, the procurement official, with this working knowledge can discharge his normal functions without frequent legal help. In case any complex legal issue arises, or a complex contract beyond the Standard Contract Form is to be drafted, appropriate legal professional may be associated at an early stage.

Salient Features of the Indian Contract Act, 1872

Three Steps for Concluding Contract: To initiate procurement, a "Notice Inviting Tender (NIT)", is to be issued. As per the Indian Contract Act (The Act) – this is legally called a "Proposal" made by the First Party (Procuring Agency). This is the first of the three steps as per the Act required for concluding a contract. In response to this, one or more bidders submit their bids – legally this is an "Offer" from the Second Party (Bidder) – as the second step of the three steps. Finally, one of the "Offers" is selected by the First Party (Procuring Agency) and an "Acceptance" is conveyed to the Second Party (Bidder). This is the last step in concluding a contract. With the acceptance, the "Offer" of the Second Party (Bidder) now assumes a status of a legal "Promise" and the Second Party (Bidder) acquires the legal liabilities of a "Promisor". The First Party (Procuring Agency) acquires legal rights of a "Promisee". The set of three steps - Proposal, Offer and Acceptance is called an "Agreement". Any legally enforceable "Agreement" is called a "Contract". This is how contracts get concluded with this three- step process.

Counter-Offers and Negotiations: In this basic three-step process, it is assumed that the "Acceptance" of the "Offer" is given in to, without any deviation. Thus, the contract gets concluded, without the need of any acknowledgement of the acceptance, from the Second Party (Bidder). In normal situations, this is seldom the case. The acceptance is at variance with the offer in many minor issues, like change in language of the clauses etc. In such a situation, the contract does not get automatically concluded with the "Acceptance". It is legally important in such a situation to obtain the written acknowledgement or signatures on the Contract from the Second Party (Bidder). This is the normal commercial practice.

There could even be major variations in Acceptance of Offer – even the price; financial terms or the delivery terms may not be totally accepted. In such situations, the chain of three steps gets broken and the last-step in the sequence, which is "Acceptance", reverts to the legal status of a Second Step – a "Counter-offer". As per law, the Second Party or Bidder's original "Offer" loses its legal validity. The Bidder does not remain bound by his 'Promise' or "Offer". Now, the contract would get concluded only after, an "Acceptance" of the "Counter-Offer" (as the third step – that too without variation), by the Second Party (Bidder) – and he is free not to do so. It is important to avoid such an uncertain legal position. Therefore, when the second party (Bidder) is invited for price negotiations; a legally worded undertaking is taken from him, without which negotiation is not started – that, in case of failure of negotiations, the Second Party (Bidder) would keep its original offer valid for acceptance, for a specified period.

Legal Concept of Completion of Communication of Proposal, Offer and Acceptance: Disputes do arise as to the point of time, when a communication of Proposal, Offer or Acceptance thereof, is legally complete and binding on either party. These legal stipulations often become very crucial.

The communication of a proposal or Offer is complete, when it reaches the person to whom it is made. Thus, a bid from a bidder is effective only when it reaches (as per records) the First Party (Procuring Agency). Hence, if an offer sent by post, reaches the First Party (Procuring Agency), after the tender closing time; he is not responsible for the postal delays, irrespective of proof produced by the sender that it was sent well in time. The intervening period is the responsibility of the bidder.

The case of completion of communication of an acceptance is a diametrically opposite legal

stipulation. It is different for the purpose of respective legal liabilities of the Bidder and Procuring Agency. It is considered complete, for the purpose of legal liability of the Second Party (Bidder), when it is put into transmission by the First Party (Procuring Agency) so as to be out of his power. However, for the purpose of legal liability of the First Party

Procuring Agency), it is considered complete, when it reaches the Second Party (Bidder). Thus, the time the First Party (Procuring Agency) delivers an Acceptance of Offer to Post/Courier – he can insist that the acceptance is complete and the Second Party (Bidder) becomes bound by his promise – although it may have not reached him yet. However, the Second Party (Bidder), cannot take his Offer to have been accepted till it reaches him and the First Party (Procuring Agency) can still revoke his acceptance, during this interim period. This is not how a layman would understand completeness of communications – but this has very important legal ramification for the Procuring Agency and Bidder.

Revocation of Offer or Acceptance: The communication of a revocation of an offer by the Second Party (Bidder) or revocation of acceptance by the First Party (Procuring Agency) has legal provisions similar to that of Communication of Acceptance in the paragraph above. Therefore, it is legal for the Second Party (Bidder) to revoke his offer at any time before the communication of its acceptance is complete, but not afterwards. However, administrative actions like forfeiture of Earnest Money Deposit or cancellation of vendor registration/ debarment can still happen. An acceptance can be revoked by the First Party (Procuring Agency) at any time before the communication of acceptance reaches the Second Party (Bidder), but not afterwards.

Pre-Requisites for "Agreement" to Become Legally Enforceable: As per law, the pre- requisites for an "Agreement" to become legally enforceable – so that it becomes a Contract are:

Must Have a "Consideration of Promise": The Bidder's "Promise" to supply required material is against an expectation of payment from the First Party (Procuring Agency). This expectation of payment is called the "Consideration for the Promise" and the "Supply of Materials" is the "Object of the Promise". Similarly, the purchasing party with his acceptance of the "Offer" implies a "Reciprocal Promise" to make the payment (object of the reciprocal promise) for the "Consideration" of supply of the required goods. A "Promise" or a "Reciprocal Promise" must have a "Consideration" for it to be a legally enforceable contract. Thus, an offer to supply materials free of cost is not a legal contract. Therefore, for honorary appointments, a payment of "Rs 1 per month" is added to make the appointment a legally enforceable contract.

Must Have Legal Intentions and Formalities: It should be clear from the context and formalities of the proposal or offer that the intention is to create a legal contract. Agreements in which the meaning is not certain, or not capable of being made certain, are void.

Must Have Free Consent of the Parties: Any agreement obtained without the "Free" consent of parties is not legally enforceable. Consent is not free when it involves:

Coercion: "Coercion" is the committing, or threatening to commit, any act forbidden by the Indian Penal Code, 1860 or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Undue Influence: "Undue influence" implies that the relations subsisting between the parties are such, that one of the parties is in a position to dominate the will of the other and uses that position, to obtain an unfair advantage over the other.

Fraud: It is any act by a party either of declaration of a fact known to him to be false; or concealment of a detrimental fact known to him; or any other act by him, with an intention to deceive or to induce other party to enter into the contract.

Misrepresentation: Presentation of a true fact (or any other act) by one party, in a manner not warranted by the information available to him, to gain an advantage for himself; or to mislead the other party to make a mistake or come to a wrong understanding

Mistake: This is a situation when both the parties are under mistake regarding a matter of fact

Parties should be Competent to Contract: The parties are competent to contract if they are of:

Age of Majority: Persons below the age of 18 years are not legally competent to contract

Sound Mind: A contract with a person who is of unsound mind at the time of signing the contract would not be a legal Contract

Not Barred by Law: The party must not be barred by any other law, from entering into a contract – as can happen to a person who is declared bankrupt.

Must Have Lawful Consideration and Object: Consideration or the Object of an Agreement is not lawful if it is partly or fully forbidden by law; or is of such nature that, if permitted it would defeat the provisions of any law; or is fraudulent; or if it involves or implies, injury to the person or property of another; or if it is immoral, or opposed to public policy.

Concept of "Time is the Essence of the Contract" and Liquidated Damages: If a contractor fails to perform, as per the time period specified therein, The Procuring Agency has the right to cancel, the unperformed part of the contract. However, this right is available only if, it is made clear in the contract that "time is the essence of the contract". Therefore, the contract must have a clear clause stating this intention. If such a clause is not there; or the Procuring Agency does not wish to cancel the contract; the person or organisation is entitled for compensation from the contractor for any loss incurred due to such delayed performance. Normally, compensation for loss due to delay is covered in a clause, called the "Liquidated Damages Clause". This stipulates a fixed percentage of the value of the delayed portion, for every unit of time of delay, to be recovered. This is usually fixed as ½% of the value of delayed goods, per week of delay, subject to a maximum of 10%. As per the current law, the Procuring Agency need not prove that he has incurred such a loss, if the Liquidated Damages clause is provided. Damages for delay can only be claimed, if the contractor is allowed to perform the delayed portion of contract, by granting an extension in time. If the Procuring Agency exercises the right to cancel the contract as a result of delay, such damages cannot be recovered – only damages for Breach of Contract, discussed later can be recovered then.

Need for Care When Accepting Delayed Performance of Contract: If, in case of a contract voidable on account of the contractor's delay in performance of the contract, the Procuring Agency accepts (or indirectly indicates acceptability of) performance of the contract at any time other than the agreed time, the Procuring Agency forfeits its right to claim compensation for any loss due to the delay, unless, at the time of acceptance of delayed performance of contract, the agency gives notice to the contractor, of its intention to claim compensation for any loss. Once the contract performance is delayed, correspondence with the contractor, even for innocent enquiry about the status of performance, would cost the Procuring Agency his rights, unless it is written that, "This is issued without any prejudice to our rights to recover compensation for the loss due to the delay".

Modifications of the Contract Conditions: Once the contract is concluded, the parties can mutually agree to substitute the contract with a new one; or cancel (rescind) it partly or fully; or vary its terms of contract. These in legal terms are respectively called, novation, rescission, and alteration of the contract. Under the law, if the Procuring Agency neglects; or refuses to provide to the contractor, reasonable facilities as per the contract for the performance of contract, the contractor is excused by such neglect or refusal as to non-performance caused thereby. Thus, mainly in Works and Consultancy Contracts, the Procuring Agency must be alert to provide all facilities promised to be provided in the contract, to prevent failure of the contract.

Breach of Contract: When a contract has been broken, the party who suffers by such breach is entitled to receive compensation from the party that has broken the contract, compensation for any loss or damage caused to him thereby. The right to claim such damages are not extinguished, if the Procuring Agency rightfully cancels the contract as a result of the breach. It is also permitted to specify in the contract, a specified amount of damaged (called Pre-determined Damages), which will be recovered in case of breach of contract. The Procuring Agency is not required to prove, that he has incurred such a loss. It can also be provided that the Procuring Agency has the right to enter into a new contract for the same material from alternative sources after cancelling the breached contract, with a notice to the defaulter that the difference in the cost between the two contracts shall be recovered from the defaulter. This is called "Purchase at the Risk and Cost" of the defaulter – or simply risk- purchase. No compensation can be claimed for any remote, consequential and indirect loss of damage sustained due to the breach.

Concept of Force-Majeure: In case the contract becomes impossible to be performed, for reasons beyond the control of the contractor (like act of God, war, Government actions), then he is neither liable for delays nor for breach of contract. These are called Force-Majeure (FM) conditions. A legally worded FM clause is normally included in the Conditions of the Contract. As per this clause, the contractor has to keep the Procuring Agency informed of such a situation arising and claiming exemption from timely performance. There is also a provision to cancel the contract, without damages on either side, if such conditions persist beyond a specified period.

Law of Agency – Agents and Principals: When an authorised person enters into a contract, on behalf of his organisation (as a Procuring

Agency or Bidder) with a "Third Party", he is acting(what is legally called) as an "Agent" of his organisation, which is called the "Principal". Arising out of the ensuing contract, is the Agent liable to face claims for compensation or other legal repercussions, in his personal capacity from the Third Party or his Principal, if disputes arise in the contract? For example, can the Third Party sue him by name in a court and seek compensation? Such issues are covered in Law of Agency, which is laid down in the Indian Contract Act. A contractor in a Works Contract or Consultant in a Consultancy Contract is also deemed an "Agent" of the Procuring Agency, who is the Principal. They also would be entitled to the safeguards available to an Agent.

Agent Has No Liability: In normal course, only the Principal (not the agent in his personal capacity) is responsible for consequences and entitled to benefits arising from the bona fide actions of his authorised Agent.

The Principal is bound to indemnify his agent against the consequences of all lawful acts done in good faith by such agent in exercise of the authority conferred upon him. This applies even if it causes injury to the rights of third parties.

Conditions When Agent is Personally Liable: An agent is bound to conduct the business of his Principal, according to the directions given by the Principal, or, in the absence of any such directions. The agent has to conduct the business with as much skill and reasonable diligence, as is generally required by persons engaged in similar business according to the custom, which prevails in doing business of the same kind. Otherwise, he is liable to make compensation to his Principal in respect of the direct consequences of his own neglect, want of skill or misconduct.

Where a Principal employs an Agent to do an act, which is criminal, the Principal is not liable to the agent, irrespective of any express or implied promise to indemnify him against the consequences of that act. Thus, if a Bidder instructs his agent to resort to bribery and he does so, the agent cannot claim compensation from his Principal, if he is caught.

Misrepresentations or frauds, committed, by agents in matters, which do not fall within their authority, do not affect their Principals. In such cases, the agent himself would be liable for adverse consequences.

Rights of Other Party's Dealing with Agent of Principal: Normally, the other party (Contractor or Procuring Agency) would have the same responsibilities and liabilities; as if the contract has been entered into, directly with the Principal. Contracts entered into through an agent and obligations arising from acts done by an agent may be enforced in the same manner and will have the same legal consequences, as if the contracts had been entered into and the acts done by the Principal in person.

Even misrepresentations or frauds committed by authorised agents acting in the course of their business for their principals have the same effect on agreements made by such agents, as if such misrepresentations or frauds had been made or committed by the Principals in person.

In cases where the agent is personally liable, as mentioned in sub-para above, a person dealing with him may hold either him or his Principal, or both of them, liable.

Precautions Required: However, it is important for the Procuring Agency to call for written documents regarding authority of the person signing the bids and contract on behalf of the Bidder, so that the interests of Procuring Agencies are protected. This is normally a part of Instructions to Bidders. It is also important in Works and Consultancy Contracts to specify clearly that the contract does not amount to an Agent– Principal relationship.

Salient Features of the Sale of Goods Act, 1930

Scope: Agreements for the sale of goods are governed by the general principles of the Contract Law. A contract for sale of goods has, however, certain peculiar features, such as transfer of ownership of the goods and quality aspects implied under a contract for sale of goods, which are not covered in Contract Act. These peculiarities are the subject matter of the provisions of the Sale of Goods Act, 1930. In this Act, the two parties to the contract are called "Seller" and "Buyer". This Act defines Goods for the purpose of applicability of this Act, as every kind of movable property, including stock and shares, growing crops, goodwill, patents, trademarks, electricity, water, gas and so on, all that can be exchanged for money - but not any kind of immovable property like realestate.

Concept of Transfer of Property (Passing of Title): Proprietary (ownership) rights and obligations in "Goods" are called legally "Title to Goods" or "Property in Goods". The meaning of property here is different from common connotation of the word. At what point of time or stage in a contract does this passing of Title of (Property in) Goods happen is laid down in this Act. This ownership of goods is different from ' possession of goods', which means the physical custody or control of goods. Delivery of goods is only a

transfer of 'Possession of Goods". It may or may not coincide with Passing of Title in Goods. This distinction is very important in Procurement.

The transfer of property in goods, from the seller to the buyer is the essence of Procurement of Goods. Therefore, the moment when the property in goods passes from the seller to the buyer is significant for following reasons:

Ownership: The moment the property in goods passes, the seller ceases to be the owner and the buyer acquires the ownership. The buyer can exercise the proprietary rights over the goods. For example, the buyer may sue the seller for non-delivery of the goods or when the seller has resold the goods and soon.

Concept of "Res Prit Domine" – Risk Follows Ownership: This concept simply means that as a general rule, risk follows ownership, irrespective of whether the delivery (or transfer of possession of goods) has been made or not. If the goods are damaged or destroyed, the loss shall be borne by the person who was the owner of the goods at that time – irrespective of whosoever is in the "Possession of the Goods".

Action Against Third Parties — When the goods are in any way damaged or destroyed by the action of third parties, it is only the owner of the goods who can take action (claim, litigation) against the third parties.

Time at Which Property in Goods is Transferred: The property in goods is transferred to the buyer at such time as the parties to the contract intend this to happen, as recorded in the terms of the contract. This needs neither to coincide with the point when payment is made; nor with the delivery of Goods; and not even with the point of time, when the seller dispatches the goods.

Documents of Title to Goods: These are voucher, bill, document, receipt, cash memo, bill of lading, lorry receipt, railway receipt, or any such acknowledgements, which prove the ownership of the goods that in the ordinary course of business, buyer may receive. These are called documents of title to goods.

Terms of Delivery Signifying Transfer of Property in Goods: There are standardised terms of delivery defining the passing of property (these also determine responsibility of freight, insurance and so on, which are also important aspects in a Contract). Some of these terms are:

- **EXW** – Ex Works
- **FAS** – Free Alongside Ship
- **FOB –** Free On Board (over the rails of Ship)
- **FOR Dispatching Station –** Free On Rail at the Station of Dispatching
- **FOR Destination –** Free On Rail at the Station of Destination
- **Free at Destination –** Free at the Destination place named in the Contract.

The places mentioned in the above terms are the places where Passing of Title happens, and the rights as well as risks of ownership of goods fall upon the buyer.

Concepts of Conditions/Warranties: A contract for sale usually would contain a number of terms, specifying the nature, quality and feature of the good being sold. All terms may not be of equal importance. Some of the terms may form the core of the contract, while the others may be surrounding and peripheral. For example, in a contract to buy pencils of a particular brand and model, and of a particular external colour, the term that the pencil must be of a particular brand and model is the core of the contract. The external colour of the pencil is not of central importance. In the Act, the core part of a contract is called the **condition;** and the terms which are not essential to a contract, are called **warranties**. (The legal concept of warranties here is different from prevalent meaning of the word). The condition is the core of a contract and its breach would be a breach of the contract. Thus, for the violation of a condition, the contract can be repudiated. On the other hand, in the case of a breach of warranty, the contract has been mostly fulfilled and cannot be repudiated – but the buyer can claim damages. In a given situation, whether a stipulation is a condition or warranty would depend on the construction of the contract. The condition or warranty can be explicitly written in the contract or they may be implied.

Doctrine of Caveat Emptor: Sale of Goods Act lays down this important concept that the buyer must act with due diligence when buying goods. It is not seller's duty to point out the defects in goods. This is a doctrine, which is not in consonance with modern times, but unfortunately is a legal position. However, this does not apply if the buyer's consent to buy is obtained by the seller, by knowingly concealing the defects, which could not have been discovered by the buyer reasonably at the time of purchase. The Caveat Emptor is also diluted under some implied conditions in a contract for sale. These are not normally well known to the procurement professionals. However, the implied conditions, where buyer gets some protection under this Actare:

Condition as to Description — In a contract of sale by description, there is an implied condition that the goods shall correspond with the description.

Condition as to Merchantability — Where the goods are bought by description from a seller, who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality.

Merchantable quality ordinarily means that the goods should be such, as would be commercially saleable under the description by which they are known in the market at their full value. This implied condition of merchantability also applies to purchase as per brand/model name or trade/ patentmark.

- **Condition as to Fitness for the Particular Usage** — Where the buyer, expressly or by implication, makes known to the seller, the particular usage for which goods are required, in a manner to show that the buyer relies on the seller's skill or judgement and where the goods are of a description, which it is in the customary course of the seller's business to supply, there is an implied condition, that the goods shall be reasonably fit for such usage. This condition is very useful in buying complex technical equipment, where besides description and specification, the usage and expectation of performance may also be stated. This will dilute the caveat emptor.
- **Fitness for Particular Usage Implied by Custom or Trade:** In certain sale contracts, for an item, which has a standard usage customarily or in trade, the specific usage is taken to be the implied condition of sale. For instance, if a person buys a watch or a detergent soap, the specific usage for which it is purchased is implied from the thing itself; the buyer need not disclose the purpose to the seller.
- **Condition as to Wholesomeness** – In case of sale of eatable provisions and foodstuff, there is another implied condition, that the goods shall be wholesome. Thus, the provisions or foodstuff must not only correspond to their description, but must also be merchantable and wholesome. By 'wholesomeness', it means that goods must be fit and beneficial for human consumption.

Provision of the Act Regarding Statutory Variations in Taxes and Duties: Statutory variations in the Taxes and Duties (customs duties, excise duty, tax on the sale or purchase of goods), after the making of any contract has to be borne by the buyer, even if there is no such express stipulation in the contract.

Salient Features of the Indian Arbitration and Conciliation Act,1996

Indian Arbitration and Conciliation Act, 1996 provides for dispute settlement either by a process of Conciliation and/or by Arbitration. This Act is based on 'United Nation's Commission on International Trade Law (UNCITRAL) Model Arbitration Law'. Its objective is to minimise the supervisory role of courts in the arbitral process and to provide that every final arbitral award is enforced in the same manner, as if it was a decree of the court. It covers both international and domestic arbitration and conciliation.

Arbitration: Arbitration is one of the oldest methods of settling civil disputes; arising out and in the course of performance of the contract; between two or more persons, by reference of the dispute to an independent and impartial third person, called arbitrator; instead of litigating the matter in the usual way through the courts. It saves time and expense; avoids unnecessary technicalities and at the same time ensures "Substantial justice within the limits of the law".

Arbitrator, Arbitration and Arbitral Award: The person or persons appointed to determine differences and disputes are called the Arbitrator or Arbitral Tribunal. The proceedings before person or tribunal are called arbitration proceedings. The decision is called an 'award'. For the purpose of Law of Limitations, the arbitration for a particular dispute is deemed to have commenced on the date on which, a request for arbitration is received by the respondent.

Arbitration Agreement: It is an agreement by the parties to submit to arbitration all or certain disputes, which have arisen or which may arise between them, in respect of a defined legal relationship, whether contractual or not non-contractual. The dispute resolution method of arbitration, as per the Arbitration and Conciliation Act, can be invoked only if; there is an Arbitration Agreement (in the form of an Arbitration Clause or a separate Arbitration Agreement) in the Contract. If there is such an agreement, Courts are barred from directly entertaining any litigation, in respect of such contracts, and are bound instead to refer the parties to arbitration.

Appointment and Composition of Arbitratal Tribunal: Both the parties can mutually agree on the number of arbitrators (which cannot be even number) to be appointed. In case there is no

agreement, a single (sole) arbitrator may be appointed. The parties can mutually agree on a procedure for appointing the arbitrator or arbitrators. Or else, in case of arbitration with three arbitrators, each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator, who will act as a presiding arbitrator. If one party fails to appoint arbitrator within 30 days, or if the two appointed arbitrators fail to agree on the third arbitrator, then the Court may appoint any person or institution as arbitrator. In case of international commercial dispute, the application for appointment of arbitrator has to be made to the Chief Justice of India. In case of other domestic disputes, application has to be made to the Chief Justice of High Court within whose jurisdiction the parties are situated.

Challenge to Appointment of Arbitrator: An arbitrator is expected to be independent and impartial. If there are some circumstances, due to which his independence or impartiality can be challenged, he must disclose the circumstances before his appointment. Appointment of arbitrator cannot be challenged on any ground, except when there is justifiable doubt as to arbitrator's independence or impartiality or when he does not possess the qualifications for the arbitrator agreed to by the parties. The challenge to appointment has to be decided by the arbitrator himself.

If he does not accept the challenge, the arbitration can continue and the arbitrator can make the arbitral award. However, in such a case, application for setting aside arbitral award can be made to Court after the award is made by the arbitrator. Thus, the other party cannot stall further arbitration proceedings by rushing to court.

Conduct of Arbitral Proceedings: The parties are free to agree on the procedure to be followed for conducting proceedings, location, language of hearings and written proceedings. Failing any agreement, the Arbitral Tribunal may decide itself on these aspects. The parties shall be treated with equality and each party shall be given a full opportunity to present its case. Arbitral Tribunal shall observe the rules of natural justice but is bound neither by Civil Procedure Code 1908 nor by Indian Evidence Act 1872. The Limitation Act, 1963 is applicable from the date of commencement of arbitral proceedings. Arbitral tribunals have powers to do the following:

- Determine admissibility, relevance, materiality and weight of any evidence.
- Decide on their own jurisdiction
- Decide on interim measures
- Termination of proceedings
- Seek court assistance in taking evidence

Arbitral Award: The decision of Arbitral Tribunal is termed as 'Arbitral Award'. The decision of Arbitral Tribunal shall be by majority. The arbitral award shall be in writing, mentioning the place and date, and signed by the members of the tribunal. It must state the reasons for the award. A copy of the award should be given to each party. The Arbitral Tribunal can also make interim awards. The Arbitral Award is enforceable in the same manners if it were a decree of the Court.

Recourse Against Arbitral Award: Recourse to a court against an arbitration award can be made by an application (within three months from the date of the arbitral award). It can be made only on the grounds specified in the Act. They are the party was under some incapacity; arbitration agreement was not valid; proper opportunity was not given to present the case; award deal with disputes not falling within the terms of reference of arbitrator; composition of the Arbitral Tribunal is not as per agreement of parties; subject matter of dispute is not capable of settlement through arbitration under the law or the Arbitral Award is in conflict with the Public Policy.

Conciliation: This is a new concept added in the Act for settlement of disputes. The party initiating conciliation shall send a written invitation to the other party to conciliate and proceedings shall commence when the other party accepts the initiation to conciliation. The parties may agree on the name of a sole conciliator or each party may appoint one conciliator.

The conciliation shall assist the parties in reaching an amicable settlement of their dispute. When the parties sign the settlement agreement, it shall be final and binding on the parties. The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each party. This process has not yet come into common use.

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