



June 2024

Guidelines issued for arbitration and mediation in contracts for public procurement

By an office memorandum dated June 3, 2024, the Ministry of Finance, Government of India has issued guidelines to government entities and agencies including central public sector enterprises (“**CPSEs**”), public sector banks (“**PSBs**”), and government companies in contracts for domestic procurement (“**Guidelines**”). These Guidelines have been issued *inter alia* in the context of the enactment of the Mediation Act, 2023 (“**Act**”), the government’s experience of arbitration in respect of contracts where the government is a party, the peculiarities of the government as a litigant, the expenses involved in arbitrations, and routine challenges to arbitral awards.

The Guidelines issued by the government are below:

1. Arbitration is not to be routinely included as a method of dispute resolution in procurement contracts / tenders involving the government, particularly in large contracts.
2. An arbitration clause if included in a contract, may be restricted to disputes valued at less than INR 10,00,00,000 (Indian Rupees ten crore). The figure is with reference to the value of the dispute and not the value of the contract, which may be higher. It may be specifically mentioned in the bid conditions / conditions of a contract that in all other cases, arbitration will not be a method of dispute resolution in the contract.
3. The inclusion of an arbitration clause in respect of disputes of a value exceeding INR 10,00,00,000 (Indian Rupees ten crore) should be based on careful application of mind and recording of reasons and after obtaining the approval of:
 - a) In respect of government ministries / departments, attached / subordinate offices and autonomous bodies, the secretary concerned or an officer (not below the level of a joint secretary), to whom the authority is delegated by the secretary.
 - b) In respect of CPSEs / PSBs / financial institutions etc., the managing director.
4. Institutional arbitration may be given preference where appropriate, and upon consideration of the cost of arbitration relative to the value of the dispute. Challenges against awards / appeals against decisions passed against the government should not be filed in a routine manner and only when there is merit in doing so and a high probability of success.
5. Government departments, entities, and agencies should avoid and / or amicably settle disputes by mechanisms available in the contract. Such decisions must be taken in view of public interest, legal and practical realities, and without shirking or avoiding responsibilities or denying genuine claims of the other party.

6. Government departments, entities, and agencies are encouraged to adopt mediation under the Act and / or negotiate amicable settlements for resolution of disputes. Where necessary (for example in matters of high value), the following course of action may be adopted:
 - a) Constitution of a High-Level Committee (“**HLC**”) for dispute resolution, which may comprise: (i) a retired judge; (ii) a retired high-ranking officer and / or a technical expert.
 - b) Negotiate directly with the other party and place a tentative proposed solution before the HLC; or
 - c) Conduct mediation through a mediator and place the tentative mediated agreement before the HLC; or
 - d) Appoint the HLC as the mediator.
7. There may be rare situations in long duration works contracts where due to unforeseen major events, public interest may be best served by re-negotiation of the terms of the contract. The terms of the tentative re-negotiated contract may be placed before a suitably constituted HLC before approval. Approval of the appropriate authority will need to be obtained for the final accepted solution.
8. Mediation agreements need not be routinely or automatically included in procurement contracts / tenders since the absence of a mediation agreement in a contract does not preclude pre-litigation mediation. A mediation clause may be incorporated into contracts when the same has been consciously decided.
9. Disputes not covered in an arbitration clause and where the methods outlined above are unsuccessful should be adjudicated by the courts.

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