

19<sup>th</sup> October, 2023

# VIVAD SE VISHWAS – II [CONTRACTUAL DISPUTES] – BOOM OR BANE

## 1. Background on Public Procurement

- 1.1 Public Procurement means purchase of goods, services and works by public authorities or civil service organizations using public funds. It is a process/system by which public organizations procure or purchase products in the form of goods, services, or sometimes the combination of goods and services.
- 1.2 Public procurement is one of the crucial economic activities of the government which characterize a substantial part of its GDP, thereby resulting in the massive financial drifts – hence deems proper regulation. The Indian Govt. through Ministry of Finance, Dept. of Expenditure, Procurement Policy Division (for short ‘DOE’) regulates Public Procurement, consequently a Manual for Procurement of Goods (Updated till June 2022) has been issued.
- 1.3 The Manual provides broad guidelines for initiation, authorization, procurement, and execution of Goods Contracts by Ministry or Department, and detailed rules and orders contained in the respective Departmental regulations shall be in consonance with the Manual.

## 2. Government e-Marketplace

- 2.1 On 9th August 2016, Government e-Marketplace (for short ‘GeM’) was launched as an online, end to end solution for sale/purchase of commonly used goods and services for all Central and State Government Ministries, Departments, PSUs, and affiliated bodies. This to ensure consistency in public procurement, and to curtail malpractices. In consonance with Rule 149 of General Financial Rules, 2017 (for short ‘GFR’) procurement of goods and services through GeM has been made mandatory.
- 2.1 Parties initiating procurement through GeM shall be governed by the contract generated by GeM, wherein contract is construed to include:
  - a. General Terms and Conditions (for short ‘GTC’),

- b. Product/Service Specific Special Terms and Conditions (for short ‘STC’),
- c. Product/Track/Domain Specific STC of Particulars Service including its Service Level Agreement (for short ‘SLA’), and
- d. Bid specific Additional Terms and Conditions (for short ‘ATC’).

For the purposes of clarity towards hierarchy of documents - STC & SLA shall supersede GTC, ATC shall supersede GTC and STC.

## 3. Vivad se Vishwas – II

Central Government vide Office Memorandum dated 29th May 2023 formulated a one-time settlement scheme named *Vivad se Vishwas – II* (Contractual Disputes) (for short ‘Scheme’). Scheme developed with intent to eliminate backlog of old litigation cases by resolving existing disputes.

- 3.1 Claims can be submitted from 15 July 2023 to 31 October 2023 on GeM or Indian Railways E-Procurement System (for short ‘IREPS’) [for non-GeM contracts concerning buyers from the Ministry of Railways].
- 3.2 Scheme applies to contractual disputes between Government/ Government organizations and contractors;
- 3.3 Under the scheme Government organizations shall include:
  - a. All autonomous bodies of the Government,
  - b. Public sector banks and financial institutions,
  - c. All Central Public Sector Enterprises,



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- d. Union Territories without legislature and all agencies thereof,
  - e. All agencies where the Government of India has a shareholding of 50% however these agencies can opt out of the scheme at their discretion.
- 3.4 The scheme applies to disputes extending to domestic awards in cases arising out of Arbitration, only for monetary relief and not specific performance.
- 3.5 Any arbitral award (whether challenged or not) rendered on or before 31st January 2023, shall be settled at 65% of the sum granted or claimed under the Scheme whichever is lower.
- 3.6 Furthermore, any Court Award issued after parties have sought the court directly or following an arbitral award issued on or before 30th April 2023 shall be settled at 85% of the awarded or claim amount, whichever is smaller.

#### 4. Constructive Analysis of Scheme:

- 4.1 In order to raise claims under Scheme, contractors will have to register under GeM and complete the mandatory profile for the scheme.
- 4.2 Non-GeM contracts are eligible under the scheme.
- 4.3 Clause 14 of Scheme clarifies that procuring entity has authority to amend/withdraw an offer, any time before acceptance of the same.
- 4.4 A patent contradiction arises in the Clause 14, 18, and 19; clause 14 vests discretion upon the procuring entity to amend or withdraw the offer and no specific quantum is mentioned under the clause to be the basis of such discretion. Whereas, clause 18 makes it obligatory on the entity's part to accept the claim whence the claim amount is Rs. 500 Cr. or less, and clause 19 lays that only in case the amount exceeds Rs. 500 Cr. the procuring entity shall have the option of not accepting the same.
- 4.5 It is trite rule of interpretation that in case of conflicting clauses the former clause shall prevail. The issue of conflicting clauses has been dealt in a number of judicial pronouncements:
- a. In *Forbes v/s. Git & Ors.* (1922) 1 AC 256 (P.C.) it was held that *"If in a deed an earlier clause is followed by a later clause which destroys altogether the obligation created by the earlier clause, the later clause is to be rejected repugnant and the earlier clause prevails...."*, the said case was also referred to by the Supreme Court in *Nagar Palika Nigam v/s. Krishi Upaj Mandi Samiti & Ors.* (2008) 12 SCC 364.
  - b. In *Ramkishorelal v/s. Kamal Narayan*, AIR 1963 SC 890 the Court held that it is necessary to make an attempt to read two parts of a document harmoniously, however if that is not possible for contradictory to each other, then the latter provisions have to be void.
  - c. Recently, in *Sunil Kumar Chandra v/s. M/s Spire Techpark Private Limited* 2023 SCC Online Del 286, the position was reaffirmed. The Court held that provided there is an existing inconsistency in two clauses of an agreement, the former clause shall have a prevailing effect upon the latter one.
- 4.6 Additionally, Clause 21 shows that a settlement is not mandatory and that the Scheme cannot be construed in an absolute sense.
- '21. In case settlement could not be achieved for any reason under this scheme, any offer, including reduction of claim amount, by any of the parties during the settlement process under this scheme, shall not be quoted in any further litigation.'*
- 4.7 The scheme is confined to cases arising out of Arbitration, and does not extend to Court Orders passed by civil courts not arising out of Arbitration. Clause 10 (a) (ii) of the Scheme includes cases where the parties have directly approached the Courts, it is in context of Arbitration, as the scheme may also extend to cases under the Arbitration Act, 1940

#### 5. Conclusion

- 5.1 While the earlier part of the clause 14 appears to make it mandatory for the procuring entity to respond to the claim with an offer, the latter part clearly confers a discretion on the procuring entity to amend/ withdraw an offer.
- 5.2 The latter part clearly confers the freedom on the procuring entity to settle or not to settle. As such entire clause if read as a whole and in harmony, it would mean that while the endeavour must be to settle and to put an end to litigation, yet the discretion on the procuring entity to choose, in its own commercial wisdom, whether or not to enter into a settlement, should not be altogether taken away.
- 5.3 If indeed there is a power to withdraw from an offer, surely there must be discretion not to respond to the offer of the contractor at the outset. Merely conferring a power to withdraw after making an offer would not be rational or logical without the discretion not to respond to the offer made by the contractor at the very start.
- 5.4 Clause 18 appears to deny any choice on the part of the procuring entities to refuse the claim by the contractor, the fact remains that there is a discretion conferred in Clause 14 to amend or withdraw the offer, and therefore it cannot be said that the procuring entities have no choice but to accept the claim.
- 5.5 A reading of clause 21 which is unqualified inasmuch as its application has not been confined to cases of claim amounts above Rs. 500 crores, also indicates that a settlement is not unqualifiedly mandatory and that the Scheme cannot be read in an absolute manner.
- 5.6 As such procuring entities will have necessary discretion even in case of claims below Rs. 500 crores.
- 5.7 Though such a scheme seems like the need of the hour in light of the backlog of cases, however there exists some glaring ambiguities and pertinent issues are to be highlighted.
- 5.8 The Scheme provides for verification of the claim, but fails to define the scope of such verification. Whether verification shall be limited to satisfaction of eligibility criteria under the scheme or existence of the Award or merits of claim amount etc.

5.9 There is also lack in clarity in the following:

- a. Definition of ‘Court Awards’ and ‘Arbitral Awards’.
- b. Whether the Scheme is applicable to awards published by Administrative Mechanism for Resolution of CPSEs Disputes
- c. Whether the Scheme will be applicable to Joint Ventures, Subsidiaries etc. of procuring authority
- d. Whether the Scheme will be applicable to immovable properties
- e. Whether a procuring authority will be required to make provisional contingent liability on account of Scheme.