

PUBLIC PROCUREMENT AND INDIAN CONSTITUTION

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At the apex of the statutory framework, governing public procurement is Article 299 of the Constitution of India, which stipulates that contracts legally binding on the Government have to be executed in writing by officers specifically authorized to do so. Position of law relating to execution of Government Contracts is well-defined in accordance with Article 299 of the Constitution of India. However, it does not necessarily imply that the provisions of the Indian Contract Act have been superseded completely; yet the formalities as imposed by Article 299 and the strict compliance of the same have been regarded by some as being extremely inconvenient and restrictive to government operations in practice, due to the procedural requirements.

Consequently, the Courts have in the manner of delivering judgements mitigated the rigours of the formalities contained in Article 299(1),

and have enforced contracts upon substantial compliance, and not strict compliance with the requirements of Article 299(1) of the Constitution of India. The Constitution also enshrines Fundamental Rights¹, which have implications for Public Procurement. By virtue of Article 299 of the Constitution of India, all contracts on behalf of the Union Government or state Governments are to be entered into and executed by authorised persons on behalf of the President of India or Governor of the state, respectively. In other words, the Government contracts must be expressed as to be made by the President or the Governor. They shall be executed by the competent person and in the prescribed manner.

All contracts shall be signed and entered into after receipt and verification of the requisite performance security, by an authority empowered to do so by or under the orders of

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¹ Article 19 (1) (g) – Right to carry on a Profession

the President of India in terms of Article 299 (1) of the Constitution of India. The words “for and on behalf of the President of India” should follow the designation appended below the signature of the officer authorised on this behalf. The President of India, Governor of the state and the authorised persons who enter into or execute such contracts are granted immunity from personal liability under this article. That is why, above the signatures of such persons, on the contract documents, a legal phrase “For and on Behalf of the President of India/ the Governor of State” is written to signify this fact.

If the requirement under Article 299 of the Indian Constitution is not complied, the Government is not bound by such contracts. However, in such cases, the person executing such agreement would be personally bound. On the other side, if the Government enjoys the benefit of the contract due to the performance of the other party, then the Government would be bound to give recompense on the principle of *quantum meruit* value. This is a quasi-contract. Besides, the principle of *quantum meruit* value, the doctrine of estoppel may also apply on the facts. However, the President or the Governor will not be personally liable on such contracts².

The fundamental principles underlying the government contracts are reasonableness and rationality, which form a part of the essential element as provided for under Article 14 of the Constitution of India wherein, the government exercising administrative power even in contractual matters must avoid arbitrariness bearing the objective of larger public interest in mind. The Government, including State and its instrumentalities are vested with the duty to act fairly and reasonably for the benefit of public and therefore, cannot act arbitrarily by entering into contractual relationship with any person by negating the norms of fairness and objectivity. The interest of public being paramount, its departure from regular procedures, without a speaking order or reasoned decision, may be regarded as an arbitrary action.

In the contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Indian Constitution in which non-arbitrariness is a significant fact³. Even in respect of contractual rights and obligations of parties, the State is not relieved of its obligations to comply with the provisions of Article 14. The State action should be governed by reason and should be free from arbitrariness. It should be just and

² *MP Sugar Mills v. State of UP*, AIR 1979 SC 627

³ *Kesul Mehta v. Rajasthan Tribal Areas Development Co-operative Federation Limited*, AIR 2004 Raj 55

reasonable, whether; the State action is at the entering stage of the contract or during the execution of the contract or even at the concluding stage of the contract. At all stages, Article 14 binds the State⁴.

Article 14 of the Indian Constitution prohibits the State from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding the contract. At the same time, no person can claim a fundamental right to carry on business with the Government⁵. It is settled law that, a public authority cannot act arbitrarily even in the matter of awarding contracts. There is a public element in all activities and it must conform to the mandates of Article 14 of the Constitution and observe tenets of equality and principles of fair action⁶. Provisions of Article 14 cannot be invoked only because some illegality has been committed by any one party as a result whereof some other party has obtained benefit. The constitutional scheme of equality clause would apply only in case where the parties are similarly situated. No equality can be claimed on the basis of illegality⁷.

When the action of State is arbitrary or discriminatory and violative of Article 14 of the Indian Constitution, Writ Application is maintainable for enforcement of the terms of the Contract⁸. However, Writ is not the remedy for enforcing contractual obligations⁹. Even then, the Government cannot act arbitrarily even though the matter arises out of a contractual obligation¹⁰. Although, ordinarily a superior court in exercise of its jurisdiction would not enforce the terms of a contract qua contract, it is trite that, when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Indian Constitution, a Writ petition would be maintainable¹¹. Right to refuse the lowest or any other tender is always available to Government. However, the principles laid down in Article 14 have to be kept in view while accepting or refusing a tender¹².

Further, Article 19 (1) (g) of the Indian Constitution grants all its citizens the right *to practise any profession or to carry out any occupation, trade or business*. This has been interpreted by courts in a way to ensure that every citizen of India has a right to get equal opportunity to bid

⁴ *Vadi and Patwa v. Union of India*, AIR 1993 Guj 100

⁵ *Association of Registration Plates v. Union of India*, AIR 2004 J&K 152

⁶ *N Kunhiraman v. State of Kerala*, AIR 1992 Ker 265

⁷ *Kerala State Electricity Board v. Sararatchandran P*, AIR 2009 SC 191

⁸ *Karnataka State Forest Industries Corporation v. Indian Rocks*, AIR 2009 SC 684

⁹ *State of Bihar v. Jain Plastics and Chemicals Limited*, AIR 2002 SC 206

¹⁰ *Mukti Maitra v. State of West Bengal*, AIR 1986 Cal 54

¹¹ *Supra* note 8

¹² *Damania Industries Pvt. Ltd. v. State of Orissa*, AIR 1998 Ori 2 (DB)

for and be considered for a public procurement contract. However, this provision does permit stipulation of reasonable eligibility or pre-qualification criteria for the selection of successful bidders in a public procurement contract. Thus, a public procurement organisation should be ready to prove in court that no eligible bidder has been denied reasonable and equal opportunity under this article to bid and be considered for the

concerned contract. However, no right is guaranteed to a citizen under Article 19 (1) (g) of Indian Constitution, to do a thing which can arise only out of a grant or contract. The right to takeout livelihood by entering into a contract with Government and statutory authorities is not an integral component of the right guaranteed under Article 21 of the Indian Constitution¹³.

¹³ *G Gurunadha Reddy v. AP Road Transport Corporation*, AIR 1999 AP 179