

# Understanding Contracts, SLAs, Procurement



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# Session Objectives

To understand legal frameworks and business aspects around:

- contracts
- service level agreements
- procurement & tendering
- sale of goods

to enable you to quickly adapt to everchanging compliances and regulatory environment



# Understanding Contracts, SLAs, Procurement



Contracting



Service Level Agreements



Procurement & Tendering



Sale of Goods



Summing it all up

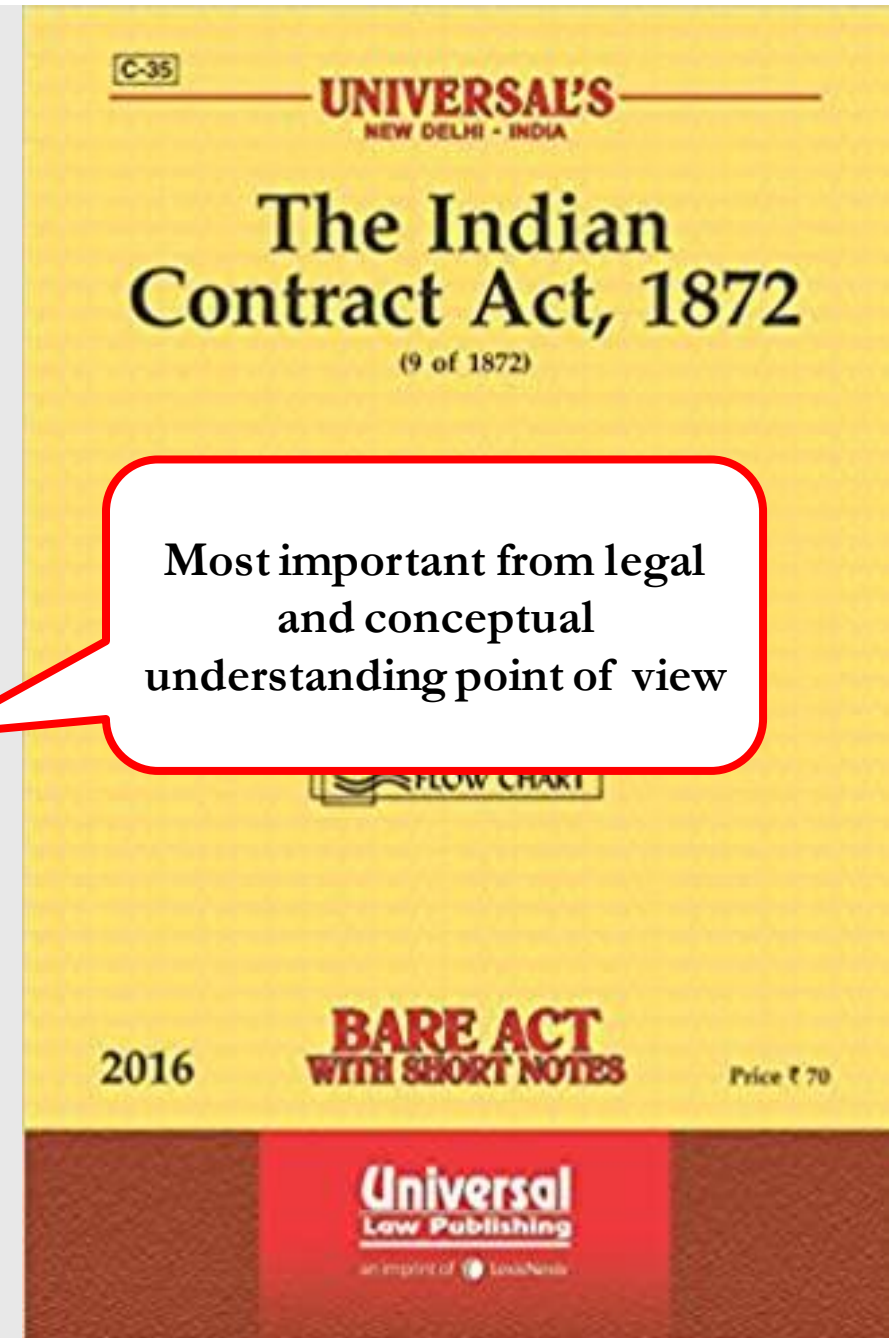
# Contract – *the concept*

- A **contract** is an agreement (written or spoken) between two or more parties to perform a service, provide a product or commit to an act and is enforceable by law
- Based on the principle - *Pacta sunt servanda* - Latin for "agreements must be kept"
- To consummate a contract there must be mutuality as well as meeting of minds of parties



# Every contract is an agreement, but every agreement is not a contract

- 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 **proposal**;
- 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 **promise**;
- The person making the proposal is called the “**promisor**”, and the person accepting the proposal is called the “**promisee**”;
- When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a **consideration** for the promise;
- Every promise and every set of promises, forming the consideration for each other, is an **agreement**;
- An agreement not enforceable by law is said to be **void**;
- An agreement enforceable by law is a **contract**;



## Balfour Case – *facts & issue*

- Mr. and Mrs. Balfour, used to live together as a married couple in Sri Lanka, they went for a vacation to their native country England. During this time, Mrs. Balfour developed rheumatic arthritis. The doctor advised Mrs. Balfour to stay back in England as, according to him, Sri Lankan climate would worsen her health
- Before Mr. Balfour returned to Sri Lanka, he promised to send £30 to her per month. During their stay away, the parties drifted apart and separated. Mr. Balfour stopped sending the money and eventually Mrs. Balfour sued for breach of contract

**Is there a breach of contract on part of Mr. Balfour?**



## Balfour Case – *decision*

- Agreements made between a husband and wife to provide capitals are generally not contracts because generally, the parties do not intend that they should be attended by legal ends
- The agreement was purely social and domestic in nature and characteristic and therefore it was presumed that the parties did not intend to be legally bound

**Legal intention to enter into a contract is necessary**

## Lalman Shukla Case – *facts & issue*

- Nephew of defendant (Gauri Dutt) ran away and in order to find his nephew his servant (Lalman Shukla) Haridwar from Kanpur, along with possible journey expenses
- In the meantime when the servant was at the search of the missing boy, Gauri Dutt issued a hand bill offering reward of Rs. 501 to the person who traces the missing boy
- Lalman Shukla was totally ignorant of this reward on offer
- Lalman Shukla was able to trace the child and bring him back to Kanpur
- Later on after 6 months of this incident the servant brought a suit against his master claiming the reward stating that the master had promised to the person who will find the missing child a reward. He alleged his master of not providing reward for the specific performance of his promise.

**Does Lalman Shukla have the right to get the reward money?**



## Lalman Shukla Case – *decision*

- Knowledge and assent about a proposal is must in order to convert a proposal into enforceable agreement and in the present case Shukla was neither aware nor has assent about the particular act
- Shukla was merely fulfilling his obligations at the time when he was tracing the boy
- Appeal was dismissed and it was held that plaintiff was not entitled to claim reward for finding the missing boy
- If the person gives his assent and then performs the condition of proposal than only he is entitled to claim rewards associated with such proposal.

**Knowledge and acceptance of a proposal are the essentials in order to constitute a valid contract**

**Offer + Acceptance = Agreement**

# Essentials of a valid contract





# Enforceability of contracts is a key factor

	Void <i>ab initio</i>	Void	Voidable
Enforceability	Unenforceable	It can <b>not</b> be enforced	It <b>can</b> be enforced, if aggrieved party affirm it.
Example	An agreement with person who is disqualified for entering into the contract by law	A offer to sell a dog to B for ₹ 50000. but later before performing the contract. Dog dies.	A sell his land to B for ₹10,00,000 under coercion.

## British Crane Hire Corporation Ltd. – *facts & issues*

- The plaintiffs supplied a crane to the defendants on the basis of a telephone contract made quickly, without mentioning conditions of hire
- The plaintiff later sent a copy of their conditions but before the defendants could sign them, the crane sank in marshy ground
- The conditions, which were similar to those used by all firms in the business, said that the hirer should indemnify the owner for all expenses in connection with use

**Is the hirer liable to pay the owner for damages?**



## British Crane Hire Corporation Ltd. – *decision*

- Court ruled that in view of the relationship of the parties, when the defendants requested this crane urgently and it was supplied at once before the usual form was received, the plaintiffs were entitled to conclude that the defendants were accepting it on the terms of the plaintiffs' own printed conditions which was to follow in a day or two
- There was a common understanding between the parties, who were in the same line of business, that any contract would be on these standard terms

**The defendants were held liable for the expense involved in recovering the crane**

## Maddala Thathiah Case – *facts & issues*

- Railways invited tenders for the supply of jaggery to the railway grain shops. The respondent (Maddalla Thathiah) submitted his tender for the supply of cane jaggery
- The tender form contained a note in paragraph 2 which was meant for the quantity required and the described dates of delivery. This note was : "This Administration reserves the right to cancel the contract at any stage during the tenure of the contract without calling up the outstandings on the unexpired portion of the contract."
- The jaggery was to be supplied in four installments. However, after receiving two quantities the Deputy General Manager informed the respondent that the balance quantity of jaggery outstanding on date be treated as cancelled and the contract closed

**Was such a clause in the tender form legally enforceable?**



## Maddala Thathiah Case – *decision*

- According to Supreme Court - the condition mentioned in the note to para 2 of the tender or in the letter refers to a right in the Railways to cancel the agreement for such supply of jaggery about which no formal order had been placed by the Deputy General Manager with the respondent and does not apply to such supplies of jaggery about which a formal order had been placed specifying definite amount of jaggery to be supplied and the definite date or definite short period for its actual delivery
- Once the order is placed for such supply on such dates., that order amounts to a binding contract making it incumbent on the respondent to supply jaggery in accordance with the terms of the order and also making it incumbent on the Deputy General Manager to accept the jaggery delivered in pursuance of that order

**Such a clause would be void and is not legally enforceable**



## After Stayzilla mess, startups advised to tweak contracts

*In long-term contracts such as debt deals, the terms of the agreement contain a clause that allows for mediation in case of differences.*

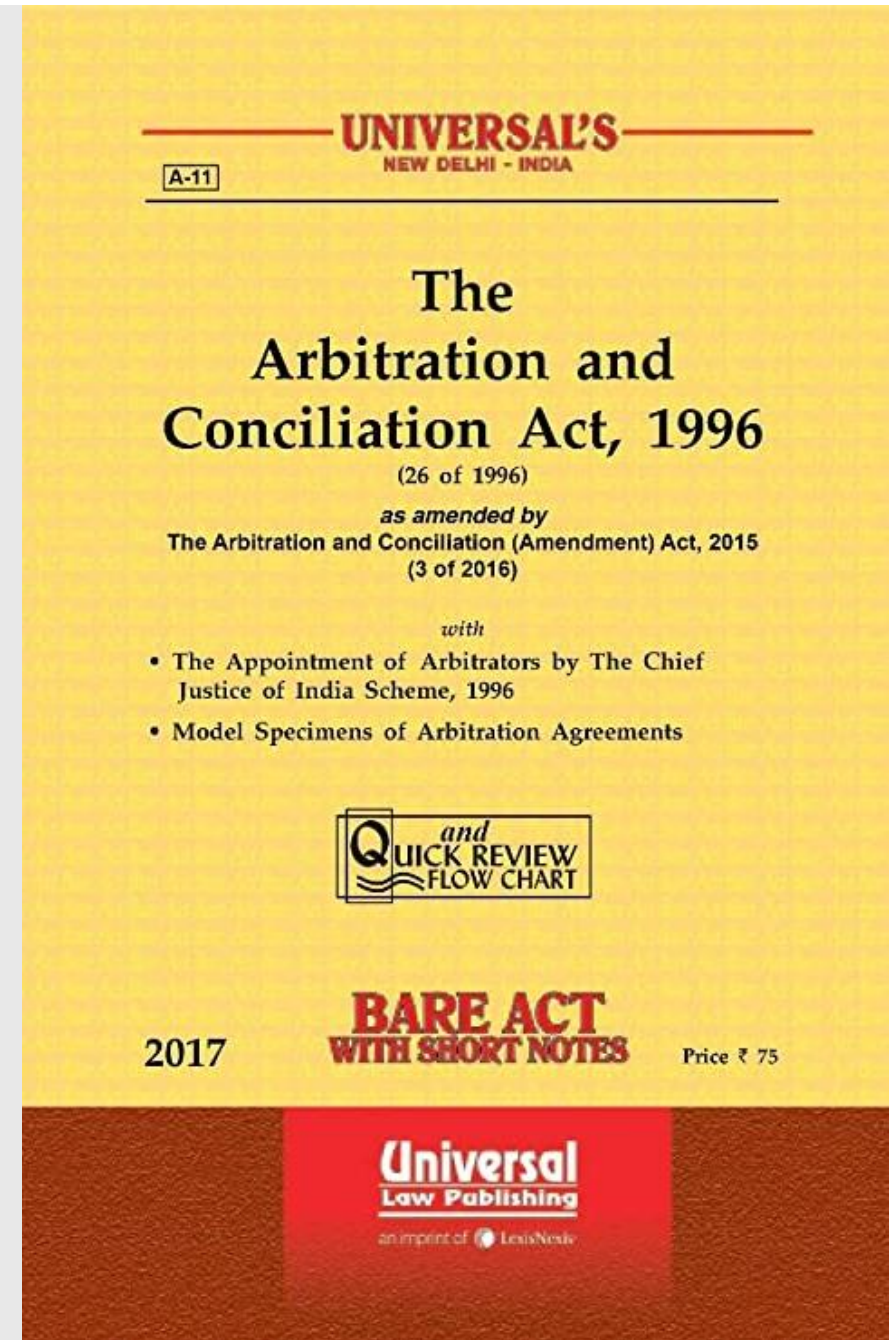
Investors and startup mentors are urging entrepreneurs to frame contracts that specify mediation as the first option to settle business disputes as the industry comes to terms with the nearly month-long incarceration of a Chennai-based founder last month.

Industry groups aim to organize specialized forums where entrepreneurs will be guided on the best way to structure and frame contracts that minimize legal tangles, particularly when business relationships turn sour.

“It’s an attempt to have every commitment written down and specify mediation as the first resort,” said R Narayanan, president of The Indus Entrepreneurs - Chennai, an industry body which plans to run sessions to train entrepreneurs on these aspects in the coming week. “Of course, no one can mandate the mediation clause,” said Narayanan.

# Arbitration is an effective and efficient alternative dispute resolution mechanism

- Arbitration is the most comprehensive and cooperative way for resolving disputes arising from the domestic and international commercial relationships whereby the parties mutually agree to reconcile the dispute by entering into an agreement
- The parties have an option to incorporate the separate agreement or as a clause within the contract defined as “Arbitration Clause” which binds a party to a type of resolution outside the court.
- Most contract arbitration takes place since the parties included an arbitration clause obliged them to arbitrate any disputes "arising under or related to" the contract. If a provision like this isn't included in the contract, the parties can still arbitrate if they both agree to it





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Contracting



Service Level Agreements



Procurement & Tendering



Sale of Goods



Summing it all up



# Service Level Agreement

## General Information

### Purpose

The purpose of this SLA is to

establish a cooperative part  
and its customers.

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be offered and  
customers:

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ro

- A service-level agreement (SLA) is a contract that establishes a set of deliverables that one party has agreed to provide another
- This agreement can exist between a business and its customers, or one department that delivers a recurring service to another department within that business



quality, availability, responsibilities

## 6 key components of a well-defined SLA

1. Type of service to be provided
2. Desired performance level, especially its reliability and responsiveness
3. Monitoring process and service level reporting
4. The steps for reporting issues with the service
5. Response and issue resolution time-frame
6. Repercussions for service provider not meeting its commitment



Who, What, When, How...then What!

## SLA examples from GEM

- CLEANING & SANITATION SERVICE
- CANTEEN SERVICE

<https://mkp.gem.gov.in/services#!/browse/>





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# Procurement seeks bids, tendering offers bids

- Procurement refers to the process of identifying, shortlisting, selecting, and acquiring suitable goods or services or works from a supplier through a direct purchase, competitive bidding, or tendering process while ensuring timely delivery in the right quality and quantity
- Tendering is the process whereby organizations invite bids for supply of goods or services or works that must be submitted within a finite deadline
- Usually the bidder that meets technical specifications and has the lowest financial bid (L1) wins the tender



# Public Procurement in India and worldwide is a big economy booster

- Public procurement refers to the process by which governments and state-owned enterprises purchase goods and services from the private sector
- Public procurement is a key economic activity of governments, accounting for, on average, 15% of GDP worldwide
- In India, government procurement constitutes about 25-30% of the GDP
- Procurement of goods and services is carried out by various ministries, departments, municipal and other local bodies, statutory corporations and public undertakings both at the Centre and at the State level



# Legal and regulatory public procurement framework in India broadly comprises 3 major elements

## Legislative provisions

- No comprehensive central legislation
- Though, there are some guiding legislations such as the Contract Act 1872, Sale of Goods Act 1930, Prevention of Corruption Act 1988, Arbitration and Conciliation Act 1996, etc.
- In addition, certain states, like Tamil Nadu, Karnataka, Andhra Pradesh and more have enacted state-specific legislations

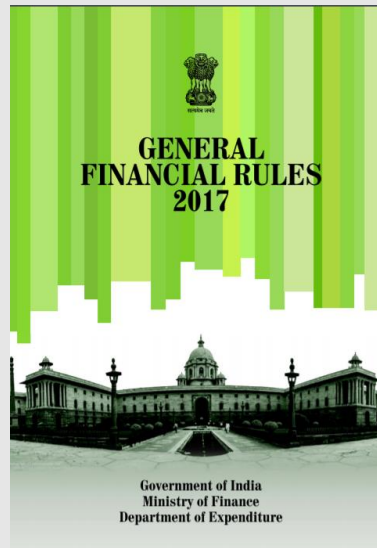
## Administrative guidelines

- Comprehensive rules and directives are contained in the General Financial Rules ("**GFR**") initially implemented in 1947 and last modified in 2017
- This is supplemented by: (a) manuals and policies governing procurement by individual ministries/ departments such as defence and railways (b) guidelines issued by the Directorate General of Supplies and Disposals ("**DGS&D**"), the central purchase organisation which undertakes procurement on behalf of ministries/ departments that lack the expertise to undertake procurement themselves

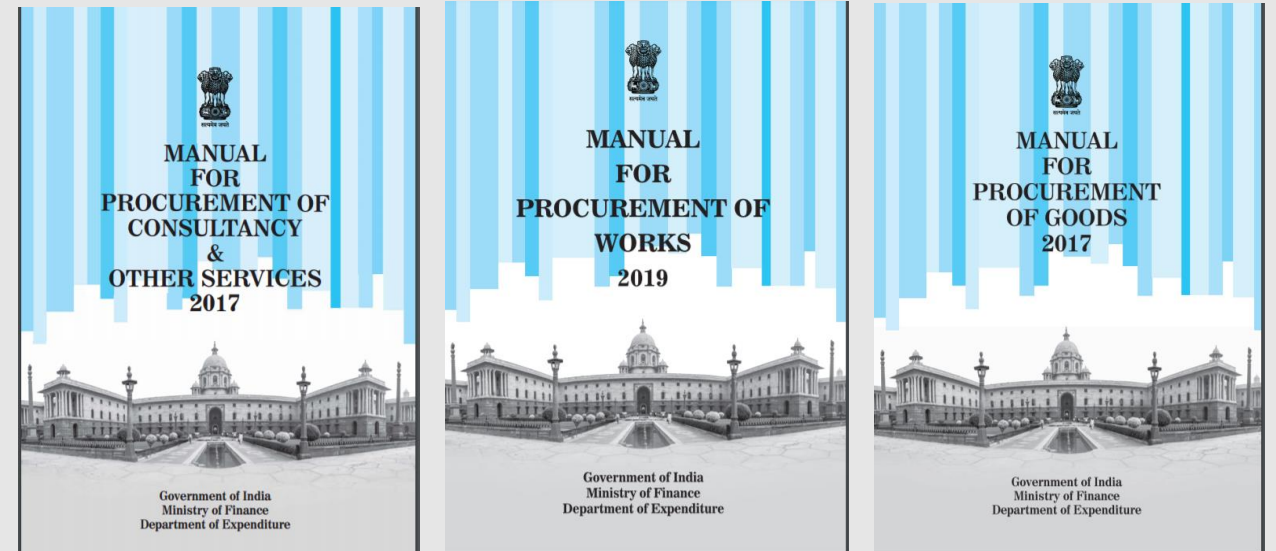
## Overseers

- Central Vigilance Commission ("**CVC**") tasked with increasing transparency and objectivity in public procurement;
- Competition Commission of India ("**CCI**") which checks anti-competitive elements; and
- Central Bureau of Investigation ("**CBI**") engaged for investigation and prosecution of the criminal activities in the procurement process such as probity issues

# Any entrepreneur aiming to get into public procurement space must become familiar with these documents



Compilation of rules and orders to be followed by all government departments and other specified bodies when dealing with public procurement and finances

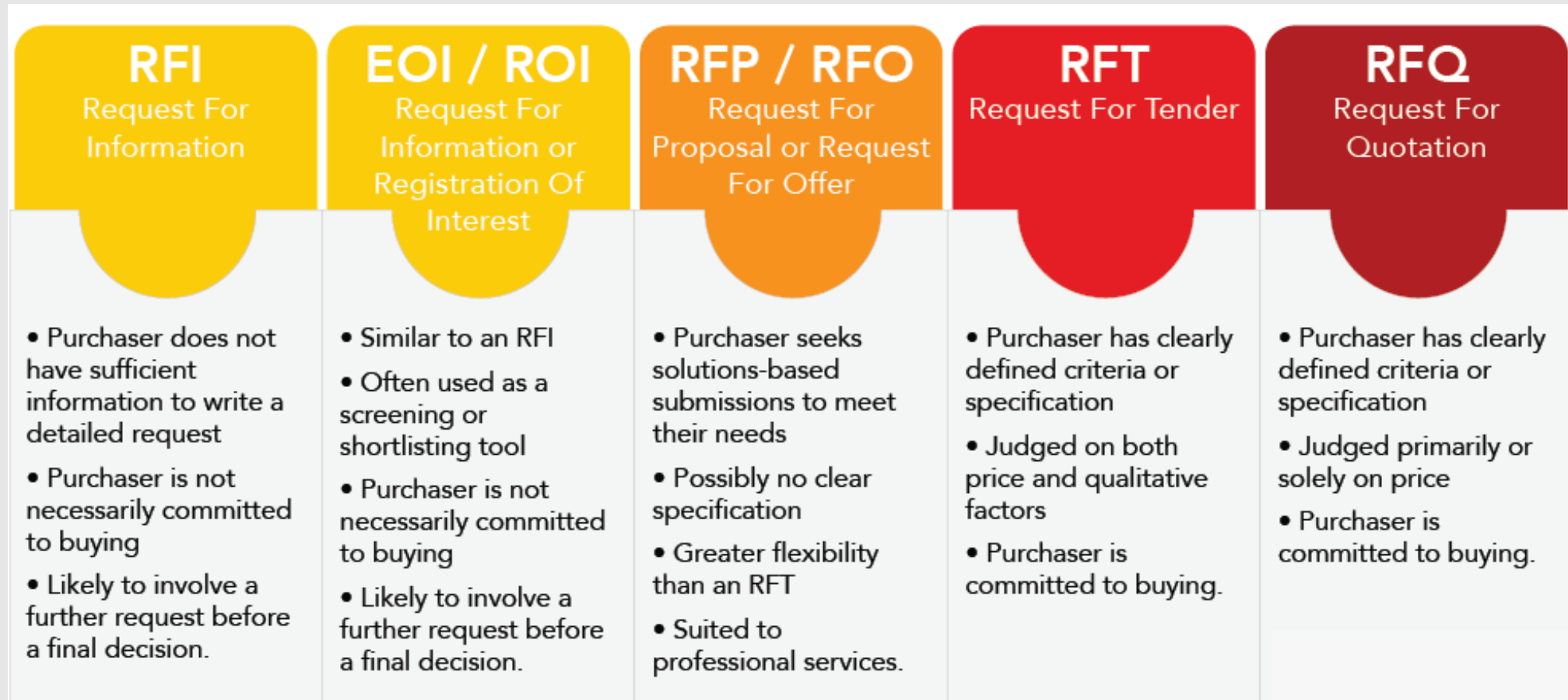


Providing framework to ensure uniform, systematic, efficient and cost-effective procedure and to ensure fair and equitable treatment of bidders/ contractors

[Latest versions of these documents and related amendments are available at https://doe.gov.in/](https://doe.gov.in/)



Request for proposal, quotation, and expression of interest are generally first steps in the procurement process



# Seriousness of participation is ensured through EMD and performance security

- **Earnest Money Deposit (EMD)**

- EMD is the Bid Security amount requested by the procuring authority to protect its interest from the bidder withdrawing or altering its bid. It is refunded to the unsuccessful bidders after the award of tender to the successful bidder

- **Performance Security**

- Performance Bank Guarantee is the Performance security (generally 5-10% of the value of the contract; mostly in the form of Performance Bank Guarantee) obtained by the procuring authority from the successful bidder to safeguard its interest against insufficient performance



# General Finance Rules (GFR) defines 5 kinds of tenders (1/2)

## 1) Advertised Tender Enquiry

- Invitation to tenders by advertisement should be used for procurement of goods of estimated value of Rs. 25 lakhs and above. In such cases the tender enquiry should be advertised on [www.eprocure.gov.in](http://www.eprocure.gov.in) and on GeM. An organization having its own website should also publish all its advertised tender enquiries on the website

## 2) Limited Tender Enquiry

- In a limited tender enquiry, various vendors (more than three) are empanelled by the Government Department for goods that are procured regularly by the Department
- Usually Limited Tender Enquiry is adopted when the estimated value of the goods to be procured is less than INR 25 Lac

## 3) Two-Stage Bidding

- For purchasing high value plant, machinery etc. of a complex and technical nature, bids may consist of two parts, as below:
  - Technical bid consisting of all technical details along with commercial terms and conditions; and
  - Financial bid indicating item-wise price for the items mentioned in the technical bid.





# General Finance Rules (GFR) defines 5 kinds of tenders (2/2)

## 4) Single Tender Enquiry

- Procurement from a single source may be resorted to in the following circumstances :
  - When only a particular entity is a manufacturer of the required goods, to the best of the concerned government department's knowledge
  - In case of an emergency, when it is necessary to purchase the required goods from a particular source. In such cases, the reason for such decision must be recorded and approval of competent authority must be obtained
  - When specific standardized machines or spare parts have to be acquired in order to be compatible with existing sets of equipment (on the advice of a competent technical expert and approved by the relevant authority)



## 5) Electronic Reverse Auctions

- An Electronic Reverse Auction is a type of online auction in which the traditional roles of buyer and seller in an auction are reversed
- The sellers compete to obtain business from the buyer and prices will typically decrease as the sellers underbid each other



# Two popular methods for evaluation of tenders for proposals that qualify the pre-qualification criteria\*

## Least Cost System

- Least Cost Selection (LCS) refers to the method of selection wherein the proposal with the lowest cost will be selected among those that qualify the minimum technical score
- The solution with the least cost is called L1. 2nd best is called L2 and so on so forth

*\*pre-qualification criteria is used to screen potential contractors, suppliers or vendors on the basis of experience, financial capacity, managerial ability, work history etc.*

## Quality Cost Based System

- In QCBS selection, minimum qualifying marks (normally 75-80 out of maximum 100 marks) are set as benchmark for quality of the technical proposal
- These are indicated in the RFP along with a scheme for allotting marks for various technical criteria/ attributes
- This method is adopted for evaluation of proposals where quality of goods/services is of utmost importance.
- Total Score = (Technical Score X Weightage given to technical criteria) + (Financial Score X Weightage given to financial criteria)

# Apart from local content requirements there is emphasis on encouraging MSEs and Startups

- DPIIT recognized startups are exempt from requirements of Prior Experience, Prior Turnover and Earnest Money Deposit on the GeM platform
- As per Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2018
  - Every Central Ministry /Department / PSUs shall set an annual target for 25% procurement from MSE Sector
  - Tender sets free of cost and exemption from payment of earnest money to registered MSEs.
  - MSEs quoting price within price band L-1 + 15%, when L1 is from someone other than MSE, shall be allowed to supply at least 25% of tendered value at L-1 subject to lowering of price by MSEs to L-1



Central Public Procurement Portal (CPPP) is integrated with Startup India. Startups can validate their status online to avail the benefits in published tenders of CPP portal



# Debarment / blacklisting are important tools for ensuring compliance with integrity-obligations of government suppliers

Reasons for debarment / blacklisting can vary from case to case, but common reasons are:

- Misbehaviour/threatening of departmental and supervisory officers during execution of work/tendering process
- Involvement in any sort of tender fixing
- Constant non-achievement of milestones on insufficient and imaginary grounds and non-adherence to quality specifications despite being pointed out
- Persistent and intentional violation of important conditions of contract
- Security consideration of the State i.e., any action that jeopardizes the security of the State
- Submission of false/fabricated/forged documents for consideration of a tender



As blacklisting not only reduces person's prospects of making profits, but also leads to loss of credibility and goodwill Courts of Law require the procuring agencies to follow certain principles

- The two main doctrines (or principles) whose compliance must be ensured by the Government or PSUs are –
  1. Principles of Natural Justice and;
  2. Doctrine of Proportionality
- General precautions and principles to be observed by debarring officers and agencies:
  - i. debarment and the Article 19 Right to Business enshrined in India's Constitution
  - ii. proportionality of debarment orders with the error committed
  - iii. permanency of debarment orders
  - iv. requirement for prior notices before issuing debarment orders
  - v. the amount of detail required to be disclosed in the notice of proposed debarment



Courts of Law want to ensure that mere disobedience by suppliers does not result in their blacklisting

# Gorkha Security Services Case

- Apart from imposition of penalty the security contractor was blacklisted for not adhering to certain labour compliances such as paying minimum wages, ESI/EPF registration etc.
- After exchanges of several communications and documents the authority decided to blacklist the supplier
- The supplier filed a writ in the High Court contending that in the show cause notice there was no mention of the blacklisting
- High Court dismissed the writ
- However, Supreme Court upheld the appeal stating that proper procedure was not followed, and it was against the principles of natural justice





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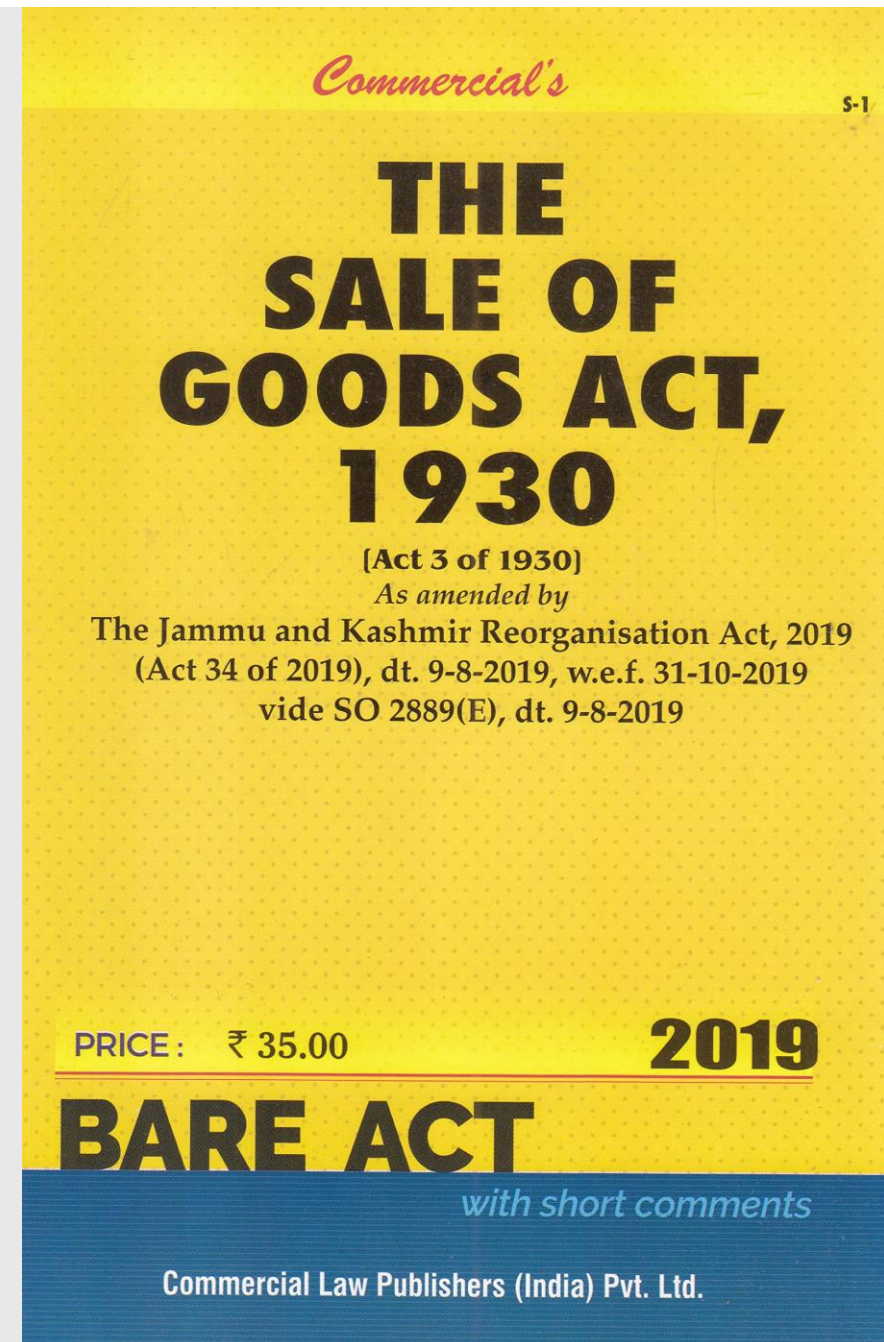
Sale of Goods



Summing it all up

# Sale of Goods Act 1930 deals with special contracts

- This act defines laws relating to sale of movable goods
- It provisions for the setting up of contracts where the seller transfers or agrees to transfer the title (ownership) in the goods to the buyer for consideration
- Deals with topics such as delivery, conditions and warranties, right of unpaid seller etc.



# Goods and Sale of Goods

## Goods

“Every kind of movable property other than actionable claims and money; and includes stock and shares growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale will be considered goods”

## Sale and agreement to sell

1. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another
2. A contract of sale may be absolute or conditional
3. Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is **called a sale**, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is **called an agreement to sell**
4. An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred





# Mysore Sugar Co. Ltd Versus Manohar Metal Industries Case – *facts & issue*

- The Mysore Sugar Company (plaintiff in the suit) advertised for sale of certain items like copper ingots, copper scraps as well as brass tubes available with the company notification dated 27.06.1966 on “as is where is basis”
- The defendant (Manohar Metals) offered to purchase the same by his letter dated 30.6.1966. The plaintiff accepted the offer of the defendant to purchase the various items
- Thereafter, the defendant lifted certain items on part-payment and when it came to lifting of copper ingots, he sought for time to pay the balance and to remove the same separating it from other things with which it was mixed up.
- The defendant had to lift 2,000 kgs of copper scrap and 2,000 kgs of copper ingots valued at Rs. 48,503.96. He wrote to the plaintiff on 28.8.1966 raising objections regarding percentage of copper contents in the articles. The plaintiff intimated to the defendant on 12.9.1966 stating that no certificate for purity of the metal would be given and the material was sold on "as is and where is" condition



# Mysore Sugar Co. Ltd Versus Manohar Metal Industries Case – *facts & issue*

- Despite repeated reminders and demands, the defendant did not take delivery of the remaining goods and remit the value. The letter dated 22.11.1966 to the defendant also did not meet with favourable response
- Therefore, the plaintiff resold copper tubes and copper ingots through an advertisement dated 30.12.1966 to M/s. Karnataka Hardware. By the said resale, the plaintiff incurred loss of Rs. 8,643.96
- Thereafter, the plaintiff got issued a legal notice to the defendant to make good the loss. The defendant did not pay. Hence, the plaintiff instituted the suit for recovery of Rs. 8,643.96 less Rs. 500/- being the initial deposit by the defendant. The plaintiff claimed, in all, Rs. 8,143.96 from the defendant along with costs and interest

**Is the defendant liable to pay for loss incurred by the plaintiff?**



# Mysore Sugar Co. Ltd Versus Manohar Metal Industries Case – *decision*

- It is the duty of the seller to mitigate the damages and his duty to see that re-sale was effected within a reasonable time especially so, when the prices were falling for the relevant material
- Three months delay, therefore, on the facts of this case, is certainly inordinate and re-sale has not taken place within a reasonable time as contemplated in Sale of Goods Act
- If the goods were re-sold in Sept 1966 within a reasonable time, the plaintiff would not have incurred any loss whatsoever. The burden of proving the damages was on the plaintiff and he has not placed any evidence on record in that behalf
- It is well settled rule that if the vendor, chooses to enforce his right to re-sell, he must do so within a reasonable time from the date of breach and that he should not allow the value of the goods to depreciate by making undue delay in re-selling them

**The buyer not found liable to pay for the losses incurred**



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Summing it all up

Doing it with diligence the first time and every time will go a long way in entrepreneurial success

- Be a devil's advocate before signing any contract
- Be as conservative as possible while getting into service level agreements
- Public procurement is a great opportunity but requires patience and perseverance
- Do not shy away from using expert help at any stage. You will never be at a loss!



Promise less  
Deliver more



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# Important links

- <https://doe.gov.in/sites/default/files/Manual%20for%20Procurement%20of%20works%202019.pdf>
- [https://doe.gov.in/sites/default/files/GFR2017\\_0.pdf](https://doe.gov.in/sites/default/files/GFR2017_0.pdf)
- [https://doe.gov.in/sites/default/files/Manual%20for%20Procurement%20of%20Goods%202017\\_0\\_0.pdf](https://doe.gov.in/sites/default/files/Manual%20for%20Procurement%20of%20Goods%202017_0_0.pdf)
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