

PUBLIC PROCUREMENT AND INDIAN CONTRACT ACT

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A procurement contract besides being a commercial transaction is also a legal transaction. There are a number of commercial/mercantile laws that are applicable equally to the private sector and public procurement, such as the Indian Contract Act, Sales of Goods Act, Arbitration and Conciliation Act, and so on. Although a public procurement professional is expected to have a working knowledge of the following basic laws relating to procurement, yet he is not expected to be a legal expert. If standard contract forms are used, the procurement official 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, an appropriate legal professional may be associated with the procurement from an early stage. The elements and principles of contract law and the meaning and import of various

legal terms used in connection with the contracts are available in the Indian Contract Act, 1872 read with the Sale of Goods Act, 1930. Some of the salient principles relating to contracts are set out briefly in this chapter.

- a. **Invitation to treat:** Issuance of a tender notice is only an invitation to the eligible persons to apply¹. An invitation to treat is different to an offer as it only invites the party to make an offer. It is not intended to be binding. A statement that goods are to be sold by tender is not normally an offer to sell to the person making the highest tender; it merely indicates a readiness to receive offers. Similarly, an invitation for tenders for the supply of goods or for the execution of works is, generally, not an offer, even though the preparation of the tender may involve very considerable expense. The offer

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¹ *Red Rose Co-operative Labour and Construction (LOC) Ltd. v. State of Punjab*, AIR 1999 P&H 244

comes from the person who submits the tender and there is no contract until the person asking for the tenders accepts one of them². Offers are to be made in response to the notice-inviting tender. Only when an offer is made and accepted, a contract comes into being. The terms contained in the notice inviting tender may have to be construed differently having regard to the fact situation obtaining in each case. No hard and fast rule can be laid down therefor. We would, a little later, notice the underlying intention of the employer in prescribing the so-called essential conditions³. In the case of *Spencer v Harding*⁴, the defendants offered to sell stock by tender, but the court held that there was no promise to sell to the highest bidder, merely an invitation for offers which they could then accept or reject at will. In exceptional circumstances, an invitation for tenders may be an offer, as in *Harvela Investments v Royal Trust of Canada*⁵, where the court held that because defendants had made clear an

intention to accept the highest tender, then the invitation to tender was an offer accepted by the person making the highest tender.

- b. **Offer or Proposal:** Offer is an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed, the 'offeree'⁶. When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal⁷. In a sale or purchase by tender, the tender signed by the tenderer is the proposal. The invitation to tender and instructions to tenderers do not constitute a proposal⁸. The important thing in determining whether there has been a valid offer is not the party's own intentions, but how a reasonable person would view the situation⁹. An invitation to treat is not an offer, but an indication of a person's willingness to negotiate a contract. It is

² *Bank of India and Others v. O.P. Swaranakar*, (2003) 2 SCC 721

³ *M/s. B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, AIR 2007 SC 437

⁴ (1870) LR 5 CP 561

⁵ (1986) AC 207

⁶ Treitel, GH. *The Law of Contract* (10th ed.). p. 8

⁷ Section 2 (a), *The Indian Contract Act, 1872*

⁸ *Gammon India Ltd. v. Union of India & Ors.* 2003 (1) ARBLR 353 Delhi

⁹ *Smith v. Hughes*, (1871) LR 6 QB 597; also see *Ermogenous v Greek Orthodox Community of SA Inc.* (2002) 209 CLR 95.

a pre-offer communication. In *Harvey v. Facey*¹⁰, an indication by the owner of property that he or she might be interested in selling at a certain price, for example, has been regarded as an invitation to treat. Similarly in *Gibson v. Manchester City Council*¹¹, the words ‘may be prepared to sell’ were held to be a notification of price and therefore not a distinct offer, though in another case concerning the same change of policy.

- c. **Acceptance of the offer:** When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise¹², i.e. an agreement; i.e. to say, it becomes a contract¹³. In other words, proposals would become a promise when the plaintiff signifies her assent as defined in Section 2(b) of the Indian Contract Act, 1872. Under Section 2(b) of the Contract Act, ‘when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted.’ Since the expression ‘signify’ means ‘communicate’ or ‘make known’, an acceptance should be

completed only when it is communicated or made known to the proposer. Since the minds of the offeror and the offeror must meet in order that an agreement may be formed, intimation of the acceptance of offer should be necessary to result in a binding agreement. Ordinarily, therefore, the offeror must receive intimation that the offeree has accepted his offer and has signified his willingness to perform his promise and if the offeror receives no such intimation, a contract may not come into existence¹⁴. An acceptance, which remains in the breast of the acceptor without being actually and by legal implication communicated to the offeror, is no binding acceptance¹⁵. Similarly, an acceptance not duly authorised by the offeree has got no legal effect¹⁶.

- d. **Contract:** The proposal or offer when accepted is a promise, a promise and every set of promises forming the consideration for each other is an agreement and an agreement if made with free consent of parties competent

¹⁰ (1893) A.C. 552

¹¹ (1979) 1 W.L.R. 294

¹² Section 2 (b), The Indian Contract Act, 1872

¹³ *Life Insurance Corporation of India & Ors. v. Mrs. Raksbna Devi*, Revision Petition No.702 of 2003 decided on

20.10.2005 (National Consumer Dispute Redressal Forum)

¹⁴ *Byomkesh Banerjee v. Nani Gopal Banik*, AIR 1987 Cal 92

¹⁵ *Household Fire and Carriage* (1879) 4 Exch Div 216

¹⁶ *Powell v. Lee*, 24 TLR 606

to contract, for a lawful consideration and with a lawful object is a contract. By virtue of Section 2(h) of the Indian Contract Act, an agreement enforceable by law is a contract. Under Section 2(h) of the Indian Contract Act, 1872 an agreement (including an agreement of service) becomes a contract only when it is enforceable by law. If it is not enforceable in law, it would be void by reason of section 2(g) of the Contract Act¹⁷. As per Section 10 of the said Act, only those agreements are contracts if they are made by the free consent of the parties competent to contract for unlawful consideration and with the lawful object and are not expressly declared to be void¹⁸. A contract is thus a consensual act of the parties who are free to settle any terms they please. Intention of the parties to the contract is a matter of inference from their conduct. If a reasonable man would infer from the conduct that the party intended to contract in a particular way then he will be bound to make good his promise¹⁹.

- e. **Competency of Parties:** Any person who has attained majority and is of sound mind or not debarred by law to which he is subject, may enter into contracts²⁰. It, therefore, follows that minors²¹ and persons of unsound mind cannot enter into contracts nor can insolvent person do so. Categories of persons and bodies who are parties to the contract may be broadly subdivided under the following heads viz. Individuals, Partnerships, Limited Companies, Corporations other than Limited Companies etc.
- f. **Consent of Parties:** By virtue of Section 13 of the Indian Contract Act, 1872, two or more persons are said to consent when they agree upon the same thing in the same sense. Similarly, Consent is said to be free when it is not caused by – (1) coercion, as defined in section 15, or (2) undue influence, as defined in section 16, or (3) fraud, as defined in section 17, or (4) misrepresentation, as defined in section 18, or (5) mistake, subject to the provisions of sections 20, 21 and 22. Consent is said to be so caused

¹⁷ *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, 1990 SCR Supl. (1) 142

¹⁸ *M/s Haryana Royalty Company v. State of Haryana & Anr.* (2015) SCC OnLine P&H 1300

¹⁹ *Bhagwati Enterprises v. Rajasthan State Road Transport Corporation*, AIR 2006 Raj 233

²⁰ Section 11, The Indian Contract Act, 1872

²¹ *Mohori Bibee v. Dharmodas Ghose*, (1903) I.L.R. 30 Cal. 539; also see *K. Balakrishnan v. K. Kamalam & Ors.* (2004) 1 SCC 581

when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake²².

- g. **Consideration:** Consideration is something which is advantageous to the promisor or which is onerous or disadvantageous to the promisee. Inadequacy of consideration is, however, not a ground avoiding the contract. However, an act, forbearance or promise which is contemplation of law has no value is no consideration and likewise an act or a promise which is illegal or impossible has no value.
- h. **Lawful Objects:** The consideration or object of an agreement is lawful, unless it is forbidden by law or is of such a nature that if permitted, it would defeat the provisions of any law, or is fraudulent or involves or implies injury to the fraudulent property of another or the court regards it as immoral or opposed to public policy. In each of these cases the consideration or object of an agreement is said to be unlawful.
- i. **Changes in terms of a concluded Contract:** No variation in the terms of a concluded contract can be made without the consent of the parties.

While granting extensions or making any other variation, the consent of the contractor must be taken. While extensions are to be granted on an application of the contractor, the letter and spirit of the application should be kept in view in fixing a time for delivery.

- j. **Discharge of Contract:** A contract is discharged or the parties are normally freed from the obligation of a contract by due performance of the terms of the contract. A contract may also be discharged;
 - i. **By mutual agreement:** If neither party has performed the contract, no consideration is required for the release. If a party has performed a part of the contract and has undergone expenses in arranging to fulfil the contract it is necessary for the parties to agree to a reasonable value of the work done as consideration for the value.
 - ii. **By breach:** In case a party to a contract breaks some stipulation in the contract which goes to the root of

²² Section 14, The Indian Contract Act, 1872

transaction, or destroys the foundation of the contract or prevents substantial performance of the contract, it discharges the innocent party to proceed further with the performance and entitles him to a right of action for damages and to enforce the remedies for such breach as provided in the contract itself. A breach of contract may, however, be waived.

- iii. **By refusal of a party to perform:** On a promisor's refusal to perform the contract or repudiation there of even before the arrival of the time for performance, the promisee may at his option treat the repudiation as an immediate breach putting an end to the contract for the future. In such a case the promisee has a right

of immediate action for damages.

- iv. **In a contract where there are reciprocal promises:** If one party to the contract prevents the other party from performing the contract, the contract may be put to an end at the instance of the party so prevented and the contract is thereby discharged.

Stamping of Contracts: An agreement or memorandum of agreement for or relating to the sale of goods or merchandise exclusively is exempt from payment of stamp duty²³. The Stamp Act provides that no Stamp Duty shall be chargeable in respect of any instrument executed by or on behalf of or in favour of the Government in cases where but for such exemption Government would be liable to pay the duty chargeable in respect of such instrument²⁴.

²³ Entry 5 of Schedule I, The Indian Stamp Act, 1899

²⁴ Section 29, The Indian Stamp Act, 1899