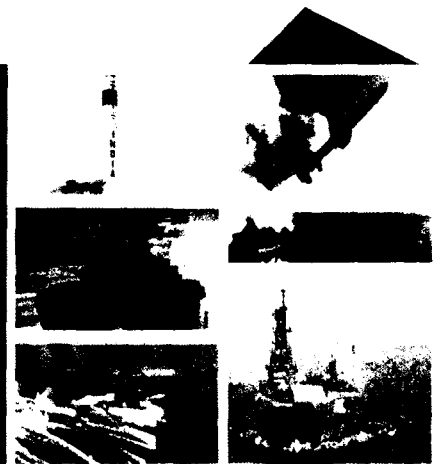


**CONTRACT MANAGEMENT IN DEFENCE
CONTRACTS WITH SPECIFIC
REFERENCE TO INDIAN DEFENCE
PUBLIC SECTOR UNDERTAKINGS
(A Report of the Research Work by the
Scholar as a part of LL.D Programme)**



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February 2018**

**Contract Management in Defence Contracts with Specific
Reference to Indian Defence Public Sector Undertakings**

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SUPERVISOR'S CERTIFICATE

This is to certify that this thesis is a record of original work done by Dr. Ashok Kumar Mishra at the National Law School of India University, Bangalore, under my guidance and supervision for the award of Doctor of Laws - LL.D. (Inter-disciplinary) on the topic "**Contract Management in Defence Contracts with Specific Reference to Indian Defence Public Sector Undertakings**". I certify that the thesis has not been submitted for the award of any other degree/diploma/fellowship or any similar title by the candidate previously.



Date: 14/2/2018
Place: Bangalore

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DECLARATION

I, Dr. Ashok Kumar Mishra hereby declare that the work reported in the Doctor of Laws -LL.D. thesis (Inter-disciplinary) on the topic "**Contract Management in Defence Contracts with Specific Reference to Indian Defence Public Sector Undertakings**" submitted to National Law School of India University, Bangalore is an authentic record of my work carried out under the supervision of Prof. (Dr.) R Venkata Rao, Vice chancellor, National Law School of India University, Bangalore. I have not submitted this work elsewhere for any other degree or diploma.

Dated: - **6 FEB 2018**
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Dr. Ashok Kumar Mishra

LIST OF ABBREVIATION

Sl. No.		Abbreviation
1	AAA	American Arbitration Association
2	ACU	Asian Clearing Union
3	ADR	Alternate Dispute Resolution
4	AON	Acceptance of Necessity
5	ATT	Arms Trade Treaty
6	B&D	Base & Depot Spares
7	BEL	Bharat Electronics Limited
8	BoM	Bill of Materials
9	CADMID	Concept, Assessment, Demonstration, Manufacture, In-service and Disposal
10	CAG	Comptroller and Auditor General
11	CCS	Cabinet Committee on Security
12	CDP	Committee for Defence Planning
13	CDS	Chief of Defence Staff
14	CFA	Competent Financial Authority
15	CGDA	Controller General of Defence Accounts
16	CIF	Cost Insurance Freight
17	CISG	Contracts for the International Sale of Goods
18	CMD	Chairman cum Managing Director
19	CNC	Contract Negotiation Committee
20	COSC	Chiefs of Staff Committee
21	COTS	Commercial Off the shelf
22	CPMFs	Central Police and Paramilitary Forces
23	CQA/A	Controller of Quality Assurance Establishment (Ammunition)
24	DAB	Dispute Adjudication Board
25	DAC	Defence Acquisition Council
26	DD	Design Documentation
27	DDTEMs	Design Documentation for Technological Equip[ping] Means
28	DEO	Defence Exhibition Organisation
29	DFIs	Director Foreign Investments
30	DFPR	Delegation of Financial Powers Rules
31	DGAQA	Directorate General of Aeronautical Quality Assurance
32	DGDPS	Directorate General of Defence Planning Staff
33	DGQA	Directorate General of Quality Assurance
34	DIPP	Department of Industrial Policy & Promotions
35	DMSMS	Diminishing Manufacturing Sources and Material Shortages

36	DOG	Defence Offset Guidelines
37	DOS	Directorate of Standardization
38	DPM	Defence Procurement Manual
39	DPP	Defence Procurement Procedure
40	DPR	Detailed Project Report
41	DPrP	Defence Production Policy
42	DPSU	Defence Public Sector Undertakings
43	DRDB	Defence R & D Board
44	DRDO	Defence Research and Development Organization
45	DSA	Draft Supply Agreement
46	Dte. Of P&C	Directorate of Planning & Coordination
47	EMD	Earnest Money Deposit
48	ENAC	Ecole National de l'Aviation Civile
49	ENSMA	Ecole Nationale Supérieure de Mécanique et d'Aérotechnique
50	ERV	Exchange Rate Variation
51	EU	European Union
52	FAA	Federal Arbitration Act
53	FDI	Foreign Direct Investment
54	FE	Foreign Exchange
55	FIPB	Foreign Investment Promotion Board
56	FLS	Formal Legal System
57	FOB	Freight on Board
58	GFR	General Financial Rules
59	GIFAS	Groupement des Industries Françaises Aéronautiques et Spatiales
60	GoM	Group of Ministers
61	GRSE	Garden Reach Shipbuilders & Engineers Limited
62	GSL	Goa Shipyard Limited
63	HAL	Hindustan Aeronautics Limited
64	HKIAC	Hong Kong International Arbitration Centre
65	HSL	Hindustan Shipyard Limited
66	IAF	Indian Air Force
67	IAI	Israel Aerospace Industries
68	ICA	The Indian Contract Act
69	ICADR	Indian Centre for Arbitration & Dispute Resolution
70	ICC	International Chamber of Commerce
71	ICSID	International Centre for the Settlement of Investment Disputes
72	IDC	Interface Control Document
73	IDH	Integrated Defence Headquarters
74	IGA	Inter Governmental Agreement

75	IJT	Intermediate Jet Trainer
76	INCOTERMS	International Commercial terms
77	IOC	Initial Operational Clearance
78	IOPs	Indian Offset Partner
79	IP	Integrity Pact
80	IPA	Indian Patents Act
81	IPR	Intellectual Property Rights
82	IPSIG	IP includes the existence of Private Sector Inspector General
83	ISAE	Institute Superior de IAeronautique et de IEspace
84	ISF	Internal Security Force
85	IT	Information Technology
86	ITA	Information Technology Act
87	ITAR	International Traffic in Arms Regulations
88	IW	Information Warfare
89	JAXA	Japan Aerospace Exploration Agency
90	JIC	Joint Intelligence Committee
91	JVs	Joint Ventures
92	LCIA	London Court of International Arbitration
93	LD	Liquidated Damages
94	LIC	Low Intensity Conflict
95	LLTR	Low Level Transportable Radar
96	LoI	Letter of Intent
97	LOT	Life of Type
98	LRU	Line Replaceable Unit
99	LSP	Limited Series Production
100	LTB	Last Time Buy
101	LTBA	Long Term Business Agreement
102	LTD	License Technical Documentation
103	LTIPP	Long Term Integrated Perspective Plan
104	MCA	Ministry of Corporate Affairs
105	MD	Missile Defence
106	MDL	Mazagaon Dock Limited
107	MDHANI	Mishra Dhatu Nigam Limited
108	MMRCA	Medium Multi-Role Combat Aircraft
109	MoD	Ministry of Defence
110	MoU	Memorandum of Understanding
111	MRO	Maintenance, Repair and Overhaul
112	MRTP Act	The Monopolies and Restrictive Trade Practices Act
113	MToT	Maintenance ToT

114	NBC	Nuclear Biological Chemical
115	NCW	Network Centric Warfare
116	NCLT	National Company Law Tribunal
117	NIRDESH	National Institute for Research & Development in Defence Shipbuilding
118	NITC	National Iranian Tanker
119	NSE	Non Standard Equipment
120	OBS	On Board Spares
121	OEM's	Original Equipment Manufacturers
122	OFAj	Ordnance Factory Ambajhari
123	OFB	Ordnance Factory Board
124	OFBL	Ordnance Factory Badmal
125	OFC	Ordnance Factory Kanpur
126	OFCh	Ordnance Factory Chanda
127	OFDR	Ordnance Factory Dehu Road
128	OMP	Obsolescence Management Plan
129	OPIC	Overseas Private Investment Corporation
130	PBG	Performance Bank Guarantee
131	PCN	Product Change Notification
132	PCT	Patent Co-operation Treaty
133	PDC	Probable Date of Completion
134	PDR	Preliminary Design Review
135	PECL	Principles of European Contract Law
136	PPP	Public Private Partnership
137	QRs	Qualitative Requirements
138	R&D	Research and Development
139	RFP	Request for Proposal
140	RM	RakshaMantri
141	RMA	Revolution in Military Affairs
142	RMSO	Repair Maintenance Supply Order
143	ROE	Rosoboronexport
144	RTC	Regional Trial Courts
145	RTI	Right to Information
146	SA	Scientific Advisor
147	SCAP	Service Capital Acquisition Plan
148	SCC	Stockholm Chamber of Commerce
149	SD	Security Deposit
150	SGA	Sale of Goods Act
151	SIAC	Singapore International Arbitration Centre
152	SME	Small and Medium Enterprises

153	SO	Supply Order
154	SOD	Strength of Design
155	SP	Series Production
156	SQRs	Service Qualitative requirements
157	STP	Sewage Treatment Plant
158	STS	Structural Test Specimen
159	SWOT	Strengths, Weaknesses, Opportunities and Threats
160	TE	Tender Enquiry
161	TEC	Technical Evaluation Committee
162	TEU	Tasko Export Ukraine
163	TI-DSPs	Transparency International UK's Defence and Security Programme's
164	THI	Thales International India
165	TMD	Theatre Missile Defence
166	TOC	Technical Oversight Committee
167	TOT	Transfer of Technology
168	TRIPS	Trade Related aspects of Intellectual Property Rights
169	TTA	Tactical Technical Assignment
170	TWT	Transonic Wind Tunnel
171	UCC	Uniform Commercial Code
172	ULF	Uniform Law on the Formation of International Contracts for the Sale of Goods
173	ULIS	Uniform Law on the International Sale of Goods
174	UNCITRAL	United Nations Commission on International Trade Law
175	UNIDROIT	International Institute for the Unification of Private Law
176	USAID	United States Agency for International Development
177	WIPO	World Intellectual Property Organisation

Executive Summary

Contracts Management in Defence Contracts in Indian Defence PSUs is of paramount importance for the growth of the Indian defence Sector for realizing the critical objectives of **self-reliance, indigenisation and design and development of future generation equipments.**

Contract Management generally involves monitoring the implementation of a contract after it is placed to ensure timely completion of all the supplies and related services shown in the contract as per terms and conditions incorporated therein. Even the published literature on "Contract Management" per se covers contract law, contracting with national and international parties / Government of a modern business contract, terminology involved in the contract Arbitration Procedures, Standard form of contract. Since Defence Contracts are on a different footing than other commercial contracts, Researcher has attempted to cover both pre and post contractual phases and issues. This Thesis has attempted to cover largely Indian Contract Act and related national & international protocols including IPR issues apart from management issues covering contractual issues both pre & post contract Management arising out of DPSU Contract with International vendors/ Foreign Government/Indian Vendors including DPSU/Ministry of Defence, Government of India and even inter-Government Agreements assigned to DPSU by Government of India.

Therefore, well-structured defined contracts and its effective management in any DPSU will set a clear path for due performance of obligations while ensuring clarity and fairness which will in turn obviate litigations and arbitrations that come in the way as setbacks in the organisation leading to delayed supplies from the vendors, consequent delayed production and deliveries to the customers, exposure to penalties, less of capability development for modern technology, loss of reputation and goodwill.

Further the recent Govt. of India new initiative of "**Make in India**", with thrust on indigenization and self-reliance, concept of Strategic partner, transfer of technology from foreign OEM's assumes importance in the context of research subject. The concept of "**Make in India**" can be successful only if indigenous defence industry is empowered on the adoption of latest technology of products acquired from foreign OEM's. This is possible only if reasonable care is taken in the various International defence procurement contracts to ensure that Technology Transfer and related Arrangements are implemented in full.

Objective of the study: The research study focuses on issues in Defence Contract/Contract Management with specific reference to Indian Defence Public Sector Undertakings. India is the fourth largest Defence Services in the world and is one of the largest Defence spenders. Indian Defence industry today is on the threshold of entering a new era through modernisation of the equipment and making the nation self-reliant in Defence products. Any setback in the defence preparedness from foreign OEMs/ upgradation of existing war inventory/ delay in development /innovation of next generation war equipment's can seriously affect the defence preparedness of the country, especially when the indigenous defence industry is not fully developed.

Defence spending in India has increased by leaps and bounds in the past two decades and presently constitute 2% approx. of GDP of the country. Major portion of the Defence spending is in procurements of Military Aircraft, Ships, Arms and Ammunition etc. Sourcing of the above procurements is also being largely done through Defence PSU's. As the country, has not attained self-reliance in Defence technology the major procurements are only sourced from foreign OEM's and hence huge foreign exchange outgoes are involved.

Hence, in the larger interest of the Defence scenario of the country it is proposed to study Defence contracts Management with emphasis on the techno-commercial, legal and financial precautions to be taken to realize the full potential of the money spent and to develop a best economical solution for Defence procurements in DPSU's apart from developing indigenous defence industrial base. The study is also to cover the various factors to be considered to ensure Technology Transfer by Foreign OEM's resulting in Indigenization of the original equipment's supplied by foreign OEM's.

Further a detailed analysis would help to bring out the real facets of our present defence contract management issues in DPSUs. This would also throw out certain deficiency in the existing system which acts as a deterrent to the Transfer of Technologies besides developing the technologies in-house.

Present research study aims at flagging the issues and suggesting a well-structured template and vetting of the draft contract before they are entered apart from legal perspective & management perspective. For the sake of accountability, a structured contract management system must be ingrained and integrated in the organisation structure.

To sum up, the study addresses “that the proposed Contractual model /suggested input emerging from the study should be capable of binding the parties to the contract and ensure effective Implementation of the contract thereby realizing the benefits to the DPSU’s and the purpose for which it has been entered into”.

In order to appropriately meet the objective, the subject has been covered in chronology through appropriate chapters and headers to elicit Research problems, its scope & concern, its Methodology, legal coverage, collection of primary and secondary data, critical evaluation of data with Headers, suggestions emerging, its implementation process etc.

Research Methodology Adopted: Analytical research method is used widely for analysing the facts or information already available, and these are analysed to make a critical evaluation of the material and to draw conclusions. Researcher has gone through historical records available, analysis of documents & data mail questionnaire, personal interview, Group Interview, Participants observation, deliberations in small group & large group and so one so forth. Also, Case studies method is adopted to establish the basic causal relations. This may be of interest to this study using samples and very deep probing data gathering through deliberations. Adopted widely discussions with stakeholders in the field apart from multiple sources of secondary data available within & outside our country.

Main Findings: While the research study has thrown out the various inconsistencies and incongruence in the various Contractual clauses some of the main findings of the study are illustrated below:

- While drafting contracts legally incorrect, vague and ambiguous clauses are included in various parts of the contracts. Major areas include Technology transfer, Offset clauses, option clause, support and services, Arbitration, Penalty for delayed deliveries, even escalation formulae, one sided unreasonable and unfair conditions to name a few.
- Every contract entered with each vendor is specific and exclusive. Normally each contract has special and general conditions. They need to be complimentary to each other. However, it is observed since enough care is not exercised in the drafting of the contract many of the contract specific terms contradict with similar terms in General conditions. This situation gives rise to various legal complications later.

- Many of the terms and conditions in the contract are loosely worded resulting in difficulties during the implementation phase. For instance, Effective date of Contract is indicated both from the date of signing of the contract as well as the date of the payment of advance which may give rise to a dispute later.
- Learning from Defence Export Contract suggests to keep the following issues in mind:-
 1. Domestic country proven products are only to be exported. Never enter into contract on new untested products, systems and modules.
 2. Jurisdiction of the contracts under a neutral venue if Indian law is not accepted be considered.
 3. Dispute Resolution mechanism be inbuilt into the contract including Arbitration or mediation or conciliation.
 4. Project Management team considering both buyer and seller team members be put in place and be a part of contractual clauses.
- India's defence capability resides mainly at a tier 2 and 3 level. Thus, it is pertinent to identify technology absorption strategies at these tiers to enable grass root level growth and subsequent rise in the value chain.
- Strategy must determine force structure and acquisition plans. LTIPP (Long Term Integrated Perspective Plan) on fighting of war gets finalised after deep thinking and extensive deliberation. Such aggressive debate leads to the finality of the science of designing and making weapons in trusted war scenario in modern era. DRDO, DPSU and OFB are duty bound to provide the base for indigenous development of such weaponry based on input provided by Defence forces.
- *Declare a Defence Industrialization Strategy*
 Available input in public domain provides that China has already established Civil Military Integration (CMI) through establishing a commission which is a very powerful body reporting directly to their Central Politburo. India has to learn from this & adopt this policy. For

example, Indian defence aerospace has to immediately adopt this strategy for their business survival as Defence on standalone mode cannot provide sufficient business on year to year basis for their survival. Defence Aerospace has to consider concurrent growth of Civil Aerospace as in India itself there is abundant demand for its growth. "Make in India" has to adopt this concept vigorously and NITI AAYOG is to provide help of government machinery to strengthen this concept, which will provide a great impetus to MSME/SME/Private sector also which has been disheartened by the approach of DPP 2016 by increasing OFFSET threshold limit from Rs. 300 crore to Rs. 2000 Crore. With authority, it can be said that High-tech Precision are equally applicable to both Civil and Defence Aerospace. The requirement will be only to sign Non-Discloser Agreements (NDA) between DRDO/DPSU/OFB/Defence Services and Industry.

- Present central government has provided the concept "Make in India" initiative under new National Manufacturing Policy with a large hope to enhance double digit growth in manufacturing sector including increasing content of percentage (Presently 16% of GDP) in GDP apart from creation of 100 million jobs by 2022. This concept applicability seems to be difficult as far as manufacturing in Defence is concerned without integrating FDI/TOT Policy, Defence Export Policy, Revisiting Offset Guideline of DPP 2016, CMI etc.
- Indian Defence Sector is to learn from its sister sector like construction sector which has grown rapidly and for certain states it is the one of the most prominent input for increasing their GDP. India itself has "Construction Industry Development Council" set up long back in 1996 at the initiative of Planning Commission by Government of India with members from Indian Construction Industry. Similarly other countries like South Korea--South Korean Defence Industry Development

Council, Malaysia—Malaysia Defence Industry Council etc.; India can also appropriately form a Defence Industry Development Council including CMI with participation from DRDO, DPSU, OFB and Services and may be headed by Cabinet Minister/ State Minister, Ministry of Defence so that MOD feels the pulse, available technological capability and other emerging indigenous input to build its own future generation equipments for all services at a much lower cost than buying under TOT/ licence production/ co-development and co-production etc. The impact of this council is given appropriate importance at top level in MOD then days are not far off really our import procurement content will be reduced from what it is today (70% Import content) and our Vigilance and Investigating Agencies concurrently to change their mind sets that “Smiling with a Vendor is not a corrupt practice”.

- a) In the implementation of offset banking provisions it is felt that there should be differentiation on the export orders placed through offset mechanism and the orders received on competitive basis without reference to offset guideline.
- b) In various countries threshold limit is for far less than Indian threshold limit of Rs 2000 crores for obtaining the offsets. It is for consideration to bring the threshold downwards and facilitate the corresponding offset obligation through a larger industrial base.
- Opportunity for technology acquisition is to be extended to DPSUs having R&D setups for their respective areas. However common technologies which are to be utilized by multiple players to be acquired through DRDO.
- It is for consideration for inclusion of representative from department of defence production and representatives from industry in Technical

- Offset Evaluation Committee (TOEC). The TOEC to be chaired by a neutral body without ownership towards industry or user groups.
- Higher multipliers could be considered if the development of technology happens in India by Indian companies with the OEM's R&D support and the Intellectual Property rests with Indian Offset Partner.
 - Mechanism to be introduced that could be instrumental for the industry in finding out the non-committed business volumes for offsets for specific OEMs and projects. By making this data accessible to all stakeholders could bring in a proactive approach in better liquidation of offsets.
 - It is for consideration that the data for completed projects can also be made available to all the stake holders. Introduction of this provision will extend an opportunity for analysis of data and provides inputs for continuous improvements, further it would enable, better utilization of offsets opportunities and development of Defence industry.
 - The purpose of offset be capability and capacity building for technology absorption, design and development of future generation equipment's. Indigenisation or such other parameter as Indian Defence Expert feel be embedded into RFP. These are to be made non-negotiable and prime factor and not an optional one.
 - Legal issues associated with co-development like protection of joint ownership of I.P (Intellectual property), Non-payment of royalty under co-development arrangement for use of technologies to develop either in the same programme or any other programme.
 - Help OEM in Indian Taxation network to avoid disputes with Indian Tax Authorities. This will provide comfort to foreign OEM.
 - Gaining core technology on critical issues/future generation technology requirement.

- Inter-government Agreement route be followed for avoiding Export Control restrictions imposed by Foreign Countries as also for boosting export.
- Offset banking and value addition be critically monitored by Government Authorities.
- Development, Assimilation and sustenance of expertise within Indian Industry.

Defence Products Export Contract:

Running for Export Contract needs to be avoided in Defence sector particularly in Defence Aerospace unless Indian PSU's/Industry gain expertise like Indian Software / I.T Industry. One of the Indian DPSU lost heavily when it won a contract for indigenously developed Helicopter with a Latin American country against a global RFQ of that country. The loss was not limited to supply of Helicopter but also otherwise and finally got a bad name in world of Helicopter suppliers. May be contract Management largely responsible. Some issues learnt are as follows: -

- The contract was subjected to laws of Buyer country, the knowledge of which was not available with the DPSU.
- The contract was subjected to the jurisdiction of courts in the capital of Buyers country.
- The contract does not have a Dispute Resolution mechanism like conciliation/mediation/arbitration.

All the above has resulted in issuance of unilateral termination without exhausting such dispute resolution mechanism.

- Non-compliance to the contractual obligations and management invites political risks. Hence management of defence Export Contract requires different behavioural character to meet project on schedules agreed in the contract.
- Currency risk cannot be ignored in such contract.
- The damage to the image and brand in International contract is very high.

Recommendations:

- Primarily my recommendation is based on studies of Defence Contract with values involving over thousands of crores rupees and covers both DPSU contract with foreign / indigenous vendors as also with Defence Customers ; participating in high value contract negotiations, discussion with various Stakeholders , reading of secondary data both available on public cloud & hybrid cloud , response of questionnaire received from various defence organisations , dispute resolutions involving crores of rupees etc.
- After going through full drill of the Research Project, it is understood that Contract Management in a defence contract is not limited to contract per se but it involves part of project management also.
- Take the citation of a fighter aircraft programme which emerged out of Inter Government Agreement. While it provided capability of 4.5 generation fighter aircraft to Defence Services made indigenously under TOT (Transfer of Technology) but learning from failures are much more. Learning commenced from poor programme management capability, poor negotiation skill, poor drafter of contract, working under pressures, feeling of failures on all front of production & supply, technical absorption, loss of money to DPSU because LD deduction by Defence Customers – although DPSU not solely responsible, delayed establishment of Maintenance facility and so on so forth. Learning from success view point is Indian PSU's /Private sector/ SME have developed capability to build fighter aircraft of modern era and can upgrade existing aircraft platform both in aviation and communication capability.
- The other similar case is with a Trainer Aircraft development programme of defence services by a DPSU. Failure of engine development in time & of capability by reputed foreign Engine Developer & Supplier emerging out of global competitive bidding and go on paying through Nose by DPSU to arrest further delay in Trainer Aircraft Development Programme. Even foreign consultancy firm of world repute unable to solve technicalities of the programme and continue to draw money under pressure from DPSU to arrest further delay of programme by repetitive amendment of contract because of multiple reasons entered on a single vendor nomination basis. DPSU has been put to brink of failures as Defence Customers will recover full money involved in thousands of Rs crores so paid as Advance payment and milestone payments. Although its own failures may be minimal but the basically defective contract followed by DPSU has laid to such situation.
- In a similar situation, an indigenous fighter aircraft programme has put the image of a DPSU goodwill to a loss in its national government

eyes; while the delayed design by Design Agency followed by Development contract with vendors has mainly created the situation. Finally the established DPSU of 1940 having at its credit design, development & manufacture of over 11 aircraft programmes has largely been made responsible by its defence customers for delay in development of one Trainer Aircraft Development programme.

- Take another citation of failure of DPSU on accepting an export order of Helicopters with one sided clause favourable to Buyer (a foreign government) at a loss just to show the world as our country is among few countries in world having capability to design, develop & manufacture helicopter, when the Helicopter programme itself was under development mission with few systems still to be tested. The contract clauses were not appropriately covered including SOP (standard of preparation), Design & Development time- frame, Training Schedules, Maintenance Philosophy, Payment Terms Vis a Vis cash flow considerations etc. Prior to entering into contract, 'preamble ' to the contract be specific & cover appropriate philosophy of design, development , manufacture, maintenance & spare supplies including product support. Rushing for export orders by DPSU based on pressure from defence customers / Government Agencies / short sighted Management has laid the DPSU to suffer over crores of rupees. All this has resulted due to non-understanding of contract formulation with appropriate coverage of concept like Force majeure, SOP drafting for marketability, Product Liability, cost management culture, EASA certification/quality certification & other such clauses including clause on Arbitration and Applicable Law over & above vigilance fear to deviate from procedure.
- A few of Summarized Recommendations are enumerated hereunder:
 - A contract drafting personnel engaged in contract drafting for defence industry be with a techno-legal-commercial background.
 - Indian side to provide first draft contract be it import/export.
 - Performance measures and reporting requirements are set.
 - Any changes to the contract are required to be made in writing and signed by all parties.
 - Wherever Technology transfer is involved the method of execution should be clearly defined including Documentation thereof with stringent penalty for failures.
 - Offset clauses, Fall Clause, Option Clause wherever applicable should be indicated in unambiguous terms and should not be a subject matter for interpretation.

- Support and services should clearly be defined and the periodicity should also be stated. Survival clause to ensure continuity of services and support beyond the contract period should be explicitly stated along with penalty for non-compliance.
- Clause relating to Confidentiality and IPR issues should indicate the liability in case of non-compliance and resultant losses.
- India is specified as the jurisdiction for governing law / third country where DPSU has its own centre including familiarity with law of that country.
- If there are limitations of liability, they are identified and reviewed for reasonableness, given the context of the contract;
- Assignment of the contract to another party is not allowed.
- Subcontractors must be approved by the DPSU/DEFENCE CUSTOMERS and bound by all the same terms and conditions as the primary contractor;
- Confidentiality issues are addressed and contractor is obligated to follow it;
- Contractor required to be trained and licensed to provide the services (where appropriate);
- Termination provisions are specified and reasonable.
- Dispute Resolution Processes are identified.
- Integrity Pact should be part & parcel of contract.
- To deal with vulnerabilities to fraud, waste and abuse a self-assessment of the acquisition function be made by each military services & DPSU's and percolate the findings from top leadership to the ground level functionary with no punitive intension but for system improvements.
- Insufficient Surveillance occurs in Defence Contracts because Surveillance is not as important to contracting officials as awarding contracts and therefore, does not receive the priority.
- DPSU faces vulnerability to contracting waste and abuse due to weakness in area like sustained senior leadership, capable acquisition workforce, adequate pricing, appropriate contracting approaches and techniques.
- It is sometimes conceded by officials that changes in the acquisition environment, increase reliance on vendor, reduction in workforce and introduction or expansion of alternative contracting approaches leads to waste & abuse of precious funds.

- Senior positions in DPSU should not be allowed to be kept vacant for a long period as it provides opportunities to determined individuals in hierarchy to circumvent established policies & procedures for their own personal gains.
- In the DPSU's also seen are cases when top management set tone streamlining acquisition to get result as fast as possible. While this is a desired result of acquisition process, the acquisition process may still be carried out within prescribed policies & procedures instead of taking divergence except in case of export contract where customer specifies particular fitment of a particular make.
- In the DPSU's the need is to have right skill set people in acquisition workforce to effectively implement best practices & properly manage the acquisition of goods and services.
- Wealth of experience and capabilities needs to be passed on to successors in acquisition wing.
- Material Procurement list which is approved before tendering needs to be carefully assessed both for requirement & pricing.
- Although concept of "incentive fees" intended for motivating excellent vendor performance and improve acquisition outcomes may be a good concept but considering additional vulnerability to waste and abuse in the way implementation likely to happen, it is suggested not to implement such concept.
- Clarity on Escalation formulae – year to year basis or point to point basis with capex on yearly escalation needs to be considered.
- Defence Customer isto be made a part & parcel of all negotiations of DPSU's / Strategic partner procurement so that there will be full clarity on technical & commercial issues including formulation of Preamble and SOP.
- IN all big defence deals involving DPSU's /Strategic Partner ,Indian reputed law schools & Economic Schools with standing be made a part & parcel of Negotiation Team for guiding team on drafting / modifying clauses.
- Government Sponsored Team /Reputed National law school teams on a continuous basis be asked to study large defence contract and go on suggesting modifications in standard contract document based on experience gained.
- Raising of Offset limit to Rs 2000cr from Rs 300cr as at present by DPP 2016 needs review to strengthen MSME in defence sector. This

is based on proposition "Failure to Plan "is a mistake but "Planning to fail "is suicidal".

- Outsourcing policy of DPSU be reviewed for involvement of MSME (Micro Small and Medium Enterprises) at component, sub-system, system, LRU, design, development, maintenance level. DPSU's / Strategic Partners be made Aggregators /Assemblers only.
- DPSU's having vertically integrated plants needs review to sell/ opt for joint venture some non-critical plants to generate resources for investments in developments of new platforms /future generation equipment's in collaboration with reputed IIT /NIT/ PRIVATE ENGINEERING colleges.
- Since Indian defence sector continuously requires innovation as seems from the study, DPSU's in collaboration with state governments /central government with its CSR funds exclusively to sponsor programmes to students of intermediate plus for generating new ideas for innovation which is lacking since 1970's in this field.
- All DPSU to constitute cross functional team to study systems & procedures of Indian Space Organization and implement the same in respective organization around contract management.
- Smiling with a vendor should not be construed as corrupt practice but they are to be treated as partners for the respective programmes without in anyway compromising on contractual terms.
- Learning for contract management can be provided by reputed law schools & their chair be established in all DPSU's.
- National law schools can think of incorporating a small module on 'Contract Management 'in its under graduate level syllabus as this is going to be sold like a hot cake in years to come as also a national requirement as current leadership wishes India to become a Global Power.

Chapter – 1 INTRODUCTION

1.1 Introduction

1.1.1 AIM's:

- Emerging Opportunities
- Global Aerospace & Defence – Perspective
- Technology-enabled manufacturing
- Research and Development (R&D) - Indispensable Ingredient for Sustained Growth
- Providing the right Market Dynamics
- Maintenance, Repair and Overhaul (MRO) – An effective support system for aerospace and defence
- Human Resource Skills – No substitute to Trained Manpower

1.1.2 OBJECTIVES:

- Indian Defence Procurement Policy-2013:
 - Cautious Optimism
 - Ambiguities & the issues from Stake holders in DPP 2011 has been addressed in DPP 2013
 - Prioritization of Various Categories for Capital Acquisitions under DPP 2013
 - Release of Public Version of Long Term Integrated Perspective Plan (LTIPP)
 - Maintenance ToT (MToT) no longer through Nomination
 - Advance Consultations for “Make” Procedure
 - Simplification of “Buy & Make (Indian)” Procedure
 - Clear Definition of Indigenous Content
 - Ensuring faster progress in “Make” and “Buy & Make (Indian)” cases
 - Defence Items List
 - Licensing for Dual Use Items
 - Consultations on Security Guidelines for Indian Defence Industry
 - Resolution of Tax-related Issues
 - Funds for MSMEs in the Defence Sector
 - Efficiency and Transparency in Defence Procurement

- **Enhanced Delegation of Financial Powers**
- **Powers to DAC**
- **Potential Problems in DPP 2013**
- **Way Forward**

1.1.3 (a) PROBLEM AREAS & (b) ISSUES:

- 1. Foreign Direct Investment (FDI) in Defence Sector**
- 2. Involvement of Domestic Industry in Defence Planning**
- 3. Abolish License Requirement for Defence Items**
- 4. Introduce Offset Credit Trading**

1.1 Introduction¹:

A commercial contract is a legally binding agreement between parties in which they are obliged to act/do or not to act/ notto do certain things. These types of contracts are written contracts, in case of defence PSUs.

Business contracts including DPSU contracts when is being entered into with international organizations even legal councils are engaged to draw important clauses in the contract/contract *per se*. A breach of contract occurs when a party to the contract fails to live up to the understanding made in the contract. Under these situations, the law is required to provide a remedy which may be sorted out by the courts or through arbitration.

Commercial contracts may be any one of the following:

- a. Definite quantity contract
- b. Firm fixed-price contract
- c. Fixed-price contract
- d. Time and materials contract

To the extent that the international commercial contracts are concerned, they are sale agreements or other commercial agreements made between parties from different countries. Some of the modalities for entering into foreign markets may be but not limited to the following methods:

- 1- Export directly
- 2- Use of foreign agent to sell and distribute
- 3- Use of foreign distributor to sell to local customers
- 4- Manufacture products in foreign country by either setting up business or by acquiring a foreign company
- 5- License to a local producer
- 6- Enter into a joint venture with a local partner
- 7- Appoint a franchisee in the foreign country

All legal disputes involve remedies. In certain situations when a court rules that no contract was ever formed , such ruling can be seen as saying that the complaining party is not entitled to any remedy for breach of contract. Even such a ruling may entitle the concerned party for some other remedy like returning advance payment that had been made. While on an economic

¹ An Article by Gurpal Singh Deputy Director General & Head (Defence and Aerospace) Confederation of Indian Industry & Defence Reader News.

standpoint, what ultimately perceived is not the doctoral question “was a valid contract formed?” but the remedial question “how much money can I collect now? “

In certain cases, failure to comply with their contracts by a party may be ordered by courts to perform – specific performance in legal terms. Such order backed up by threats of more severe sanctions for contempt of court .It is also seen that the default remedy for breach has the breaching party pay money to the aggrieved party.

1.1.1 AIM's²:

India is going to become global power wherein defence will play a paramount role.

As per projections, India is likely to have the ability to project conventional military power globally with the third largest defence expenditure pegged at US\$ 654 billion by 2045.

India can become manufacturing hub for global requirements as the skill set and low labour cost are the two main advantages to capture world market.

Govt. of India is aiming to reduce dependence on imports which is presently 70% to a lower percentage and wishes to have more self-reliance through indigenization. This involves the methodology to reduce imports and increase indigenisation; both together will help the country to achieve self-reliance in defence products & services. All this suggests for primarily to synergies Indian defence industry which may be large corporate sector or SME / MSME with the global corresponding defence / civil industry. The Capital procurement under the Ministry of Defence is guided by Defence Procurement Procedure while revenue procurement is guided by Defence Procurement Manual. Both are guiding documents for procurement under Ministry of Defence. Such documents whenever updated / revised, it takes into consideration, the views of industry, service headquarters, DPSU, OFB, MOD and the prevailing world market in defence sector.

The above said guiding documents have all the inputs to generate the trigger point for providing the propulsion affect to the defence industry. The industry and the service headquarters based on the above guiding documents initiates Research and Development and procurement action subject to availability of budget in the current year and estimated fund availability in the

² An Article by Richard Rekhy Head of Advisory KPMG in India

years to come. With changing times & requirements for modernization of various equipment of all the three services, stakeholders mainly the Govt. of India, political & bureaucratic bosses have initiated the change in mind-set and accordingly liberalising this defence sector by overcoming the challenges & streamlining the procurement process for modernization & growth. While increasing Foreign Direct Investment (FDI) content from 26% to 49% and for strategic consideration even by allowing 100% FDI wants to build technological base to create ripple effect for the defence industry. Future generation equipment and modernization requires continuous technology upgradation & development. This necessitates the upgradation of skill-set of human resources, good research and development setup and growth of SME/MSME to become the suppliers of DPSU's / Ordinance factories.

DRDO and its various other laboratories to continuously strive for developing future generation equipment / modernization of existing equipment of services with the skill setup of IIT's / NIT's / IISC / ISRO. In the process these development institutions to outsource their low end jobs to SME/MSME's with funding from the govt. / CSR funds accumulated by different industries; not only this even these SMEs / MSMEs be provided commitment for the order of full programme for production, overhaul / product support so that they can generate sufficient revenue for their survival & growth. All this wave will generate a win-win situation for both the government and Indian industrial organisations be it in large organization / MSME / SME. Initially there is no harm in allowing foreign integrators to setup their shops with higher FDI limit for next 5 to 10 Years plans so that the base of Indian Industry is established. Time has also come to understand the problems of industry why they have not grown so much because of monopsony market prevailing in India and not generating sufficient revenue for the survival of industry and hence for common platforms and systems defence aerospace be merged with civil aerospace or otherwise so that sufficient revenue can be generated for the industry. This phenomenon is already available in most part of the world where they manufacture common product for both industry (i.e. both defence & civil aero-space).

a) Emerging Opportunities:

The basic premise that underlies this projected opportunity in Indian Aerospace and Defence are:

- Government taking appreciable steps for modernisation of the industry by way of change in FDI limit as also streamlining procurements process including availability of funds.

- Positive industry reforms and the potential economic opportunities in related sectors.
- Transfer of technology with an eye on global supply chains of large defence equipment producers to gain advantage of shops in India resulting from cheap labours.

b) Global Aerospace & Defence – Perspective:

Defence sector all over globe is booming with the pace which no other sector is growing. Despite challenges like:

- Long gestation period
- Regulatory framework
- Complicated procedures
- Eco system of the supply chain
- Technology advancement
- Requirement of new skills
- Political focus

The growth in the defence sector is growing exponentially. In India also government is taking many steps which are encouraging to develop ecosystem of supplier base. However, much more has to be done strategically with long term perspective and taking into consideration” Make in India” paradigm.

c) Technology–enabled manufacturing:

Innovations in technology and supply chain will be the major factors in defence manufacturing.

As mentioned elsewhere in chapter that IT industry in India has grown multi-fold and multifaceted but still weak in defence sector and that’s why large foreign corporations have opened their IT sector in defence arena. This allows them to take help of Indian technocrats at much lower costs whereas our own IT Industry managed by Indian Management are not considering the defence production and services area because of lack of continuous order.

The technological requirement for defence production & services are bit different and requires expertise in process shops, systems engineering, communication systems, avionics / display systems, naval systems, electronic warfare, ERP, modelling techniques for the design & development of weaponry, modular manufacturing, integration and assembly etc.

Presently DPSU’s and OFB’s are mainly involved in this sector and hence the recent DPP 2016 has innovated the concept of “Strategic Partner” which

requires involvement of at least one industrial house for each defined sector under defence.

d) Research and Development (R&D) - Indispensable Ingredient for Sustained Growth:

Research & Development is one of the critical elements for defence sector modernization. Innovations are required to be made continuously for the sustenance of this industry. Although worldwide the trend is to reduce budget but India needs rather a bigger push for the growth of this sector. While DPSU's are contributing their funds in a balanced manner apart from the government which also provides for the limited funding. The newly selected strategic partner also needs to bring funding for such programmes. May be CSR funding through change in Govt. regulation is also needs to be diverted to this sector, initially to strengthen the innovation and R & D base. Supply chain area also needs to be rejuvenated by changing certain regulations / directions of CVC / Govt. to go for vendor selection on nomination basis for the life time of the project.

e) Providing the right Market Dynamics:

SME / MSME are the foothold of large defence organisations / DPSU's as they are providing sub-systems and systems to these large houses / DPSU's for integration and final assembly of the main defence product. SMEs are more leaner and having advantage of low setup cost and high level skills. However, these SMEs are expanding into new areas such as design and development capabilities.

Further, they are joining hands with foreign players and thus their potential to be tapped for building strong base for ecosystem for the supply chain in the defence sector.

f) Maintenance, Repair and Overhaul (MRO) – An effective support system for aerospace and defence:

It is observed that more is spent by organisation on Maintenance, Repair and Overhaul than the cost spent on manufacturing and procurement. It is seen that Europe and North America serves a large part of MRO market.

Emerging MRO hubs such as Singapore are now balancing the global MRO equilibrium. India should also develop MRO facilities of its own owing to cheap labour cost and availability of skilled manpower.

g) Human Resource Skills – Need to have Trained Manpower:

The backbones of the defence sector i.e. manufacturing industries are highly dependent on the skills and the technical abilities of the workforce.

Thus, it is imperative and government is rightly doing so by creating a platform like Aerospace national skill development council for the training and generating skill-set to the technicians having diploma's / ITI's in respective trades for application of these skills in Aerospace Industry.

Initiatives like separate Ministry for Skill Development, joining hands with engineering institutions & industry, opening up of more vocational training institutes like ITIs and recognition of technical expertise will give impetus to defence sector which is very much required for sustainable growth and economical contribution towards the country.

1.1.2 OBJECTIVES:

- **Indian Defence Procurement Policy-2013:**

The –revised- Defence Procurement Procedure (DPP-2013) document, outlines procedural guidelines for all stakeholders involved in defence procurement.

- **Cautious Optimism:** The new DPP 2013 promises to address the issues and problem areas of the earlier Defence Procurement procedures.

DPP 2013 has added certain new areas like maintenance transfer of technology including its scope, evaluation of commercial quotes at par with international best practices, collaboration between Indian & foreign companies with much simplified procedure and enhancement / prioritisation of indigenous products categorization. The most preferred category under DPP 2013 is "Buy Indian" followed by 'Buy and Make (Indian)', 'Make (Indian)', 'Buy and Make' and 'Buy (Global)'. The stress is on maximum indigenization and reduction in import.

- **Ambiguities & the issues from Stake holders in DPP 2011 has been addressed in DPP 2013:**

Following are the highlights of the amendments to the DPP-2011:

SI No.	DPP 2011	DPP 2013
1.	Preference for indigenous procurement	Preference for indigenous procurement has been clearly addressed by giving prioritization of

		<p>Various Categories for Capital Acquisitions:</p> <p>Preferential order of priority is as follows:</p> <p>(1) "Buy (Indian)";</p> <p>(2) "Buy & Make (Indian)";</p> <p>(3) "Make";</p> <p>(4) "Buy & Make with ToT"; and</p> <p>(5) "Buy (Global)". Any proposal to select a particular category must now state reasons for excluding the higher preferred category/categories</p>
2.	Long term perspective for technology was missing	"Technology Perspective and Capability Roadmap" (TPCR) for 2012-2027 i.e. 15 years perspective document was approved by DAC (Defence Acquisition Counsel) to be released as public version .
3.	Maintenance Transfer of Technology (MToT) has been hitherto reserved largely for OFB and DPSUs through the nomination process	MToT no longer through Nomination this will boost private sector participation.
4.	Emphasis on make procedure was missing	Advance consultations of actual procurement by Service Head Quarters (SHQs) are allowed. Capital acquisition plans can be modified into defence R&D and production plans. For simplification of "Make" procedures, a high level committee was formed to release full potential of this to release category.
5.	Complex procedure for Buy	Simplification of "Buy & Make

	and Make	(Indian)" Procedure which leads to faster processing of the proposals
6.	Clarity of Indigenous content was missing	Indigenous content has now been properly clarified. This has provided clarity and a common understanding.
7.	Proposals for Make and Buy & Make (Indian) cases were processed with lot of complexities and taking time.	Ensuring faster progress in "Make" and "Buy & Make (Indian)" cases
8.	Funds for MSMEs in the Defence sector	More emphasis on funds for MSMEs has been given.
9.	Validity of Acceptance of Necessity was 02 years	More efficiency and transparency has been ensured to expedite the acquisition process by reducing the validity from 02 years to 01 year.
10.	Delegation of Financial Powers	Enhanced Delegation of Financial Powers. Like: Service Chiefs/ DG Coast Guard financial powers enhanced from Rs.50 crore to Rs.150 crore for capital acquisition cases.
11.	Powers to DAC: Deviations were getting approval by Defence Minister.	Approval for all deviations from the Defence Procurement Procedure will henceforth be sought from the Defence Acquisition Council instead of the Defence Minister.

Military expenditure in India was at a record low of 2585.80 US million \$ in 1956 which increased to 51295.50 US million \$ in 2015 and further increased to 55630.70 US million \$ in 2016 while China's military expenditure for the same year is 225712.60 million \$ and Russia's military expenditure is 70345.10 million \$, United States remained at the top of the list with 611 billion US \$.

- How will indigenization be achieved at all tiered levels when it is quite obvious that India does not possess some key aerospace and defence processes and technologies, including aerospace-grade materials?

- **Way Forward:**

With all its shortcomings, the DPP is an honest attempt by the MoD to streamline defence equipment procurement in India and use it as a tool for achieving indigenization and self-reliance. There is a strong need for deliberation and interaction between the MoD and the industry, which is patchy and unstructured at the moment. Officials from within the MoD, services and the industry need to come together to establish a common direction and vision to ensure that the policy measures bring about the desired result, this would go a long way.

1.1.3 PROBLEM AREAS & ISSUES:

SI No.	PROBLEM AREAS	ISSUES
1.	Foreign Direct Investment (FDI) in Defence Sector	<p>“FDI to be encouraged along with transfer of technology to India. This requires to generate foreign defence firms the confidence that they will have greater share in the profits and larger say in the management of the entities they create.</p> <p>According to the FIPB guidelines, foreign firms that may tie up with Indian entities are allowed only 49 per cent equity in such ventures. The remaining equity has to be owned by Indian entities. The ceiling of 49 per cent is a major impediment to the success of the offset policy.</p> <p>Thus, FDI to be liberalised.</p>

2.	Involvement of Domestic Industry in Defence Planning	<p>In defence sector, gestation period is very high since establishing a defence venture can take much more time than other commercial ventures. There is a need for providing Domestic Investors a opportunity for raising funds and seek foreign collaborations. This will generate a good atmosphere for trust & confidence to Domestic Investors. Presently Annual Defence Plans are not known to private players.</p> <p>Thus, information needs to be shared well in advance.</p>
3.	Abolish License Requirement for Defence Items	<p>At present, license is required for the supply of defence items. Sourcing components and subcomponents that make up complex systems from countless small enterprises in foreign countries. In India too, there are thousands of small and medium producers</p>
4.	Introduce Offset Credit Trading	<p>Supplying such components to DPSU's.</p> <p>Offset banking was introduced in 2008. Guidelines provides offset for banking permissible for a maximum period of two-and-a-half years. Further, government should introduce offset trading.</p>

MOD is moving in right direction and GOI too has taken appreciable efforts towards achieving these goals. These may, however, not be enough. Further changes as suggested above to be made can boost FDI and private participation in defence sector. These steps of the government will not only boost the national economy but will also bring the latest technology in the country.

1.2 Need for Study

1.2.1 National Security

- a) Background of Defence Planning in India**
- b) National Security Policy and Strategy**
 - **Problem**
 - **Solution**
- c) Focus on National Security and Way Forward**
 - **Perspective Planning**
 - **Integrated Planning**
 - **Self-reliance in Defence Technology**

1.2.2 High Stakes in terms of Value and Risk

- a) Joining the Arms Trade Treaty (ATT) – how India can support emerging defence exporters**
- b) Corruption in the Defence and Security Sector**
- c) Augusta Westland Helicopters case**

1.2.1 National Security:

This requires not only protection of territorial boundary but to build a progressive society with technologically advanced & efficient in order to have a better quality of life. It also covers views of economic, social, strategic, technological & political exposure.

The following reasons require Long term planning for defence:

- Changing environment globally poses new threat and power equations.
- To ensure fair allocation of resources and cost effective utilization.
- Advances in technology, which results in weapons and equipment systems becoming obsolete at a fast rate.
- Time required to produce or acquire and introduce new weapons and equipment systems is very high.
- Coordination problems between various functionaries within & outside MOD.

a) Background of Defence Planning in India:

Table 1
Defence Planning in India

Period	Defence Planning
Before Independence	System of contract budget and defence expenditure was Rs.55 Crore per year. No threat from outside.
1950	Defence expenditure started raising but no planned effort only outright purchases
1962-64	Sino-Indo conflict in 1962 aroused new defence consciousness. Systematic defence planning started
1964-69	A planning cell was established in 1965 and further first five year defence plan was drawn up.
1969	Second five year plan on roll-on basis was drawn.
1971-72	Roll on revisions scrapped and immediate requirements dominated
1974	An Apex group headed by Union Minister for planning recommended constitution of planning machinery

1977	Government formed committee for defence planning to undertake regular assessments in the light of all the factors having bearing on national security and defence
Late 1970's	A perspective planning directorate was established in respective services
1986	Directorate General of Defence Planning Staff was established under chief of staff committee to co-ordinate and harmonize defence planning
After Kargil Conflict 1999	Group of Ministers (GoM) and cabinet committee on security approved many reforms. For example: Establishment of an Integrated defence Headquarters (IDH), Defence Intelligence Agency, creation of Defence equipment production and Research and Planning council in IDH and MoD.

DELAYS IN DEFENCE PROCUREMENTS

- The Parliamentary Standing Committee on defence in its report presented to Parliament in April 2013 stated that there has been a "steady decline" in the number of defence contracts signed during the 11th five year plan period.
- The number of Contracts signed each year during the period is 84 in 2007-08, 61 in 2008-09, 49 in 2009-10, 50 in 2010-11 and 52 in 2011-12, said the report.

b) National Security Policy and Strategy:

- **Problem:**

Corruption risks get embedded in procedure due to high confidentiality & high volume contracts. The estimated corruption in figures which has lost every year in this sector is comparatively very high. And that is only a modest estimation of the costs incurred when national security concerns become a veil to hide corrupt activity. Corruption like unfair treatment to vendors, biased appointments & promotions, involvement of agents and many more forms of

corruption in this secretive sector waste taxpayer funds and put citizens' and soldiers' lives at risk.

- **Solution:**

Bringing transparency is the only solution which helps in protecting international arms transfers, defence contracting and security agencies from corrupt activities. For bringing transparency, the defence industry has begun to introduce essential codes of conduct and developing the right processes in place. However, we need to monitor whether these standards are met. This means anti-corruption measures must be aligned across purchasing under defence ministries, exporting governments and contracted companies.

- c) **Focus on National Security and Way Forward:**

National security rests mainly on the proposition that many foreign and domestic political, economic and military issues are inter-related, each with implications on the other.

A response to this type of environment calls for a highly focused national security policy and strategy which constitutes basically three elements namely:

- Perspective Planning,
- Integrated Planning and
- Self-reliance in Defence Technology.

- **Perspective Planning:**

Perspective plan takes into consideration defence requirements including R & D effort for at least a period of 15 years. This plan is prepared by integrated defence headquarters. This involves military R & D experts, technologists & experts from defence production & supplies. These authorities take an integrated view of future threats scenario. Each service headquarters prepares their perspective plans and submit to integrated defence headquarters for compilation & requisite approval.

- **Integrated Planning:**

India's defence planning cannot be service based, it needs to be integrated and holistic approach is to be adopted. Integrating defence planning not only streamlines the consolidation of the requirements but results in reduction in total cost.

- **Self-reliance in Defence Technology:**

DRDO was created mainly to ensure self-reliance in critical technologies as per requirement of defence services. Defence services requirement will

always be state of the art weapons. Arm forces also require technically advanced weapons than its enemy possesses. DRDO, no doubt, formulates R & D programmes and then it is supposed to execute also. It has a network of 51 laboratories. DRDO has developed exceeding 1100 types of items of weapon systems & equipments. Still the defence services are not happy with the performance of DRDO and their confidence level is low on DRDO. Hence, the government will have to get periodic performance & periodic audit of DRDO to enhance its efforts.

1.2.2 High Stakes in terms of Value and Risk:

a) Joining the Arms Trade Treaty (ATT) – how India can support emerging defence exporters:

As a large player in the global defence industry and the largest importer of conventional arms, India's defence spending is going to be around US\$100 billion by 2025.

With a new government since 2014 as well as recently renewed defence procurement and production policies, the country's defence market – which was previously dominated by state-owned firms such as the Defence Research Development Organization – is opening up to external actors. Like some of the other BRICS, India is increasingly seeking partnerships for technology transfers and off-set deals.

In 2014, government announced opening of defence industry to foreign investors, allowing external defence contractors to own much bigger percentages of Indian military equipment makers than before, thereby potentially was supposed to attract billions of dollars of new investment. Indeed, given the country's current prioritization of the defence market, Engineering services and components manufacturing can be a large market in India for foreign governments and companies around the globe. In this, joining the ATT would be a definitive asset and proof of continued willingness to conform to the growing global norm of responsible conventional arms trade.

b) Corruption in the Defence and Security Sector³:
Corruption poses five risk areas which are listed below:

Corruption in Defence and Security Sector

Table 2:

Risk Area	Explanation
Political	Corruption in defence because of political scenario
Financial	The risk of large, secretive budgets.
Personnel	The risk of corruption among armed forces and defence ministry personnel.
Operations	The risk of corruption occurring during military operations at home or abroad.
Procurement	The risk of corruption in the process of purchasing defence equipment and arms.

Table 3: Five Key Risk Areas and their Attendant Sub-Risks

Political Risk	Financial Risk	Personnel Risk	Operations Risk	Procurement Risk
Defence and Security Policy	Asset Disposals	Leadership Behaviour	Disregard of Corruption in Country	Technical Requirements / Specifications
Defence Budgets	Secret Budgets	Payroll, Promotions, Appointments, Rewards	Country Within Mission	Single Sourcing
Nexus of Defence and National Assets	Military-Owned Businesses	Conscription	Contracting	Agents / Brokers
Organised Crime	Illegal Private Enterprise	Salary Chain	Private Security Companies	Collusive Bidders

³ An Article on "Identifying Corruption Risks in Defence & Security" by Oliver Cover and Saad Mustafa both are officers at Transparency International UK's Defence and Security Programme.

Control of intelligence services		Values and Standards		Financing Package
Export Controls		Small Bribes		Offsets
				Contract Award, Delivery
				Subcontractors
				Seller Influence

Analysis of these provides and necessitates framework which is full proof and does not give any scope of corruption.

C) Augusta Westland Helicopters case:

An Integrity Pact (IP) was signed between Ministry of Defence, Government of India & Augusta Westland. IP prohibits bidder to offer directly or through intermediaries any brokerage, fees, commission or gift to the buyer. Breach of any of the requirement of IP by the seller authorises Defence Ministry to take action against the buyer. The impact involves steps such as cancellation of the contract, to take back any advances already made with interest, forfeiture of earnest money, to cancel other contracts with the bidder including debarring the bidder from entering into any bid for a minimum period of 5 years from the Govt. of India. The Defence Ministry issued show cause notice to Augusta Westland for violation of integrity pact for 12 helicopter procurement programme but Augusta Westland confirmed them that they have not violated any Indian law for last 40 years. However the govt. cancelled the procurement programme and blacklisted the Augusta Westland.

Chapter 2

RESEARCH METHODOLOGY

2.1: Goal of the Study

2.2: Research Methodology

2.3: Sources of Data

2.4: Research Questions

2.5: List of Case Studies

2.6: Limitations of the Study

RESEARCH METHODOLOGY

2.1 Goal of the Study:

The specific objectives of the study may be as follows:

- To study legal perspective in the area of contract management.
- To identify the weaknesses prevailing in the multiple stages of Contract Management in Defence Contracts of DPSU's.
- To study the scope of various contracts and identify the major contract related issues faced by DPSU's in their Defence Programme / Projects.
- To study management strategy & MIS system in the area of contract management.
- To evaluate the impact of contract management in the execution of these contracts.
- To suggest broadly standard Contractual terms and conditions for DPSUs procurements.
- To ensure "Value for money spent" both in short term and long term in Defence Procurement of goods / services.

The research study aims at flagging the issues and suggesting a well-structured template and vetting of the draft contract before they are entered. For the sake of accountability, a structured contract management system must be ingrained and integrated in the organisation structure.

2.2 Research Methodology:

- **Type of Research method followed:**

Analytical Research Method is used by analysing the facts or information already available, and these are analysed to make a critical evaluation of the material and to draw conclusions.

Applied Research Method is also followed to arrive at a solution for the problems faced in defence acquisition.

Diagnostic/Clinical Case Studies Method is adopted to establish the basic causal relations. This method is useful to understand in depth the causes of things or events that has an impact on the various Contracts and the related consequences. This may be of interest to this study as, using very small samples and very deep probing data gathering devices.

Mixed Methods (including qualitative and quantitative case studies and comparative methods).

The aim of the Research methodology was to gain a holistic, integrated view of the various Contractual issues involved in the Defence procurements and with particular reference to Defence acquisition in respect of Indian Defence PSUs.

2.3 Sources of Data

Multiple sources of secondary data were used. These include:

1. Ministry of Defence website,
2. Survey of Defence PSU's,
3. Defence procurement procedure,
4. Defence acquisition contracts,
5. Department of Defence Production website,
6. Indian Contract Act 1872,
7. International contracts, arbitrations/dispute settlement procedure,
8. Performance reports of various DPSUs and ordnance factories,
9. Various books and publications on defence contracts .Ministry of Finance website, Defence Procurement manual (DPM),
10. Controller & Auditor General Reports,
11. International contracts, Reports of Transparency International /government Audit,
12. Various Policies including Industrial licensing policy. FDI policy, Foreign Trade policy, Tax Policies, International Traffic in Arms Regulations (ITAR).
13. GFR 2015/2017

14. CVC Reports:

A lot of input gathered based on discussions with various stakeholders, analysis of large defence contracts involving thousands of crores of rupees of a particular programme in a specific area from inception (pre-tender documents) till the final stage of termination of contract of a DPSU with foreign vendors, indigenous vendor as also with Defence customers, participation in large negotiations, Study of management & legal literature, policy analysis available in public & private cloud, related national & international protocols etc.

Questionnaires were issued to officials of various DPSUs and structured deliberations were held with senior operating officials of DPSUs and MoD-DDP.

2.4 Research Questions:

1. General:

- a) In your opinion what is the most important factor with respect to Contract Management & Practice?
- b) In your opinion what are the contractual clauses that are normally resisted by vendors/subcontractors?
- c) During the currency of Contract how frequently the clauses/terms & conditions of the contract are interpreted between the parties?
- d) In case it is decided to Blacklist a Vendor/Subcontractor? What is the procedure followed? What is the available recourse in Contract Management?
- e) Are overseas Vendors accepting for DPP 2013 terms and conditions? If not, what are their deviations?
- f) What are the contentious issues encountered in MoD contracts? A brief may be provided?
- g) List five major issues being faced as a DPSU while executing the MoD contracts?

- h) Do you agree for Limitation of Liability in your Contract? How do you define Limitation of Liability? What are the exemption's you agree?

2. Prices:

- a) Are your contracts being finalized on Fixed Price Basis or Variable Price Basis?
- b) In case of a contract with Variable Price, are the methodology and appropriate indices are properly defined?
- c) What has been experience in contract execution, having price on variable basis?
- d) Is there any slab rate for application of price variation clause or it is variation on continuous basis?
- e) In case of price variation clause, the escalation has been insisted by the vendors for deliveries beyond actual scheduled delivery period?

3. Delivery:

- a) How the "Effective Date of Contract" has been defined? Is letter of intent /acceptance taken as "Effective Date of Contract" for commencement of contract?
- b) Has there been case where dispute has arisen with regard to "Effective Date of Contract"? If so, the reasons of dispute may be specified.
- c) Have you had any experience while levying Liquidated damage due to improper definition of terms like – incoterms, selection of freight forwarder, carrier etc. ?
- d) If above is yes, what course of action has been resorted to for resolution?
- e) Extensions of delivery period Vs application of Liquidated Damages are related terms. How the contracts are managed in respect of above two aspects.

4. Risk Purchase:

- a) Is the Risk Purchase Clause accepted by major vendors? How many times the Risk Purchase Clause has been invoked during last 3 years?
- b) In case Risk Purchase Clause is invoked, is Liquidated Damages for delays has been also levied?

5. Bank Guarantee:

- a) Is Bank Guarantee in the Companies format acceptable or some deviations are put forwarded by vendors?
- b) What are the deviations and what is the process of resolution of such deviations?
- c) Is the vendor being informed before invoking the Bank Guarantee?
- d) Has any dispute arose while invoking of Bank Guarantee.

6. Integrity Pact:

- a) Is Integrity Pact in the Companies format accepted by vendors?
- b) If Integrity Pact is not accepted by vendor, what resolution measure is being adopted?

7. Breach of Contract: In case of Breach of Contract by vendor what course of action is resorted to? Is cancellation of Contract is done or specific performance of contract is insisted upon.

8. Arbitration: In case of Breach of Contract, whether arbitration clause has been invoked by DPSU/ vendors. Details of cases during last three years may be provided with current status?

9. Applicable Law: In case of International Contracts ,what is the experience of "Applicability of Law" regarding Contract Management including dispute resolution process.

- 10. Technology transfer** is the essence of any defence procurement. In case of Transfer of technology is agreed upon ,how it is ensured that it is implemented in its original form of usage?
- 11. Offset Clause:** Offset clause even though invariably is included in majority of defence procurements, implementation of the same is far from satisfactory? What has been your experience and how do you ensure its effective implementation?
- 12. Option clause:** Is option clause insisted upon? If so what is the maximum limit to which it can be exercised?
- 13. Force Majeure:**
- a) In case Force Majeure, How is it decided that the Force Majeure event has occurred? In case of disputes arising there from, what mechanism is used to prove the Force Majeure event/s?
 - b) What major events which constitute Force majeure are specified in the Force Majeure Clause in your Contracts?
- 14. Fall clause:** Is Fall clause acceptable to the vendor? In case it is accepted how do you ensure its enforcement?
- 15. Support and Services:** The longevity of the product requires support from the OEM in the form of supply of Spares and services. How the requirement of Support and services ensured as part of the original Contract?
- 16. Breach of Confidentiality:** Many of the Defence Contracts are governed by the Confidentiality clause. In case of Breach of Confidentiality what is the legal course of redressal adopted?
- 17. Survival Clause:** Many of the contractual clauses like Warranty clause, Confidentiality clause, Support and services clause, option clause need to continue even after the original contract? If not how the affectivity of the clauses as above are protected?

- 18.** In case future amendments to the contracts become necessary due to various subsequent developments, the original contract should provide for such amendments. Is this taken care of as part of the original contract?
- 19.** Design and development and subsequent productionisation is very common in defence procurements. The contractual arising therefrom like production set prices etc. need to be taken care. How is it ensured? Are there difficulties at the production phase in this regard?
- 20. Termination Clause:** Is the grounds for termination clearly spelt in your contract? Will termination to be preceded by a notice or the party terminating the contract can unilaterally terminate the contract if any of the circumstances mentioned in the contract occurs?
- 21. Compensation clause:** Where there is a need to terminate the contract, due to default on the part of the supplier is there a contractual clause wherein the concept of compensation for the loss suffered is built in the contract?
- 22. Export License:** In case of imports from a foreign country the obligation for obtaining an export license rests with Supplier. If the export license is not granted for any reason whatsoever, what is the remedy available to the buyer from the supplier? Is this claimed by the buyer as breach of contract?
- 23. Consequential Damages:** Do your Contracts agree/provide for Consequential Damages arising on account of Breach of Contract? If so, the upper limit is specified as part of the contract or not?
- 24. Intellectual Property rights:** How is the buyer protects the IPR from any infringements by the seller? Is any suitable contractual Clause included in the contract?
- 25. Indemnity Clause:** With regard to indemnity clause, for third party liabilities, what is the liability accepted? Is it capped or open ended?

Respondents are officials at different levels of management structure of DPSUs and OFB.

2.5 List of Case Studies:

**Table 4
List of Case Studies**

Sl. No.	Case Studies
1	Substantial variations in terms of Contract after finalisation of tendering procedure – Import Contract
2	Change in Payment & Other Terms demanded by vendor after conclusion of contract – Import Contract
3	Amendment in payment & other terms to accommodate demand of the vendor – Indigenous Contract with DPSU's Associates
4	Improper drafting of Force Majeure Clause – Import Contract
5	Contract with One-sided clauses against the supplier's interest – Export Contract
6	Setting up dedicated manufacturing facilities without firm commitment – Export Contract
7	Improper assessment of cost of production while quoting resulted in loss of Rs 20.21 crores in the production and export of 10 ship sets – Export Contract
8	Flaw in the contract regarding the methodology in calculating price escalation clause leading to additional financial burden to the importer – Import Contract
9	Un-realistic technical specification leading to subsequent relaxation as well as escalation of development cost – Foreign Design and Development Contract
10	Variation in standard clauses of integrity pact to conclude the contract – Import and Indigenous Contract
11	Improper assessment of man-hour requirement and total cost leading to submission of lower quote and loss to supplier – Indigenous Outsourcing Contract

12	Undue waiver of liquidated damages to ensure maintenance supplies of the CNC Jig Boring Machine – Import Contract
13	Inadequate data submitted by the foreign supplier leading to delay in design and procurement action – Import Contract
14	Lack of clarity in the contract specification – ToT Contract
15	Delay in execution due to Inordinate delay by the foreign vendor to provide the required technical documentation – Import Contract
16	Ambiguous details regarding training period time schedule in the contract – ToT Contract
17	Delay in deliveries and huge cost overrun due to deficiencies in planning, execution, co-ordination in contract management – ToT Contract
18	Contract entered without liquidated damages clause resulting in huge financial loss due to project delays – Import Contract
19	Deficiencies in planning, execution, co-ordination in contract management resulting in abnormal delay and cost escalation of the whole project – ToT Contract
20	Deficiency in contract management – improper planning to augment infrastructure facilities – ToT Contract
21	In-adequate support services from the licensor leading to difficulties in Repair &Overhaul program of Aircraft – ToT Contract
22	In-ordinate delay in engine development program – Foreign Design and Development Contract
23	Delay in project execution due to not resolving the pricing issues between the parties – ToT Contract
24	Delay in project execution due to non-submission of critical documents, items by the foreign supplier – ToT Contract
25	Inability to terminate the contract and recover advances given to supplier in absence of termination clauses in the contract – Import Contract
26	Inability to execute the contract in absence of clarity in scope of work – DPSU to DPSU Contract

27	Non-inclusion of supply of critical spares in the contract leading to acute shortage of fittings
28	Case study on determination of L-1 in a large Defence Contract - Indigenous Contract – MoD – DPSU Contract
29	Lessons learnt from failure to perform an Export contract by a DPSU – Export Contract

2.6 Limitations of the Study:

- 1 Impact of lethargy in DPSU / Service HQRS / MOD not considered on failure of defence contract management.
- 2 Study of organisation structure of DPSU not considered.
- 3 Risk associated with management style structure of DPSU not assessed
- 4 A detailed study of man-hours taken by licensor & licensee not done.
- 5 The effect of concept of 'strategic Partner' in MOD contract not considered as still the concept is in nascent stage.
- 6 Influence of coalition central government in implementing defence procurement policies also not assessed.
- 7 Effect of "Make in India" programme not assessed as it is still to take momentum.
- 8 Scope of discussion was limited to largely public domain data due to confidential nature of input.

However as far as practicable all the above issues have been touched for providing a feel for the issue barring a few.

Chapter - 3

DEFENCE CONTRACTS AND CURRENT SCENARIO

3.1 Administration of Defence Contracts

3.1.1 Introduction

3.1.2 Focus on Administration of Defence Contracts

- In relation to Domestic Contracts
- In relation to International Contracts

3.1.3 What is ailing the Indian Defence Industry?

3.1.4 Major Challenge Areas

- **Aircraft Manufacturing Projects**
 - Poor/Unrealistic Initial Cost Estimation
 - Contract Administration Issues
 - Financial Administration Issues
 - Infrastructure Issues
- **Design and Development Projects**
- **Transfer of Technology Projects**
- **Civil Works/Hybrid Projects**
- **Automation/Information Technology Projects**

3.1.5 Qualitative Requirements (QRs) and Level of Technology

- **Transfer of Technology (ToT)**

3.1.6 Multi-System/Multi-Component Projects

- **Design and Development Projects**
- **Cost Aspects**
- **Payment Terms/Advance Payment to Vendor**
- **Project Milestones/Delivery Schedule**
- **Phasing of Projects**
- **Issue of Letter of Intent (LoI) and Conclusion of Contract Agreement**
- **Project Monitoring**
- **Delays in Processing**
- **Cases involving cost and time over-runs**
- **Closure of Developmental Projects**

- **Capacity Augmentation/Modernization Projects for Defence Sector**

3.1.7 Defence Procurement Procedure (DPP) 2013—Important Issues

3.1.8 Defence Procurement Procedure (DPP) 2016—Important Issues

3.1.9 Defence Procurement Procedure (DPP) 2016—What distinguishes it from DPP 2013

3.1.1 INTRODUCTION

DEFENCE CONTRACT MANAGEMENT is a long drawn process and it involves the firming up of a specific product/service requirement, receipt of getting offers/technical and commercial bids, and analysing technical parameters through discussions/clarifications, commercial evaluation of tenders, thereafter negotiations and finally the firming up of contract clauses and signing of agreement / contract and perpetual monitoring for getting the accomplished task completed as far as possible within desired time and cost.

In order to reduce the security risk of the country, the contract for supply of product / services are always to be in place. All these suggests that the Contract Management of Defence Procurement is a long drawn exercise and involves even years together as multiple issues arises including involvement of Multiple Government Departments / Agencies, vigilance and Audit issues etc.,

The Defence Procurement Procedure (DPP) relates to capital procurement whereas Defence Procurement Manual (DPM) is applied for revenue procurement. Latest Defence Procurement Procedure is available of 2016 and DPM 2009 & Supplement 2010 to DPM -2009 are the recent guidelines available.

In a world of changing global scenario ,there are multiple development in this field on a continuous basis and hence Defence forces has always to keep in mind that they should have latest technology. But the object is never fully made because of several controversies raised in a democratic set up and hence Defence Contract Management will always have to be updated on various technical and contractual features to make latest technology available to the Armed forces with least controversies.

3.1.2 Focus on Administration of Defence Contracts:

⇒ In relation to Domestic Contracts

- The most controversial subject in domestic procurement is arbitrary change or relaxation of original specification or adding of certain technical features at a later stage. It has also been observed that ambiguity in various defence contract clauses resulting in wrong interpretation in multiple clauses particularly relating to delivery, penalty clauses, payment term, IPR issues, applicability of taxes etc., apart from technology transfer or requirement changes emerge as controversy.
- When we all understanding with the past controversy in the defence sector that any change in specification at a later date brings

controversy then the contract management team have to be extra careful while allowing such change in specification. As far as controversies on other contractual clauses are concerned, it results from basically non availability of appropriate clause in the contract to sort out the issue so raised. Like if there is liquidated damage for delay in delivery it must contain properly how the eventuality of a particular circumstances will be measured, to know about a particular situation the source of information must be either industry sponsored agency source or Government agency source as also if such liquidated damage delay has resulted due to the mistake of buyers i.e., Defence forces for not keeping the infrastructure ready, then how liquidated damage can be applied, determined or waived?

Hence, following basic principle need to be focused while formulating various contractual clauses.

- Awareness of contractual clauses must be with both parties' buyer and seller.
- Contract should be complete in all respect and should cover all known and unknown eventuality based on past experience.
- Contract clause must provide both buyer and seller for a professional and objective debate to sort out issues arising during the execution of contract.
- Buyer and seller both should treat each other as a partner of a procurement process and must be responsive to each other. Seller should also build reputation with the buyers or its various agencies so that win-win situation is achieved by both buyers and sellers.

● **IN RELATION TO INTERNATIONAL CONTRACT:-**

In order to develop a strategy in International Procurement in Defence area "value for money" is equally an important factor. Generally it is observed that, International Procurements in defence area are not providing full proof confidence on the following issues:-

- In terms of latest updated technology.
- In terms of life cycle cost.
- In terms of sustainability and support from Foreign OEM as they are always with- holding critical technology / critical systems with them.
- Utilisation of common technology in multiple platforms.

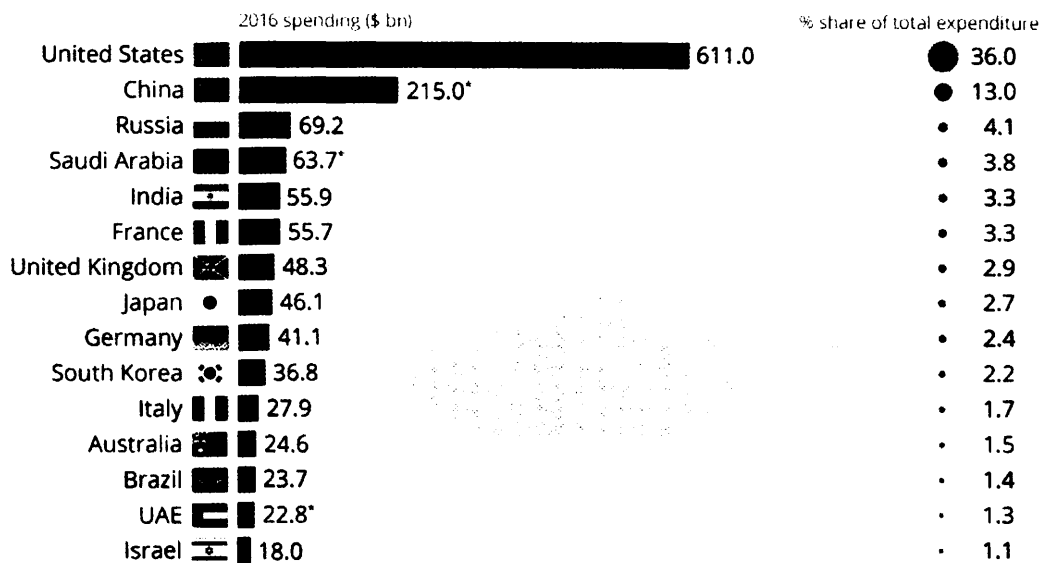
Basically managing international contract where the foreign OEMs are involved both side will have to adopt flexibility and adoptability to meet dead-lock situation and even controversial situation.

MILITARY EXPENDITURE AS A PERCENTAGE OF GDP FOR 15 HIGHEST DEFENCE SPENDING NATIONS

Table 5
Military Expenditure

The Top 15 Countries For Military Expenditure in 2016

2016 military expenditure by country and share of global total



© StatistaCharts * Estimate
Source: SIPRI

Forbes statista

3.1.3 What is ailing the Indian Defence Industry?

Indian defence procurement system faces two critical problems:-

- Issues resulting from alleged kickbacks.
- CAG observations.

In 2010, Italian helicopter maker Finmeccanica, got a contract of 12 Helicopter supply from the Indian Government involving over 750 Million US dollar contract. This was the largest order for Augusta Westland Helicopter for the company in that year. But the alleged

kickback put the deal on hold and then cancelled. Later on, the firm was blacklisted.

But the other platform of the same foreign company is available with one or other defence customers. Now blacklisting effected supply of spares for those platforms. For last three decades any defence procurement of large size involved some alleged irregularity and as a result of that the whole defence machinery for procurement is becoming weak in taking decisions and sooner or later it will effect defence preparedness of the country as 70% defence procurement needs are met through imports.

India fought two wars with Pakistan and the China, but India is still relying on defence equipment which has become quite old even 20 years old.

While the Bofors gun controversy of 1980 collapsed though then ruling Indian Government for alleged bribes for procurement of Howitzer field guns to the Indian Army. But even after 30 years, India could not purchase the gun; only about a few years back Indian Government signed a deal with U.K based BAE systems.

All this suggests for that, in such circumstances, it will be very difficult for India to catch up China for modernization and massive capacity building in this sector. We can now define the problem into two broad categories:-

- Develop methodology so that, corruption / alleged corruption should not emerge at a later date either before entering into contract or after entering into contract.
- To generate a comprehensive contract management team and standard contract clauses apart from past experiences.

The Government will have to hold the hand of bureaucrat so that, the fear psychosis should go away from them and similarly our CVC should insist for pre-vigilance vetting and pre-audit concept in all large deals with a positive set of minds & keeping National security threat perception with open mind.

The thrust on International Procurement should be more on strengthening the technical and technological capability of the country rather than purchase of specific equipment.

3.1.4 MAJOR CHALLENGE AREA:-

Defence procurement process requires expertise in Military, Technology, finance, quality assurance, market research, contract administration and project management.

MOD manual and guidelines provides for the requisite policy frame work for the procurement of Capital and Revenue equipment. However, the major challenge areas are the followings:-

- Aircraft Manufacturing Projects
- Design & Development Projects
- Transfer of Technology Projects
- Civil works/Hybrid Projects
- Automation / Information Technology Projects

The issues involved in each category of project are enumerated herein below while there may be overlapping issues also. But generally, relevant issue for each of the above project are discussed herein below :

● Aircraft Manufacturing Projects :-

Manufacturing Aircraft is a difficult task that requires effective and efficient management of all associated activities in order to avoid the cost and time over runs. While getting the weapons and equipments in time is of paramount importance in order to build up the capability and to avoid any substantial gap in the capacity building of concerned services. It has been found recently that, various sensors of desired quality specification are also of equal importance for adding to the capacity building. The study has revealed that in Aircraft Manufacturing lot of issues are faced. It requires deep probing, effective and efficient management of project monitoring mechanism for such capital intensive projects having long gestation period. The issues are as follows:-

- Weaknesses in appraisal;
- Execution and monitoring of projects;
- Delay in finalization of drawings/design;
- Non -Availability of material and inadequate infrastructure; and
- Price inefficiency and lack of transparency.

Poor/unrealistic initial cost estimation:-

A question has been raised on the lack of scientific bench marking of the various cost component involved, futuristic qualitative requirements, etc., apart from various extraneous reasons. In the absence of bench marking for each work station module, the financial implication projected for initial approval of the Government often turn out to be unrealistic, under estimated and is totally depended on contingencies provided in the project cost.

Manufacturer or the executor of the TOT programme is not in a position to arrest cost and time over run as they are not the controller of all the issues relating to the programme. It involves even the Government Departments and the TOT provider involvement in the programme.

Cost overruns are becoming natural phenomena in the defence programme as the changes in the technical features become a common phenomenon as also the Government "cost plus contract" terminology involved in certain programme. However, defence services are even paying for exchange rate variations along with service charges/profit percentage to some extent.

Contract Administration Issues:-

It is observed that the contract agreement signed between the Government and the DPSU concerned were having varying delivery dates corresponding to the delivery approved by sanctioning authority and the delivery mentioned in the contract. Because services keep some margin so that time over run can be arrested. It is difficult to comment on this whether it is a good idea or a bad idea. But not a very healthy idea. It has been seen that the DPSUs are getting the letter of intent (LOI) even before the sanctioning of the proposed scheme by the Government, in order to arrest the time over run. Defence services are trying to help the DPSUs ; So that, they can start their procurement of materials, putting up infrastructure etc., in the pipeline well in advance without making firm commitment for those items and helps in advancing the procedural compliances which are very lengthy and time consuming on which DPSUs are not having much control.

Even it has been observed the ex-post-facto approval by the Government Machinery for those time and cost overrun takes more than 10 years for submission and approval of the proposal by the Defence PSU/MOD.

Financial Management issues:-

- 1) It has been noticed that payments had been released to the DPSUs concerned even in excess of the original cost sanctioned by the Government, on the pretext of avoiding further cost and time over-runs and in anticipation of the approval of the Government for regularization of such payments.
- 2) It has also been seen that the DPSUs were sanctioned huge advance payments, which remained unutilized with the DPSU concerned for years together. Even the categorization of advances viz. interest bearing or non-interest bearing was done in an ad hoc manner.

Furthermore, release of funds to the DPSU concerned was done in an arbitrary manner without linking it to specific milestones of the project and spending capacity of the DPSU concerned. Such release of funds was apparently aimed at booking of expenditure towards the end of the financial year with a view to avoiding surrender of budget and was actually tantamount to "parking" of funds. Such instances reflect rather poor financial management of public money. Moreover, such practices tend to dilute budgetary discipline through arbitrary cash flow out of Government treasury.

Infrastructure Issues:

One of the main reasons cited for inordinate delays in Aircraft manufacturing projects is inadequate availability of infrastructure at DPSUs. As per the C&AG's report, despite inadequate infrastructure at the DPSU for undertaking aircraft construction, the Government did not take effective steps for augmenting such infrastructure projects through timely interventions and planning. The Government has often sanctioned piece-meal augmentation of infrastructure facilities as part of the aircraft manufacturing projects.

● Design and Development Projects:

Some of the glaring issues that have been noticed in processing of Design and Development Projects are as under:

- i. It has been noticed that the Qualitative Requirements (QRs) formulated at the time of initial sanction of the project were rather unrealistic and high-end, which required relaxation during the course of development on account of being practically unachievable.

ii. Qualitative Requirements (QRs) and delivery schedule in case of design and development projects was left open-ended in the RFP on the pretext of flexibility. Such an approach leaves a lot of uncertainty, ambiguity and discretion with the development agencies and makes the appraisal and monitoring of the project rather difficult.

iii. The development agency took inordinately long time in offering the system/sub-systems for 'User Confirmatory Trials', thus affecting the project completion schedule in an adverse manner.

iv. The development agency sometimes initiates new sub-project(s) during the course of development of the main project for approval of Government, without consulting the main user defence services/organization. Such an approach leads to huge gap between the requirements and development plan of the user organization and the offer made by the developing agency concerned.

v. Further, inordinate delays have been noticed in submitting the proposal for seeking approval of the appropriate authority/Government for anticipated cost and/or time over-runs.

vi. Sometimes, approval for revision in cost/delivery schedule is sought from a lower CFA and not the appropriate CFA. Such cases may invite avoidable audit implications and effectively render the case 'fait accompli' for the appropriate CFA, depriving him of the opportunity for timely intervention towards mid-course corrections.

vii. The revised date of completion of proposed project for approval involves uncertainty and is not worked out and projected in a firm manner.

viii. It has further been noticed that procurement of a sub-system has actually been made from a DPSU, though the RFP was issued to private sector vendors.

ix. The Letters of Intent (LoI) for projects of sub-systems have been issued to the DPSU concerned, even before/in anticipation of approval of the Government. Thus, the financial powers of the appropriate CFA appear to have been exercised at lower a level, which is procedurally irregularity and may, inter alia, involve audit implications at a later stage.

x. It has also been seen that substantial interest-free advance payments have been released to the DPSU concerned, without obtaining approval of the appropriate CFA and even without issue of RFP for the project. Such advance payments are stated to have been released based on the actual expenditure, which was claimed to have been incurred by the DPSU concerned in anticipation of approval of the project.

xi. Although while seeking approval of the Government, an indicative time-frame was envisaged regarding the progressive extent of indigenization in the course of execution of the project, the actual extent of indigenization achieved over the years was found to be rather low.

● **Transfer of Technology Projects:**

i. It was noticed that after obtaining approval of the Government for the project for transfer of technology from a foreign vendor, the Government department had sought approval for significant additional financial liability stated to have arisen on account of certain new items (e.g. tooling etc.), which were not envisaged or included earlier in the proposal.

ii. Dependence on foreign vendor in ToT cases is a great curse and after completion of ToT, it has its own inherent impact on project management and completion.

iii. The complexities involved in integration of the sub-systems with main platform also affect the project schedule due to dependence on the OEM/main vendor concerned.

● **Civil Works/Hybrid Projects:**

a) While civil works involve construction (civil and electrical) works, the hybrid projects involve civil works together with installation of equipment and machinery. Such projects are found to have suffered from significant cost and time over-runs on account of inordinate delays in demolition of old structures, cutting of trees etc., besides changes in quantities and QRs during the course of project implementation. Certain significant variations in the cost of construction material e.g. abnormal increase in steel prices have also affected final cost of the project in an adverse manner.

b) The cost over-runs in such civil works projects have also led to corresponding increase in the associated consultancy cost, if the same is not frozen initially and is to be worked out on the basis of a fixed percentage of the final project cost.

● **Automation/Information Technology Projects:**

a) It has been seen that the information technology related projects submitted for approval involve rather long implementation period, which is

fraught with the possibility of technological obsolescence and crash in prices with technological advancements.

b) Furthermore, in case of subsequent phases of such projects, the due appraisal of the previous phases interlinking with the proposal, which have since been completed is often not undertaken to evaluate the achievement of the intended objectives, besides the critical issues relating to integration of the various phases of such projects.

Suggestions:

Based on the discussions in the preceding paragraphs and experience gathered in processing the various proposals pertaining to defence acquisitions, the following suggestions are made to improve the quality of project appraisal, monitoring and completion and to minimize the time and cost over-runs both for DPSUs and services including associated government Department:

3.1.5 Qualitative Requirements (QRs) and Level of Technology:

i. It should be ensured that the technology involved in the proposed procurement is state-of-the-art/futuristic and acceptable, and does not require any re-assessment due to obsolescence on account of time overruns/ delays in processing.

ii. If the QRs projected had been finalized or approved long ago, their validity with regard to the present requirement should be specifically confirmed.

iii. In case a particular platform or system is intended to be used by different services and agencies, it may be ensured that the level of technology meets the requirements of all such agencies concerned.

• Transfer of Technology (ToT):

a) If the proposal involves Transfer of Technology (ToT), the extent and scope of ToT and value addition and indigenization envisaged in various phases of ToT should be indicated in financial terms confirming the economic viability of the purchase through the ToT route, and indicating the extent of continued dependence on foreign vendor during and after completion of the ToT envisaged in various phases of the project.

b) In case of acquisition or development of a sub-system or weapon system, the compatibility and complexities envisaged in integration

with the main platform, which may, inter alia, require comprehensive assistance from the Original Equipment Manufacturers (OEMs) with associated financial or contractual implications, need to be adequately addressed ab-initio.

- c) It should be seen as to whether the extent of indigenization envisaged in various phases is linked with commensurate reduction in foreign exchange (FE) component of the cost of the equipment or system in conformity with the project objectives.

3.1.6 Multi-System/Multi-Component Projects:

If the project envisages integration of various other systems/equipment with the main platform at a later date, it should be clearly brought out as to whether such systems and sources thereof have since been identified, and whether the delivery schedule thereof matches with the corresponding milestones of the main platform.

- **Design and Development projects:-**

These types of projects generally suffer multiple limitation even when we import technology from a foreign country. This is due to ongoing improvement in the various systems and modules to enhance the functioning of the product / Aircraft/ missile system. Sometimes, even the technology has not matured on a foreign land and the foreign agency has transferred the technology in order to compete in the global competition.

Other problems associated in the design and development is that, prevalence of uncertainty. These uncertainties are related to the output and matching of the various systems and modules to the Airframe and even in naval systems. So system realisation is one of the most important aspects in such programmes.

- i. In case of design and development projects, the system realization, its viability as well as confidence level of the developing agency, with regard to project outcomes and outputs, need to be deliberated in consultation with all stakeholders including the ultimate user and to be appropriately worded in Contract. It need also to be indicated in quantified terms, particularly in case the technology for the system has not matured even in other developed countries, or the system is to be designed and developed indigenously for the first time. While doing so, the uncertainties envisaged, if any, should also be brought to the notice of the competent authority.

ii. For developmental projects, it should be clearly brought out as to whether the project is a composite one with defined project outcomes/deliverables or is only a part/sub-project of an umbrella project, or will ultimately lead to several further independent projects, which would subsequently involve considerably higher financial implications.

iii. The possibility of 'sunk costs', if any, anticipated in the project, and the agency to be responsible to bear such costs should be clearly brought out.

iv. If the project envisages association of a foreign vendor, there should be an appropriate provision in the contract / agreement or in the Memorandum of Understanding (MoU) for sharing of the possible 'sunk costs', so that they also have adequate financial stake in the success of the project.

v. A desirable course of action for better monitoring of the extent of indigenization in Design and Development Projects would be to quantify and spell out the targeted and anticipated extent of indigenization over successive phases of production, which could be monitored at appropriate levels.

● **Cost Aspects:**

i. In case of manufacturing projects, the reasonableness should, inter-alia, be confirmed vis-à-vis the cost of prototypes under the design and development phase. Moreover, in case the design and development of the system has been funded by the Government, it should be confirmed that the investment made thereon has been appropriately factored-in while working out the cost of the system being manufactured, and commensurate financial benefits for the Government have been ensured. Such financial benefits should be adequately ensured in case of commonality of the design with a similar design/system, if any, earlier funded by Government.

ii. In support of the estimated cost, the price level/base year of the cost estimates should be indicated. In case the cost estimates have not been worked out at current price level, the specific reasons therefore should be spelt out.

iii. In respect of development-cum-production projects and projects involving transfer of technology being funded by the Government, there should be a pre-determined arrangement with the implementing agency to share with the Government financial benefits, if any, in the future, as a result

of commercial exploitation of the facilities/assets/technology to be acquired by the implementing agency during execution of the project.

Payment Terms/Advance Payment to Vendor:

i. The Payment Terms/phasing of expenditure should be worked out, inter-alia, duly linked with defined milestones and tangible deliverables, in consonance with the anticipated physical progress of the project, and factoring in the spending capacity of the vendor, so that the proposal does not appear to be expenditure driven and the release of payments is not tantamount to parking of funds with the vendor concerned, or merely to meet the expenditure targets.

ii. In case advance payments have been released to the vendor, it should be ensured that before releasing subsequent stage payments, the question of adjustment of interests on advances (which could not be utilized by the supplier within the agreed timeframe), if any, accrued to the supplier is also taken into account.

● **Project Milestones/Delivery Schedule:**

i. The delivery schedule/project milestones should be worked out in a realistic manner so as to avoid frequent revisions at a subsequent stage.

ii. The delivery schedule/milestones envisaged for the project should factor in the production capacity and limitations, if any, of the DPSU and vendor concerned in meeting the commitments of technology absorption, related qualitative and quantitative parameters etc., and their workload in respect of various other developmental and production projects already in hand with them.

● **Phasing of Projects:**

i. The projects should be divided into convenient monitoring phases, which would have the associated benefit of concurrent review of technology, if necessary, before undertaking the subsequent phases.

ii. Inordinately long implementation period for the project/phase may not turn out to be technologically prudent and financially wise in certain types of projects, e.g. for communication or information technology related projects, where the technology becomes obsolete and prices crash considerably at very short intervals.

iii. While undertaking a new phase of an on-going project, it should be ensured that the milestones envisaged therein have been appropriately dovetailed with the corresponding milestones of the inter-linked previous/parallel phase under execution.

iv. It may be desirable to undertake simultaneous preparation of budgeted cost/outlays and performance schedule and outcomes in respect of the implementing agency for six monthly intervals for the project, to be subsequently compared with the actual cost incurred and performance achieved during that period in order to facilitate timely forecasting of likely time and cost over-runs, and to take further corrective action(s).

● **Issue of Letter of Intent (LoI) and Conclusion of Contract Agreement:**

i. The issue of letter of intent or conclusion of contract agreement for any purchase should be only after obtaining prior approval of the competent authority in order to avoid adverse comments or possible audit, contractual or legal implications at a later stage.

ii. The contract agreement for the projects should be concluded within a reasonable time period, after the project has been sanctioned by the competent authority. Delay in signing the contract document should be avoided even if the Letter of Intent (LoI) has been issued. The agreement should contain, inter alia, well-defined project milestones and clearly lay down the responsibility of each party for scientific monitoring at different levels.

iii. The stage payments incorporated in the contract agreement should be linked to defined milestones and in conformity with the spending capacity of the vendor/shipyard concerned.

iv. The timelines and procurement activities for platform construction and associated system/equipment should be dovetailed suitably so as to avoid any time over-runs on account of gap in their availability.

v. It is suggested that the equipment, weapons and sensors under development should be replaced with proven systems, in case the development process does not synchronize with the timelines planned for aircraft manufacturing.

- **Project Monitoring:**

- i. The Ministry/Department should have appropriate and effective mechanisms at sufficiently high levels for monitoring of physical and financial progress of the project at regular intervals, with a view to anticipating slippages, forecasting and minimizing likely time and cost over-runs.
- ii. Such mechanisms should be buyer/user driven, and should have adequate representation from all stakeholders.
- iii. The frequency of monitoring should be adequately high.
- iv. The mechanism should generate necessary and timely reports for information and decision of competent authority regarding corrective actions.

- **Delays in Processing:**

Sometimes it is seen that although the 'Acceptance of Necessity' (AoN) or 'in principle' approval for the project was obtained long ago, further processing of the proposal suffered from inordinate procedural delays, inviting adverse comments from the user. Such delays, particularly those affecting operational preparedness, need to be brought to the notice of the competent authority, duly explaining reasons and circumstances leading thereto.

- **Cases involving cost and time over-runs:**

- i. The cases where revision of cost estimates/Probable Date of Completion (PDC) is anticipated should be taken up for decision/approval of competent authority as soon as such possibility comes to notice, without waiting for completion of the project.
- ii. The cases, where cost/time over-runs have already taken place or the system has been delivered long ago with cost/time over-runs, rendering the case 'fait accompli', should be taken up with the competent authority for ex-post-facto approval, duly explaining the compelling reasons and circumstances for delay in seeking approval.
- iii. In case the interim approval of an authority lower than the competent authority has been obtained by the Ministry/Department, the facts and circumstances relating thereto should be brought to the notice of the competent authority at the time of seeking its approval.
- iv. The specific reasons warranting the proposed revision in cost/PDC should be brought out indicating, inter-alia, whether the revision is due to any change in scope of work etc., and the agencies responsible for the cost/time over-runs.

v. The mechanism for monitoring the progress of the project should also be indicated.

vi. If the initial estimates approved by the competent authority could not be worked out realistically in the absence of requisite information/cost data, this fact should be brought to the notice of the competent authority at the time of seeking approval for the revised cost.

vii. In case, there are any other reasons also for cost/time over-runs, which may reflect poor project management, poor administrative and financial controls etc., which led to failure in ensuring requisite mid-course corrections, these should be candidly disclosed to the competent authority.

viii. The impact of components like escalation/inflation and exchange rate variations (ERV) should be separately brought out, duly indicating as to whether admissibility of such escalation/exchange rate variation in the event of slippages in project completion was provided for at the time of seeking initial approval of the competent authority.

ix. A comprehensive analysis of physical and financial progress of the project (phase-wise/component-wise) should be carried out and commented upon in the proposal. If necessary, a detailed report, based on physical verification of the progress of work as well as the corresponding expenditure booked should be obtained at appropriately high level, in order to facilitate an informed decision particularly with regard to the extent and scope of continued Government support to the project.

x. The impact, if any, of the changes in delivery schedule/cost estimates of the project on quality of deliverables and performance of the equipment/system should be spelt out.

xi. The impact of cost over-runs on the profit originally approved in respect of the DPSU/vendor concerned should be analyzed in order to see that the cost over-run does not eventually result into benefit to the vendor on account of increase in profit, instead of commensurate penalty and accountability for delays.

xii. It should also be ensured that liquidated damages/penalties, if any, charged by the DPSU/Implementing Agency from their sub-vendors are appropriately passed on to the buyer Ministry/Department.

xiii. In the cases involving cost over-runs, often the 'Work Services' component involves very high escalation, both in absolute and percentage terms, over the original approved cost. In such cases, deeper scrutiny of project planning and implementation is called for in order to ascertain the reasons therefore.

- **Closure of Developmental Projects:**

(i) The approval for formal closure of developmental projects, if required, should be sought without any delay after physical completion of the project and achievement of requisite programme objectives. The delays, if any, in seeking approval should be explained adequately.

(ii) While seeking approval, the gaps, if any, in achieving the programme objectives should be candidly brought to the notice of the competent authority.

(iii) In case any of the objectives envisaged in the original proposal have not been completed, or have been de-linked, or are being taken up separately as independent projects or supplementary projects or as subproject of another project, the position should be explained to the competent authority, duly indicating corresponding additional financial implications, if any.

- **Capacity Augmentation/Modernization Projects for Defence Sector:**

i. There is a strong case for increasing the capacity for aircraft-manufacturing, refit, repair and maintenance in public sector and private sector. Such capacity should be state-of-the-art and commensurate with the futuristic requirements of quality as well as quantity, in conformity with the demand forecast.

ii. The proposals for investment on modernization and up-gradation of infrastructure and capacity augmentation of various Defence Public Sector Undertakings (DPSUs), Shipyards and Defence Research and Development Organization (DRDO) laboratories should also factored in the installed capacity and its utilization in the recent past, besides the additional futuristic annual requirement.

iii. Such proposals should normally not be linked with the ongoing projects, and corresponding investments should not be loaded to the project cost.

iv. Such investment proposals should normally be taken up separately in a comprehensive manner, instead of piecemeal manner, after preparing a road-map for modernization activities of the DPSU concerned, duly carrying out the cost benefit analysis, and evaluating the various options available (inter-alia for funding e.g. through internal resource generation, market

borrowing etc.) as well as the quantum of workload on the DPSU, in order to arrive at the most cost effective option.

v. The proposals should be appraised in a comprehensive manner in consultation with all stakeholders in the Ministry/Department vis-à-vis the extant policy of Government.

3.1.7: Defence Procurement Procedure (DPP) 2013 – Important issues:

The Defence Procurement procedure (DPP) 2013 came into force from 30th May 2013. No doubt this has addressed some critical issues related to capital acquisition some such issues are described hereunder:-

- The concept of prefer categorisation was changed in the following categories.

An introduction of the 'preferred categorization' in the following order Buy (Indian), Buy & Make (Indian), Buy & Make, Buy (Global) brought a major shift in policy framework. This change in categorization is an impetus to indigenization.

- New provision of DPP-2013 clarifies the concept of indigenisation and made more stringent. This requirement of indigenisation even extend to the lowest tier of outsourcing.
- Indigenisation content requires 30% indigenous effort including on material under Buy (Indian category). This requirement became compulsory both overall basis as well as core components. The requirement of 30% indigenisation content became compulsory for trial stage also. All these were supposed to help more meaningful efforts in the targets of achieving indigenisation.
- While the procedure provided for making up of the deficiency at a later stage but a penalty was stipulated for not achieving the required indigenisation content at a particular stage.
- Similarly there was no stipulation for minimum indigenisation content in the buy component but Indian vendor is to achieve prescribed indigenisation content in the overall delivery under buy and make (Indian cases). This helped Indian vendor to absorb ToT set up manufacturing facility and work towards meeting the service requirements with a clear cut approach of achieving minimum indigenisation content.

- Although assessment of indigenisation content based on self-certification by the vendor was allowed with a provision to get audit done by MoD or its nominated agency, if found, inevitable.
- In order to speed up procurement process a stipulation was made to finalize the SQRs before seeking to accord for acceptance of necessity and reduce the period from two years to one year. All this helped in bringing down the processing time of individual cases of procurement.
- The delegation of power of the SCAPCHC increased from Rs 50 Crores to 150 Crores and the power of the DPB from 150 crores to 300 crores – All these enhancements of power will speed up the procurement process.
- Even provisions was made that, timely submission of the bids is a must by the vendor and request for extension of time can only be considered if it is submitted two weeks prior to the bid submission date with adequate justification.
- Provision was also made to give maintenance ToT to another Indian vendor of their choice in case of buy (global). The system of nomination by the ToT for the MToT partner is no longer a requirement.

3.1.8: Defence Procurement Procedure (DPP) 2016 – Important Issues:

DPP 2016 has brought the concept of BUY – IDDM'- category of the acquisition in the top most priority. Industry is feeling that it will give a good impetus to indigenous design and development of defence equipment. Self-reliance along with "Make in India" programme is that the moto of the present DPP. Some defined projects under "Make" projects category reserved exclusively for MSMEs.

The concept of strategic partners for promoting defence sector has also been mooted.

However, the offset clause would be applicable for "Buy (Global)" or "Buy and Make" categories of procurement where the indicative cost of acquisition is Rs. 2000 crores or more. This is a disheartening provision as other Asian countries are keeping offset unit of even 5 to 10 Million US Dollar while India has increased thresh-hold limit from Rs 300 cr. in DPP 2013 to Rs 2000 Crores in DPP 2016. The opportunity of Defence export through offset has been lost by MSME Sector. It is important for India to enhance its manufacturing content in gross domestic product (GDP) and this can only be done if our home grown Industry get an opportunity to manufacture and supply even in defence sector where India is importing 70% of its procurement.

Inter-Government Agreement is a better option for high value acquisitions especially in cases where product support over a long period of time is the necessity. Such an inter-government agreement is expected to safeguard the interests of the Government of India and should also provide for the assistance of the foreign government in case the contract runs into unforeseen problems.

DPP 2016 also permits vide clause 106 procurement on strategic consideration. When procurement requires to be made based on strategic consideration on a Single Tender basis, approval of cabinet committee on security (CCS) is necessary.

DPP 2016 allows any deviation from the prescribed procedure which will be put up to DAC through DPB for approval. Situations not foreseen and explained in the DPP may arise; under such circumstances the DAC would provide the necessary guidance to determine the appropriate course of action.

3.1.9 Defence Procurement Procedure (DPP) 2016 — what distinguishes it from DPP – 2013:

This DPP is also not applicable for procurement by DRDO and DPSUs as they will continue to be governed by their own procurement policy duly approved by their competent authority. This Defence Procurement Procedure (DPP) 2016 is to meet the requirement of implementation of Government of India new policy i.e., “Make in India” policy. It is good that the DPP-2016 has incorporated a “Preamble” and it recognises that Defence procurement are different from other procurements normally made under GFR. They have even considered that it is not a standard open market commercial procurement and therefore, need flexibility by stake-holders. The requirement is to build the capacity for armed forces in a time bound manner. It has even gone a step further and is suggesting to eliminate “opportunity cost”. DPP deals with procurements under capital Budget of MOD and covers modernisation of services. The policy preamble also accepts that in case of Defence Procurement failure or delay in procurement cannot be totally ruled out.

- **SIGNIFICANCE POLICY CHANGES IN DPP-2016**

- **Buy (Indian-IDDM):**

- This is a new category introduced in DPP-2016 and is being told as the most favoured category. This category provides Indian industry to take up R&D job to meet the stringent criteria. This will also help India to reduce dependence on Foreign Country & on their products involving Indian partner. This criteria requires 60% indigenous content which cannot be met through Foreign-cum-Indian JV.

- **Definition of Indian Vendor:**

- DPP-2016 has clarified who is to be called Indian Vendor and the proper definition has been incorporated which includes companies incorporated in India.

- **Indigenous Content (IC):**

- Indenisation content in DPP allowed 40% on cost basis when it is considered under "Buy-India".

Similarly indenisation content is 50% under the category of "Buy and Make India". All these changes will help in indenisation effort which in any case increases pressure on R&D effort as well as capacity to absorb the technology from the foreign collaborator.

- **SQRs:**

- Staff Quality Requirement (SQRs) has incorporated three broad parameters and are given below for incorporation in RFP:

- Essential parameter (A)
 - Essential parameter (B)
 - Enhanced Performance Parameter (EPP)

- All these parameters incorporation will have an impact on selection of better quality equipment. EPP would get a good recognition for having technical superiority.

- **Defining Attributes (DAs):**

- This clause would help in elimination of Arbitrariness in procurement system

- **Offsets:**

This is the one parameter which has major impact on policy. The need was to reduce the limit from the then existing limit of Rs 300 Crores of procurement value at DPP 2013 level to lesser value for having offset clause. This has been increased to Rs 2000 crores which is relief to Foreign OEM. All the other Asian countries have a few million US dollar limit only like 5 to 10 Million US Dollar which in India it has been increased; this will result in lot of disadvantages to the Indian MSME Sector.

- **Single Vendor Situation at Bid Submission Stage:**

This has been permitted under DPP-2016 with the due approval of competent authority.

- **'MAKE' Category of Acquisition:**

Under DPP-2016 this category has under gone a total change from that of DPP-2013. Under this category there will be two sub category Make-I and Make-II. Cases under Make-I would be funded by Government while case under Make-II will be without Government funding. Now, prototype development cost to the extent upto 90% of the cost will be borne by the Government under Make-I category. It has also been defined that acquisition under Make will be in two stages like prototype design & development stage and other will be acquisition stage under Buy (Indian-IDDM) - Indian Development Design Management. Not only this, MSME sector will get assured business as certain projects of certain value is reserved for them.

- **Strategic Partnership:**

This is also a new concept for the first time in DPP, as it will provide long strategic partnership with Indian Private Industry. This concept will build additional capacity in six strategic segments such as armoured vehicle, command and control systems, critical materials, warship / submarines, Aircraft, Helicopter and Missile. The Government has also announced the policy for selection of strategic partner.

- **Other Noteworthy Improvements/Policy and Procedural Changes:**

It is being said that, this DPP is more in simple language than in earlier volume of DPP. However some important changes are given below:

- Integrity pact in all cases of procurement for a value of Rs 20 crores and above will have to be signed.
- Staff evaluation report be approved and accepted by CFAs as per their delegated power at Service Headquarter.
- TEC report also be approved and accepted by CFAs at Service Headquarter based on their delegated power.
- Now foreign company can choose their Indian partner as per their formulated plan under Buy and Make category. Similarly under Buy and Make Indian category all Indian company can participate for the offered product from one foreign OEM.
- Procedure has also been laid down for “change of name of vendor”
- Time frame between drawing up of AON and RFP issue is now six months which earlier use to be one year for certain category like Buy and Make cases and one year for Buy and Make Indian cases.

- **Conclusions:-**

All the above deliberations reflect one thing very categorically that, project management for a defence project/defence programme/defence product are complex and critical. It is very much clear that, all the successive Government have tried their best to put the policy in proper format to enhance indigenisation and capacity building. However, the two factors i.e., Vigilance angle and CAG observations are also the bottle-neck. To comment on a failure programme is very easy and to calculate substantive loss based on Notional Figure are also not difficult; but, to implement those programme within the four walls of Rules and Regulations is a difficult job.

Similarly, DPSUs are also facing similar problems, they are also changing their internal procurement rules based on experienced gain but in almost all the programmes there is a delay on their part also. I have seen from a closed door how DPSUs officers are sometimes

becoming more Rule oriented than programme oriented resulting into delay in the execution of the programme.

What the defence programme needs is to follow the procedure of Indian Space Organisation where our comparable achievements are much more in comparison to other developed country. But now a days even space procurement proposals are creating lot of vigilance and CAG issues and only after five to ten years we will come to know whether our future space programme is running on same breath as it was running a few years back. Unless officials are getting hand hold from their superior bosses both political and bureaucratic their speed cannot be embedded into the defence procurement process. In a nutshell pre-vigilance check and pre-CAG audit along with hand holding by superior officials / political bosses are must for the growth and capacity building for the defence sector particularly in indigenisation context.

3.2 Defence requirements of the country

3.2.1 Introduction

3.2.2 Environmental Changes Affecting Military Operations

3.2.3 Future Role: Defence Forces of India

3.2.4 Transformation

3.2.5 Nuclear

3.2.6 Conventional

3.2.7 Low Intensity Conflict

3.2.8 Peace keeping

3.2.9 Joint Endeavours

3.2.1 Introduction:

India is aspiring to be a potential Super power with a larger role in the world affairs. In order to maintain its supremacy, the Nation must insulate itself from the vagaries of pseudo denial regimes that can be observed from the fact that foreign OEMs offer platforms but deny export of vital few sub-systems / parts. Self-reliance in defence production is a must in these days of modernisation particularly, seeing the example of North Korea in recent days. India has to learn self-reliance ruthlessly if it wants to become regional power in Asia. Indian defence needs presently are skewed towards imports due to lack of technological base and the need for sophisticated warfare equipment.

With the economic development and resolve to project it as potential global power India is facing challenges in terms of technology denial by the defence equipment exporting countries. This was evident especially after the nuclear tests by India in late 90s. Years of Proxy war leading to Kargil made it imperative for India to review its long-term policy to reserve the Defence Manufacturing to state sector for a wider participation and increased manufacturing base to meet its ever growing needs.

Having opened the Defence sector for participation by the private sector, the enlarged Indian defence industry gradually and successfully will demonstrate their capabilities to move up the value chain in defence manufacturing and system integration.

Besides manufacturing of defence products, we must focus on development of futuristic and critical defence technologies under development mode. This can be achieved by partnering with foreign OEMs. Foreign OEMs due to their constant R&D efforts are developing new products at much faster pace resulting in lesser focus on support to existing/past products. Since defence procurements are capital intensive involving huge cash outlays, the platforms acquired are used for a long duration which needs to be maintained and supported by the OEMs in addition to addressing the issue of obsolescence. Hence, the vendor's potential to maintain any purchased / inducted equipment in operational condition is primarily dependant on product support.

Successive DPP seeks to achieve the objective of indigenization not just through manufacturing but also through maintenance of the equipment. In 'Buy (Global)' cases, the enabling policy for technology transfer will help Indian Private Defence industry in catering the maintenance and support needs of equipment's. OEMs are free to choose Maintenance Transfer of Technology (MToT) partner.

3.2.2 Environmental Changes Affecting Military Operations:

We have already seen recently, India China border stand-off at Doklam in East India, while India relation with Pakistan is permanently bad resulting from Kashmir issue and LTTE problem in Sri Lanka, Maoist struggle in Nepal and Naxalite & terrorist issue in India. Our close door neighbour like China and Pakistan is always arming them with Nuclear weapon and missile technology apart from navigational guidance system. It is being said that Pakistan and China had provided from time to time conventional weaponry to Sri Lanka, Myanmar, Nepal and Bangladesh. It is important to note that, nuclear technology, bio-technology, navigation, space, under-water operation and information technology are changing war feature concept and it is further aided up by the advance development in information technology. The days are not far off in electronic warfare and electronic warfare will have the most serious impact on the system integrity.

Conflicts are continuing in South Asia having historical baggage Global advancement although made the world a global village. Land Army will no doubt play an important role in capturing the enemy territory but the war will be fought on the strength of weapon, sensors, communication and information technology. The technology which will play perhaps the most important role will be bio engineering, Nano engineering and robotic and artificial intelligence. The missile technology proliferating in the field of precision Guided and terminally guided ammunitions (PGMs and TGMs) and multi-dimensional manoeuvre vehicles are some of the breakthrough technologies and will have an impact on the warfare.

Modern war if it happens based on nuclear, biological, chemical weapon, smart weapon, lethal and precise weapon missiles and modern fighter aircrafts all will have a disastrous effect on a warfare. Hence modern warfare will be strategic and tactical and battle field will be for a very short period. Hence India is supposed to learn modern warfare with joint and combined operation and will have to change its DPP more to capture this field.

3.2.3 Future Role: Defence Forces of India:

India is to face lot of internal threats resulting from terrorist attack, Maoist issue, Kashmir issue, now Hindu fundamentalists all this requires the use of strong paramilitary forces. But it is being seen that the Army is being used for internal aggression which is not a healthy trend. The political bosses with the assistance of bureaucrats will have to appropriately take suitable measures to strengthen paramilitary forces and intelligence agencies to handle such internal aggressions. Using army needs to be disheartened as

our army has to take case of external aggression created by our immediate neighbours. Our respected defence forces needs to be strengthened in the area of nuclear, biological, chemical weapon, missile technology, proxy war, national reconstruction etc., including IT and information warfare in a big way. A peace cannot be purchased without strengthening the defence forces. And security or boundary safety requires most modernisation in the defence services. A need is there to restructure and equip them with contemporary technical ammunition. In the coming decades our defence forces may have to face non-traditional threats which cannot be met with present inventory of defence forces but will require like modern space programme. Hence, the Government should think over not just to go amending the DPP or DPM but to pay huge attention to most modern needs of defence forces. Their procurement system should be different, their policy should be different and their testing mechanism should be different. This necessitates even DPSU will have to utilise their profits for strengthening and developing such future generation equipment and Government should fund their programme to a certain extent and should not insist for handling like common PSU and asking them to go for disinvestment/IPO while we understand that even US companies are largely publicly traded companies in defence but their Government uses different mechanism to protect them and to augment them. Our defence forces are fully aware of the capability. Defence forces on their own cannot purchase the equipment and cannot build future generation equipment technology without the help of bureaucrats and political bosses; because any large deal has to go through cabinet committee on security headed by Hon'ble Prime Minister.

3.2.4 Transformation:

The concept of transformation requires higher budgetary allocation which is less than 2% of the present GDP and strengthening of CDS. Our traditional inventory which is more than 20-30 years old are still in the inventory of our Air forces, Army etc., all these requires quickest replacement with modern platforms and equipments. While arresting corruption is a must in defence deal but this should not be considered as a bottle neck in modernising our warfare platforms be it in the inventory of IAF, Army and Navy. Even the opposition party of the running Government should consider the basic necessity for strengthening modernisation when our neighbours have all such advance weapons whether it is in the field of missile, NBC, advance network communications with upgraded information technologies and electronic warfare strength.

The CDS needs to be strengthened with more joint command to be set up. Internal difference in the services should be minimise. The national strategy and process of change must be quick and effective, realistic strategic

directions be enforced. Phasing out of traditional warfare assets is also a requirement. Military institutions being more complex institutions naturally require truly competent and dedicated civil officials also. Exercise must be done for moral upgradation of the armed forces.

3.2.5 Nuclear:

India requires retaliatory capability in this sector. Deterrence capability is a must in nuclear warfare which requires a range of warheads and support systems. This also requires substantial increase in missile capability and hence Indian defence forces will have to prepare round the clock.

3.2.6 Conventional:

Conventional deterrence is a normal phenomenon and is a primary requirement, surgical strikes and effective superiority in conventional forces are a must. Pakistan is no doubt at a comparable strength to India and China is much more than India plus. Hence, expert in this field are suggesting for additional strategic capability in the area of Air force and Maritime Arena. Presently, China may not be interested in war because they are strengthening their economic side. But India has to prepare itself to provide a good deterrence even to China.

3.2.7 Low Intensity Conflict (LIC):

Available literature suggests for avoiding use of Army on low intensity conflict involved in tackling insurgency and terrorism. Only when such insurgency is aided and abated by our neighbouring countries then limited use of army can be made. And it should not become the order of the day for all types of insurgency.

3.2.8 Peace keeping:

The peacekeeping operation mostly under the aegis of United Nation is a common feature for our defence forces and it will continue to arise.

3.2.9 Joint Endeavours:

In any war as we understand from discussions with the Defence Officials that, synergy between the forces is a must. No war can be fought on standalone mode; Army, Air force and Navy has to work in an integrated manner to achieve the best result.

Conclusion:-

Now as mentioned above, the war will not be a conventional operation but it will be more based on technological advancement. Hence in sum and substance the need is to modernise the equipment, pay attention towards training of Service Personnel, gain knowledge and experienced through joint exercises. Remote warfare systems and technologies, IT, Software etc. will play a major role.

Although India is quite advance in Information Technology (IT) but the country has not advanced in IT warfare technology. The marginal changes in the procurement methods is not going to yield the enhancement in capacity building but there is a need to have a separate policy for Defence Procurement of such technology and methodology considering the future era of wars. India's experience of space development programme can be of great help for strengthening future scenario in defence area. While it is being said that, change is difficult as India is highly conservative and its bureaucracy both in Civil and Military are not morally high so to bring change for procurement of modern technology / future technology is a complex task.

India may become a global economic power the way GDP growth was about a year back, but to become a global military power only upgradation of present military machine / equipment will not serve its purpose. It has to revamp and restructure through its whole military procurement systems and it requires synergistic and visionary approach for a strong India.

To realize the potential of Defence spending and to achieve the "Value for money" in all procurements it is essential that certain pertinent questions indicated below need to be asked while finalizing every Defence procurement:

- How should the DPSU manage the diversity of regulations and foreign laws related to technology transfer, intellectual property and availability of local skills for indigenization of components as much as feasible while seeking to negotiate with OEM's.
- How should India manage its defence and civilian aerospace businesses by synchronizing the requirements besides utilizing the offset obligations?
- How diplomatic and commercial considerations should play a role in defining the contractual terms and conditions.
- What innovative joint ventures, mergers, or other collaborations will fuel growth among aerospace.

3.3 Defence Budget Outlays

3.3.1 Introduction

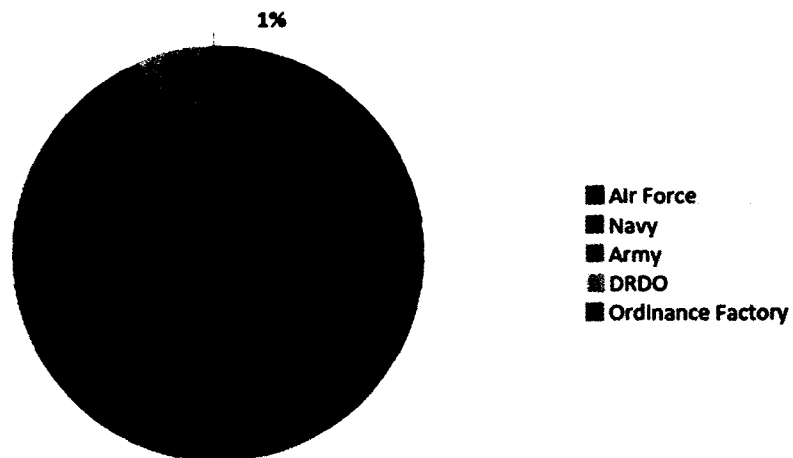
3.3.2 Current Scenario

3.3 Defence Budget Outlays

3.3.1 Introduction⁴:

India's Defence expenditure constitutes 2.1% of the GDP for the financial year 2015-16 while it was 2.3% in 2014-15. And increase of 10.95% in defence expenditure over financial year 2014-15 was a meagre amount and even inadequate to allow for inflation which is owing around 6.27% per annum. Generally annual inflation in the international war weapons, ammunition and other defence machinery is around 12 to 15% per annum.

Table 6
Share of Defence Services in Defence Budget 2017-18



3.3.2 Current Scenario:

- The total allocation under the Defence Services Estimates for India is as under:-

⁴<http://www.globalsecurity.org/military/world/india/budget.htm>

Table 7
Defence Budget Outlays (2009-10 to 2017-18)

Defence Budget Outlays						
(Rs. Crores.)						
Year	Total Defence Budget Outlay	Capital	Revenue	Imports	Share of GDP (%)	Share of Central Govt. Budget (%)
2009-10	141781	51112	90669	35778		
2010-11	154117	62056	92061	43439		
2011-12	170913	67902	103011	47531	2.4%	16.4%
2012-13	181776	70499	111277	49349	2.3%	16.4%
2013-14	203499	79125	124374	55388	2.3%	16.3%
2014-15	224000	89588	134412	66212	2.3%	17.1%
2015-16	246727	94588	152149	71400	2.1%	16.4%
2016-17	249099	86340	162759		2.3%	17.1%
2017-18	262390	86529	175861		2.1%	16.8%
* India Imports 70% of its Defence Equipments						

It is being said that, India is planning to spend approx. 100 billion US dollar over 10 years on defence modernisation. All this suggest for that, military spending has to be increased from presently below 2% of the GDP to a higher level.

India's defence requirements are met through both imports and domestic sources. However, there is greater reliance on imports. Currently, indigenous content in defence acquisition is about 30%. Going forward, the target of the BJP led government is to achieve about 70% indigenization in defence procurement by 2027. It may be noted that India was the world's largest importer of arms between 2010 and 2014. According to SIPRI, its share of international arms imports was 15% during this period. Some of the countries from which India imports defence equipments are Russia, USA, Israel and France.

The fund requirement will also be in the area of development of Railway system in the border area. Everybody in the Ministry of Defence and even of Opposition Party to the newly Government stressed the need for modernisation of defence preparedness but

practically it is not enhancing the capacity building in the way our neighbours are building in this security arena. There is a need for strategic priorities to enhance military expansion and modernisation plan as mentioned above.

While Ministry of Defence includes Secretary Defence (Finance)/ Financial Advisor (Defence services) and their Department is to look into Internal Audit and Defence Expenditure Accounting but still we are observing lot of vigilance and CAG observations. Hence the time has come when they have to revamp their own system. So that, recurrence of vigilance and CAG issues are reduced.

- **Conclusion:**

Care needs to be taken for appropriate allocation to different services based on their priority needs as all the three services like Army, Air force and Navy all are equally important to win a war. Based on this requirement mountain stripes Corps were created in 2013-15.

3.4 Contribution of DPSU'S to the defence requirements of the Country

3.4.1 Introduction

3.4.2 Private Sector Participation

3.4.3 Ordnance Factories Organisation

3.4.4 Defence Public Sector Undertakings: An Overview

- **Statistics of DPSU'S**

3.4.5 How DPSUs / Ordnance Factories Could Spearhead Transformation of Indian Defence Industrial Base

- **Order Book**
- **Capacity Augmentation**
- **Export Potential**
- **Product Support**
- **Joint Ventures**
- **Public Private Partnership (PPP)**

3.4.1 Introduction:

Ordnance Factories and DPSUs have established variety of production facilities for various defence equipment. Presently, India has 39 Ordnance Factories and 9 DPSUs. All of them are engaged in manufacture of weapons and systems for the 3 services i.e., Army, Air force and Navy.

Defence production wing under MoD was set up in November 1962 to look after the DPSUs and Ordnance Factories. Now, the various DPSUs are manufacturing armoured vehicles, fighter Aircraft, warships, missiles, ammunition etc.

Main organizations under the Department of Defence Production are given below:

1. Ordnance Factory Board (OFB)
2. Hindustan Aeronautics Limited (HAL)
3. Bharat Electronics Limited (BEL)
4. Garden Reach Shipbuilders & Engineers Limited (GRSE)
5. Goa Shipyard Limited (GSL)
6. Hindustan Shipyard Limited (HSL)
7. Mazagon Dock Limited (MDL)
8. BEML Limited
9. Bharat Dynamics Limited (BDL)
10. Mishra Dhatu Nigam Limited (MIDHANI)
11. Directorate General of Quality Assurance (DGQA)
12. Directorate General of Aeronautical Quality Assurance (DGAQA)
13. Directorate of Standardisation (DOS)
14. Directorate of Planning & Coordination (Dte. of P&C)
15. Defence Exhibition Organisation (DEO)
16. National Institute for Research & Development in Defence Shipbuilding (NIRDESH)

The production and turnover of Ordnance Factories and DPSUs have been increasing steadily, in response to the increasing requirements of armed forces. Details of turnover for the last nine years are given below:

Table 8**Details of total turnover of DPSU's & Ordnance factories for few years**

YEAR	TOTAL SALES/VOP ORDNANCE FACTORIES	TOTAL SALES/VOP PUBLIC SECTOR UNDERTAKINGS	GRAND TOTAL (Rs. in crores.)
2007-08	6937.81	16740.25	23678.06
2008-09	7229.31	20403.64	27632.95
2009-10	8715.26	25899.64	34614.90
2010-11	11215.01	25975.06	37190.07
2011-12	12391.00	28667.00	41058.00
2012-13	11975.00	29896.00	41871.00
2013-14	11123.00	32622.00	43745.00
2014-15	11364.00	35464.00	46828.00
2015-16	19982.00	39921.00	59903.00

All the above suggests that, there is a need for holding the hands of these DPSUs and Ordnance Factories. It is these Institutions which have also contributed in winning 1971 war with Pakistan & facing 1962 war with China.

3.4.2 Private Sector Participation:

To achieve self-reliance in the Defence sector, continuous efforts are being made to indigenize Defence equipment wherever technologically feasible and economically viable. Now under "Make in India" programme, Government has opened up Private Sector for 100% participation apart from large Industrial houses to come as "strategic partner" apart from enhancing Foreign Direct Investment (FDI) upto 49%.

It also considers all matters relating to Production of Defence equipment by licensed companies viz. applications for self-certification, permission for export products manufactured under license, as well as cases for cancellation of license due to breach of licensing conditions or security provisions etc. The Joint Secretary (Electronics Systems) is presently Chairman of Standing Committee with members from diversified fields viz Naval HQrs, Air HQrs, Army HQrs, DGQA, DGAQA, DoD, OFB, DRDO and BEL.

Department of Industrial Policy & Promotion (DIPP) has, so far, issued 178 Letters of Intents (LOIs)/Industrial Licences (ILs) (10 ILs issued in year 2011) to companies for manufacture of a wide range of defence equipment on the recommendation of the Ministry of Defence.

3.4.3 Ordnance Factories Organisation:

The Ordnance Factory was set up before independence and its first factory was set up at Cossipore, Kolkata. Presently they have got 39 factories scattered throughout India and their two more factories have recently come up at Korwa in U.P and at Nalanda in Bihar.

Its functions are under the administrative control of Department of Defence Production in the MoD. Their factories have integrated in infrastructure and primarily caters to the requirement of the Army. It is learnt that, they are producing main battle tank, capital T90, Infantry combat vehicle, Artillery guns, rockets for Artillery, wide range of small arms, mortars and other medium calibre weapons. They are also upgrading their facilities and taking up development jobs also, apart from supporting modernisation of the Indian Army.

3.4.4 Defence Public Sector Undertakings: An Overview:

All the DPSUs are functioning under the administrative control of Department of Defence Production in the MoD. They are in corporate forms with more freedom towards utilising their financial and operational resources. They are working in high- end technology spectrums e.g., manufacture of fighter aircraft and helicopters, aerospace equipments, warships, missiles, electronics and other communication and aviation system.

Below provides some key financial statistics of the DPSUs for 2012-13.

Table 9

Key financial statistics of DPSU's

● **Statistics of DPSUs:**

Sl. No.	DPSUs	Value of Production (Rs in Cr)	Value of Sales (Rs in Cr)	No of Employees	Exports (Rs in Cr)	R&D Exp (Rs in Cr)	Order Book (Rs in Cr)	GOI's Share (%)
1	HAL	14201.83	14323.64	32644	382.82	1948.95	71918	100
2	BEL	6290.19	6012.19	10305	178.09	416.17	24949	75.86
3	BEML	3359.70	3289.79	11005	198.00	94.36	...	53.87
4	MDL	2290.64	2404.69	8670	0	100
5	GRSE	1529.37	464.34	3480	0	0	7206	100
6	GSL	506.00	844.12	1602	0	...	1769.93	51.09*
7	HSL	483.84	558.59	3351	0	...	1108.21	100
8	BDL	1175.52	1074.71	2897	0	19.28	17000	100
9	MIDHANI	537.37	538.59	1121	0	100

1 GOI: Government of India

2 MDL also owns 47.21 per cent equity share in GSL in addition to Government share.

Table 10
Profit after tax of DPSU's

Profit After Tax (Rs. in crore)

Name of the PSUs	2011-12	2012-13	2013-2014 (Provisional)
HAL	2539.43	2997.00	2735.00
BEL	829.90	890.00	853.00
BEML	57.25	79.87	0.00
MDL	494.31	412.72	332.50
GRSE	108.03	131.54	119.12
GSL	82.80	15.57	-35.63
BDL	234.96	288.40	308.18
MIDHANI	68.45	82.52	72.58
HSL	(-) 85.98	(-)55.17	(-)85.00
TOTAL	4329.15	4842.45	4299.75

DEFENCE PUBLIC SECTOR UNDERTAKING IN INDIA

Table 11

DPSU's location / year of establishment / product profile

Name of the DPSU	Location	Year	Sales (Rs Cr) 2016-17	Procur ement (Rs Cr) 2016-17	Product profile
Hindustan Aero nautics Limited (HAL)	Bangalore	1964	17605	6786	Airplanes and Helic opters
Bharat Electron ics limited (BEL)	Bangalore	1954	8296	4500	Electronics for Aero space and defence
Bharat Earth M overs Limited(B EML)	Bangalore	1964	2820	1480	Defence Vehicles, Rail Coaches & Sp are Parts and Minin g Equipments.
Bharat Dynami cs Limited (BD L)	Hyderabad	1970	4875	900	Ammunitions and missile systems
Mishra Dhatu Li imited (MIDHAN I)	Hyderabad	1973	800	294	Specialized metals and alloys
Goa Shipyard L imited (GSL)	Goa	1967	1030	389	Warships and frigate s manufacturing
Garden reach Shipyard and E ngineers Limite d (GRSE)	Kolkata	1960	964	1700	Design and constru ction of warship
Mazagon Dock limited (MDL)	Mumbai	1934	2865	1293	Main activities are c onstruction of state- of-the- art warships and su bmarines (2014- 15 Fig.)

Hindustan Ship yard Ltd. (HSL)	Vizag	1952	625	186	Manufacture and repair of Ships
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3.4.5 How DPSUs / Ordnance Factories Could Spearhead Transformation of Indian Defence Industrial Base:

The need for indigenisation emerges from the very fact that Ministry of Defence imports 70% of procurements of equipments from world market comprising of Companies from France, Russia, USA, Germany, Israel, U.K etc., hence the requirement is not only as a substitute of import but also the very point of view is self-reliance in the crucial area of defence. In order to enforce self-reliance; involvement of both public and private sector is a must as the equipments are multiple and intricate.

Not only this, the requirement of Indian Air Force is in the field of Aviation and equipment apart from manufacture of Engines etc.; Whereas requirement of Navy is mostly in ship-building and Army requirement is in the field of land system etc.

However, the participation of private sector presently in defence manufacturing field is very small. The MSME/SME always feels that there is a lack of fund & continuous order flow and they need to have a long term order book position. The Government system works basically on yearly requirement and yearly order bookings. This leads to repeated failure for the growth of private sector which always harps that the order placement should be for a longer period; virtually to cover for the entire project /programme so that they can generate sufficient revenue to match the corresponding expenditure through the process of learning curve in the long term.

High level of imports also reflect that domestic defence production industry are not growing in spite of reforms of policy changes from 2001 onwards, the

year from which the stress in the field of indigenisation increased in the domestic defence production.

The Defence Production Policy of January 2011 desired to build robust indigenous defence industry base by involving and encouraging larger involvement of the Indian Private Sector in design, development and manufacture of defence equipment.

The Defence Production Policy 2016 has also incorporated the concept of **Strategic Partner**, the basic purpose of which is to involve large Private Sector industrial house to take up the Defence Manufacturing Programme. While the Government is contemplating to synergise and increase the national competitiveness in procurement of equipment for the three services Indian Air Force, Army and Navy. But as seen so far it is not adding to its self-reliance strength in this sector. What we have gained so far in the Defence Manufacturing Programme that our DPSUs & OFB has capacity to absorb ToT/Licence production effectively and efficiently, but they have not yet succeeded in the indigenisation effort.

Let us hope that formation of Joint Ventures, Co-production, Co-development and Public Private Partnership will help the Government in achieving this task with the involvement of R&D institutions, scientific institutions and IITs and NITs.

- **Order Book:**

The Government so far was relying more on DPSUs and OFBs, but they failed to execute order book in time as per the identified programme & as a result of this, bulk of contracted orders are outstanding for execution in lakhs of crores of Rupees with slippage in delivery and delay in capacity building of the services.

- **Capacity Augmentation:**

DPSUs through its own iterative method will never be able to meet the task of indigenisation or self-reliance in Defence Production unless it involves MSME/SME in design & development and manufacture of systems/ sub-

systems/ Equipments. The DPSU has to become an assembler/aggregator instead of becoming a vertically integrated manufacturer where they built up from component part to sub-systems to systems to Engine, Airframe and land system. DPSUs/OFB will have to treat MSME/SME as their partners instead of as their vendors and they have also to consider the large industrial houses for developing and manufacturing even their A class items like engine in aircraft industry or such other equipment for other services. DPSUs and OFB should not consider private sector a threat but consider them as a partners. Time has come when vigilance organisation may also be required to get themselves engaged in the solution to the problem of self-reliance by way of holding the hands of DPSU/OFB officials in case of honest mistake committed and should not consider "smiling with a vendor, a corrupt practice" and consider a vendor as a partner in defence production area. All this requires help from top management / Bureaucracy / Political Bosses.

- **Export Potential:**

Export in defence sector is possible only for low value items being manufactured by MSME/SME/Private Sector. As far as export of supply of equipments are concerned like Aircraft/Helicopter we have already seen the export performance of a particular DPSU that they have lost heavily and also brought a bad name to the DPSUs/Government. Hence, Export performance can enhance only when we go for capacity augmentation and self-reliance /indigenisation in defence design & development and production sector.

- **Product Support:**

Till now DPSUs/OFB are the production agencies in all ToT / licence production programme of services generally and is undoubtedly responsible to provide product support over the life of the project/product. There is a need here to involve MSME/SME for each supply system / sub-system; so that the economies of scale for manufacture of sub-system / system will reflect reduction in average cost of production and supporting continuous production for better product support for the services i.e., Indian Air Force, Army and Navy. As far as IAF is concerned due to inadequate product support from DPSUs they have to cannibalize sub-systems & systems. Lot of items from other idle Aircraft are taken out to keep a few always operational due to non-availability of spares in times. Hence it is strongly recommended that the Department of Defence Procurement may put stress on DPSU/OFB to opt for MSME/SME /other private sector for production of spares of a particular project/product/programme or for common items of

multiple programmes; so that they can get their economies of scale and DPSU/OFB may be allowed to go for the role of Assemblers/Integrator/for upgradation of Main Equipments including Aircraft & Helicopters and design & development of higher version of the Equipment. DPSU/OFB be provided the same role as ISRO has been provided under space programme. Department of Defence Production will have to hold the hand of officials of DPSU/OFB in case of certain failure as without failures success cannot be dreamt of & that too in such a sophisticated defence production.

- **Joint Ventures:**

It is welcome step that, due to Government impetus the DPSU have formed multiple joint venture companies in Aerospace sector and shipyard sector. However, the future will tell whether these joint ventures mode is a successful method for enhancing indigenisation / self-reliance.

- **Public Private Partnership (PPP):**

This concept Public Private Partnership has generated growth in infrastructure sector and implemented in health scheme in Karnataka & Andhra Pradesh. The need is to borrow this concept for defence production also. Time has come and DPSU/OFB will have to do the job of skill development and to enhance the capacity of skill development for private sector /MSME/SME for indigenisation and for design and development of product in defence sector. Perhaps, Public Private Partnership requires involvement of large industrial houses along with DPSUs for large programmes. The only point is that the Private Partnership should not join with only purpose to take over DPSUs. This intent creates fear for DPSUs officials. Presently skill manpower in the defence sector is available only in DPSU/OFB/DRDO and no private sector can grow without their assistance.

Time has come when the Government is to take up the issue with Industrial Association and DPSU Boards to formulate the perspective plan with MOU on PPP models. So that Defence Production through indigenisation should grow and concept of PPP becomes successful in defence production. While

DPSU/OFB has already gone ahead with the development of Tier-II and Tier-III Private sector vendor. It is expected that, Private Industry will meet their system / sub-system production & supply well in time at a reasonable cost with quality output. India perhaps has not learnt from Import mechanism of its Equipments through its offset policy as has been done by China and other countries in gaining expertise in design & development and Production of its Defence Equipments.

While the particular DPSU in Aerospace field has developed 11 Aircraft till 1970 could not develop successfully even one Trainer Aircraft after that. Perhaps the concerned DPSU failed to attract IITians(Indian institute of technology graduate engineers) after 1990 because of so many factors including withdrawal of campus selection, freedom to go for development, not giving proper remuneration to the IITians etc. Considering the IITians at the same platforms as Engineers from private technical institutions has also perhaps laid to such situation. So we have failed in getting appropriate technology on our imports; may be due to lack of capability to engage better terms and conditions with foreign suppliers or the inability to understand the basic legal requirement or agreeing with protection clause in the contract executed with large multinational companies in defence etc.

3.5 Offsets

3.5.1 Definitions

3.5.2 Offset Policy & Objective

3.5.3 Key Features

3.5.4 Foreign Direct Investment (FDI)

3.5.5 Offset Policy in Defence Procurement Procedures (DPP)

3.5.6 Offset with respect to Category of Acquisition

3.5.7 Offset Criteria

3.5.8 Banking of Offset Credits

3.5.9 Indian Offset Partner

3.5.10 Legal issues in offset Contracts

3.5.11 Suggestions for improvement of existing Offset guidelines

INTRODUCTION

OFFSET

3.5.1. Definition:

An offset is nothing but a trade-off. Sometimes it is also called a barter system in economic terms. The seller generates cash inflow for the buyer country. It flows from the main contract for the supply of defence equipments to generate benefit for the economy of the buyer country. Sometimes this agreement helps the buyer to start manufacturing the same equipments in his own country based on input provided by the seller. Sometime offset agreement also mentions setting up of joint venture Company with the Indian Manufacturers having some experience in this field and such joint venture agreement with seller-original equipment manufacturers (OEM) to produce defence products or for maintenance and repair overall of such defence product as has been purchased from OEM.

As far as classification of offset is concerned there are two types of offsets- direct offsets and indirect offsets.

The examples of direct offsets are co-production, subcontracting, licence production or marketing activities/training. This offset helps the buyer's economy to establish domestic industry in the defence sector.

The examples of indirect offsets are credit assistance, technology transfer, investment and training: this helps the buyer country to stimulate the economic growths in its country

Direct Offsets:

This is in the form of co-production, co-design and co-development, outsourcing sub-system, marketing activities directly assigned by the foreigners to the Indian companies. Under this concept, the foreign manufacturer is to purchase sub-system, structure etc., from the Indian partners directly. Direct offset also involves investment by these foreign companies into the other sectors in the form of a primary manufacturer. This helps basically in growing domestic industry.

Indirect Offsets:

Under this concept they have to purchase items from unrelated sectors and they may have to make investment in training and technology assistance to the purchaser country for manufacture & supply of any goods / services. Here the basic purpose is to stimulate economic growth in the purchaser country.

3.5.2. Offset Policy & Objective:

This policy also acts as leverage in capital acquisition for the development of defence industry in the buyer country. The advantage of this policy is to establish research, design and development related to the concerned sector i. e. in case of defence for defence equipment and services.

3.5.3. Key Features of Offsets:

The purpose is to develop and strengthen the defence manufacturing sector in India and generate efficiency in the procurement process.

3.5.4. Foreign Direct Investment (FDI):

In order to support the offset policy to be well driven and meet its objectives:

- FDI Limit is raised from 26% to 49%
- FDI through direct Route up to 49 % is allowed
- Above 49% it will be referred to the Cabinet Committee on Security (CCS) and will be allowed on case to case basis.
- Greater inflow of FDI will provide substantive economic advantages, but the effects of the same to be analyzed and discussed in detail.
- FDI increased to 49 % while foreign OEMs asked for 74%
- FDI greater than 49 % is recommended for critical technologies.

3.5.5. Offset Policy in Defence Procurement Procedures (DPP):

- The offset policy when introduced in July 2005 was a two page document. Since then it has undergone five revisions and is a much more forward looking policy now. The Ministry of Defence (MoD) is still inviting opinions on how the offset experience could be further improved.
- DPP 2005-09 - Defence offset policy formulated (DPP 2005) and DOFA created
- Make & Buy and Make Categories (2006 & 2008) introduced.
- Banking of offset credits
- DPP 2011 - Offset scope enhance to include aerospace and internal security
- DPP 2012 - Revised Offset Guidelines issued wherein ToT included in list of offsets
- DPP 2013- Emphasis on indigenous production and Long Tern Integrated Perspective Plan (LTIPP)).

- DPP 2013 Amendment. -OEM can change Indian Offset Partner (IOP); offset details which were to be provided at the time of signing the contract can now be provided at the time of claiming credits.

3.5.6. Offset with respect to Category of Acquisition:

Under the new policy of DPP-2016 the offset will be applicable only for "Buy and Make" category of procurements where the cost of procurement is Rs. 2000 crore or more. Under this policy DEFENCE ACQUISITION COUNCIL has been authorised to consider either for full waiver or partial waiver from offset clause. In case of a waiver for a particular acquisition case, eligible/selected Indian vendors need to be exempted from the corresponding IC (Indigenisation content) stipulations.

In decreasing order of priority the procurement of defence equipment, under this procedure are categorized as follows:

- a. Buy (Indian – IDDM) – Indigenisation content (IC) 40%, on cost basis or 60% on cost basis of total contract value.
- b. Buy (Indian) – IC 40% on cost basis of total Contract value.
- c. Buy and Make (Indian) – IC 50% on cost basis of the 'Make' portion.
- d. Buy and Make – left to AoN according authority on IC to decide.
- e. Buy (Global) – outright purchase.

However it is observed that DPP-2016 has revised the offset threshold limit to Rs 2000 Crores (Approx. US \$ 300 Million) from Rs 300 Crores. It seems MOD having difficulty in implementing the existing offset contracts could be the main factor for increasing offset threshold limit. Notwithstanding any underlying reasons, the hike is untenable not only from the point of view of the practices followed by other countries but also in view of the 'Make in India' initiative. With regard to international practices, it will be of interest to observe that the offset threshold is as low as US \$ 5 to 15 Million in many countries like Israel, Malaysia, Turkey and UAE. Further based on experienced gained over a period of time lower offset threshold is fixed. With increase in threshold, now only a fewer areas import contract would be eligible with a big set back to the local industry particularly to manufacturers of parts and components under 'Make in India' initiative.

3.5.7 Offset Criteria:

- Threshold: Procurement of all capital Acquisition of Rs. 2000 Cr. or more
- Obligation: Minimum 30% of the Contract Value(Base Price)
- Fulfilment Period: end of delivery plus 2 years
- Penalty: 5% for every year of delay and Max cap up to 20%
- Performance Bond: BG for Full value of un-discharged offset
- Offset Banking: Applicable for Contracts entered into after 1st Sep 2008
- Multipliers: A. Strategic Technologies to DRDO
 - (1) 2.0- Indian armed forces;
 - (2) 2.5 - both military & civil,
 - (3) 3.0- No Restrictions including right to export
- B. Discharged by MSMEs: 1.5
- Re-Phasing : Allowed within the period of discharge
- Offset credit for ToT and Equipment allowed.
- Tier -1 to OEM allowed for discharging offset.
- DOMW created; Offset proposal need to be submitted 3 months after main bids submission
- Fast Track Acquisition is Exempt from Offset Obligations as also procurement under option clause
- Provisions related to "Services" kept in Abeyance since May 2013 has been restored.

Avenues for Offset Discharge:

- a) Direct Purchase/ Export
- b) FDI for Manufacturing and Maintenance through JV route with Indian Enterprise equity Investment.
- c) Investment in kind for ToT for manufacture and Maintenance
- d) Investment in kind in Indian Enterprise.
- e) Provision of equipment and ToT to Govt., institutions including DRDO for manufacture and maintenance.
- f) Technology Acquisition by DRDO
- g) Offset Banking: Foreign vendors could consider creation of Offsets Programmes in anticipation of future obligations.

3.5.8. Banking of Offset Credits:

- Shall be reckoned for discharging offset obligations after main procurement contract
- Pre-approved banked offset credits considered subject to a maximum of 50 percent of the total offset obligation under each procurement contract.
- Vendor is to apply for banking offset credits within one year of completion of the transaction.

3.5.9. Indian Offset Partner:

- Indian enterprises /institutions/establishments engaged in manufacture of eligible products and/or provision of eligible services, including DRDO.
- The OEM/vendor/Tier-I sub-vendor will be free to select the Indian offset partner for compliance with the offset requirement provided in the IOP and has not been barred from doing business by the Ministry of Defence.
- The agreement between the OEM/vendor/Tier-1 sub vendor and the IOP shall be subject to the laws of India.

3.5.10 Legal issues in Offset Contracts:

Originally this concept has emerged in DPP in 2005, the offset obligation as per the policy was for creation of new market source for services and products from any DPSU or OFB towards offset obligations. Thereafter in DPP 2006 existing clause was replaced by a new clause where the foreign vendor is to directly purchase or execute export orders for services and products from DPSU/OFB/Any private defence enterprises operating under an industrial licence. The amplification of definition of services was done to cover maintenance, overall, upgradation, life extension, engineering, design and testing. Thereafter the concept of banking offset credits emerged in DPP 2008. DPP 2011 expanded the list eligible products to include the internal security/aerospace in civil sector etc.

Thereafter offset guideline was revised on 1.08.2012 by MOD these guideline covered apart from acquiring key technology area to include in investment in documentation, training and consultancy required for full TOT. DPP 2013 introduce the concept of multipliers for investments/purchase form MSME.

A stress was given for protection of intellectual property associated with co-development under offset agreement. Violation of IP will lead to legal dispute and the claim for damages by the OEM. This will be applicable even for joint developed IP. Taxations is another grey area which needs to be examined critically before entering into offset agreement by Indian Enterprises. Similarly TOT agreement needs to be studied by an Indian organisation thoroughly so that they meet the criteria of Indigenisation. Export Control Restrictions are equally important and to be seen by Indian Enterprises for which country of the globe they want permission for supply of their product. Product liability is to be carefully accepted otherwise it will pose significant risk on Indian Enterprises.

3.5.11. Suggestions for improvement of existing Offset guidelines:

The following are suggested points for improvement of existing offset guidelines:

1. Technology Acquisition:

- a) As per the existing offset guidelines, offset proposals of OEMs include the submission of information. The information being sought in these Annexure reflects the state of OEMs enjoying the liberty to decide on mode of liquidating the offsets.
 - ✓ It is for consideration that a formal RFP for Offset as supplementary to the main acquisition be floated based on the inputs obtained from Indian Industries as part of the tender documents.
 - ✓ The review of requirement / offset projects may be based on the criteria such as necessity and utility, relevance of technology and feasibility of indigenization, and avoidance of technology / processes which are already existing or being developed indigenously.
 - ✓ The above would channelize the flow of core technology through offset to the country.
- b) Opportunity for technology acquisition is to be extended to DPSUs having R&D setups for their respective areas. However common technologies which are to be utilized by multiple players to be acquired through DRDO.
- c) It is for consideration for inclusion of representative from department of defence production and representatives from industry in Technical

Offset Evaluation Committee (TOEC). The TOEC to be chaired by a neutral body without ownership towards industry or user groups.

- d) A provision for flexible multiplier option is to be provided in DPP based on critically / importance of technology and the extent of permissible rights offered by OEMs for technology usage to enhance offset opportunity. A higher multiplier can be considered for acquisition of technology with proprietary rights to Indian Government.
- e) Higher multipliers could be considered if the development of technology happens in India by Indian companies with the OEM's R&D support and the Intellectual Property rests with Indian Offset Partner.

2. Offset Banking:

- a. In the implementation of this banking provisions it is felt that there should be differentiation on the export orders placed through offset mechanism and the orders received on competitive basis without reference to offset guideline.
- b. In various countries threshold limit is far less than Indian threshold limit of Rs.2000 crores for obtaining the offsets. It is for consideration to bring the threshold downwards and facilitate the corresponding offset obligation through a larger industrial base.

3. Value Addition:

Concept of value addition is applicable to direct purchase/export of eligible products (i.e. to goods only) and not for services. By the concept of value addition uniformly for both products & services will definitely boost the growth of manufacturing sector.

4. Development, Assimilation and sustenance of Expertise within Indian Industry:

For Capability and Confidence building in Defence Sector fetching of high end work is required. For example learning and assimilation of technology is possible by not merely developing the software without knowing the uses /integration with hardware. Similarly manufacturing and export of complete Aircraft/Naval Platform/Submarine helps in effective absorption and retention of various expertise including project management skills.

Processing High end jobs also creates favourable ecosystem for exponential growth. Prevailing Offset guidelines treats high-end work packages at par with least technology intensive manufacturing.

It is for consideration to introduce higher multiplier depending on the complexity of work packages for encouraging the development of Tier-1 and Tier-2 supplier base. Further additional multiplier can also be considered in case high end work packages are being processed by Start Ups, Micro and Medium Enterprises.

5. Other Enablers:

- a) For Technology acquisition through offsets, payments are not to be made for technology, instead granting of offset credits based on evaluation by Technology Acquisition committee (TAC) are required. For uniformity of understanding by all stakeholders it is for consideration to bring out this aspect explicitly.
- b) Consideration on setting up a forum to address the complexities in procurement procedures and its provisions enables the better understanding of the procedures. This forum with an authority can publish the Frequently Asked Questions (FAQs) on a dedicated website so that the basic questions are readily answered. For specific questions, people can approach the forum and get their doubts clarified.

6. Transparency in Offset Monitoring:

- a) Mechanism to be introduced that could be instrumental for the industry in finding out the non-committed business volumes for offsets for specific OEMs and projects. By making this data accessible to all stakeholders could bring in a proactive approach in better liquidation of offsets.
- b) It is for consideration that the data for completed projects can also be made available to all the stakeholders. Introduction of this provision will extend an opportunity for analysis of data and provides inputs for continuous improvements, further it would enable, better utilization of offsets opportunities and development of Defence industry.

3.6 Review of International Contracts and its Present Shortcomings

3.6.1 United Nations Convention on Contracts for the International Sale of Goods

3.6.1.1 Introduction

- **Background History**
- **CISG as an International Commercial Legal Code**

3.6.1.2 Practical CISG Issues for Purchasers

- **CISG Advantages and Disadvantages**

3.6.1.3 Practical Issues in Implementation of CISG

- **India and Practical aspects in Implementing CISG**

3.6.2 Passing of Risk in International Contracts of Sale of Goods between the United Nations Convention on Contracts for Sale of Goods 1980 (CISG) and the English Sale of Goods Act 1979 (SGA)

- **Introduction (Risk Transfer in International Sale)**
- **General Background and Basic Rules provided by the CISG and the SGA**
- **Comparative Evaluation of SGA and CISG**

3.7 Best Practices in US Defence Procurement System vis a vis India

3.6.1 United Nations Convention on Contracts for the International Sale of Goods⁵

3.6.1.1 Introduction:

Lack of awareness of different legal setups at different countries brings legal uncertainty which leads to increase of cost of transaction or become deterrent to the transaction. Thus, it is imperative to have clear understanding of international laws and international trade.

- **Background History:**

The United Nation Convention on Contracts for the International Sale of Goods ("CISG" or "Convention") is an important and a good example of International legal cooperation. It projects the possibility of creating a uniform law to govern International trade.

- **CISG as an International Commercial Legal Code:**

The United Nations Convention on Contracts for the International Sale of Goods ("CISG" or "Convention") is a multilateral treaty that governs the rights and obligations of parties to International sales contracts. It adopts International trade by making it easier and more economical to buy and sell raw materials, commodities and manufactured goods in transnational commerce through a unified legal approach. The Convention is an International commercial legal code.

In 1980 & 1981, nineteen nations signed the Convention, including the United States. Thereafter the Convention has achieved relatively wide-spread acceptance. 85 countries as of May 2016 have adopted CISG out of 204 countries. Countries like Russia, USA, Italy and France have adopted CISG. UK & India have not yet adopted.

International Trade Law Branch of United Nations Office of Legal Affairs servicing the United Nations Commission on International Trade Law publishes the updated list of countries which have ratified CISG.

⁵ United Nations Convention on Contracts for the International Sale of Goods, an Article by Tom McNamara.

3.6.1.2 Practical CISG Issues for Purchasers:

- **CISG Advantages and Disadvantages:**

Advantages	Disadvantages
<ul style="list-style-type: none"> ● It depicts International business expectations. ● It is reasonable and does not appear overall to favour buyers at the expense of sellers or vice-versa. ● It is “good law” in that it represents fair compromises on difficult commercial issues acceptable to most of the important participants in International trade. ● It is reasonably well-drafted ● It is generally similar to the UCC on most issues. ● It promotes uniformity. ● It may make International transactions easier for “heavy volume” traders who trade with numerous different foreign countries since the domestic sale laws of such other foreign countries are less important if the CISG governs. 	<ul style="list-style-type: none"> ● Despite many years of existence, it is still an unproven commodity. ● United States traders are unfamiliar with the CISG. ● Lawyers (for United States traders) are yet to be familiar with the CISG. ● Courts are unfamiliar with the CISG. ● It is not yet tested through legal proceedings on most issues. ● UCC is more acceptable to United States traders, lawyers and Courts and may better reflect the expectations of the United States business community. ● The nonfamiliarity of traders, lawyers and Courts with the CISG may raise transactional costs and the costs of dispute adjudication

Non-Applicability of Convention:

As per Article 2 of CISG, this convention does not apply to sales:

- Relating to personal, family, or household use goods purchased
- Through auction
- Resulting from authority of law
- Investment in shares, stocks, securities and other form of negotiable instruments
- Relating to aircraft, vessels, ships

f. Relating to electricity

3.6.1.3 Practical Issues in Implementation of CISG:

CISG is a well drafted by taking into consideration international expectations and is accepted by 85 major countries out of 204 countries as on May 2016. CISG has not only provided uniformity but is bedrock for future international contracts. Notwithstanding, UK and India have not adopted CISG.

India and Practical aspects in Implementing CISG⁶

- Since most of the countries are the signatories to the convention of CISG, it is prudent to India to adopt the same.
- Indian sales law i.e. *The Sale of Goods Act, 1930*, is old and is outdated and does not address the modern needs of the international business.
- Era of globalization and advent of internet added new dimension to international business which calls for uniform setup at international level.
- India's legal system which is not in harmonization with CISG leads to increase of work burden and legal hassles.
- CISG provides a framework of uniform legal system which addresses day to day problems quite effectively.
- CISG culminates the international transactions at reduced costs and is a boost for global economy

Thus, it is concluded that India should immediately adopt CISG to meet out the challenges imposed by latest changes in technology and legal systems with respect to international trade.

3.6.2 Passing of Risk in International Contracts of Sale of Goods⁷:

- **Introduction (Risk Transfer in International Sale):**

The concept of Risk, especially passing of risk plays a vital role in the area of International legislation in relation to sales contracts. Due to its peculiar nature, it may involve unfair impact and buyers may be made responsible to pay for goods in spite of the goods damaged or lost. Legal practitioners have observed that there is too much risk involved in the contract for sale and either party have to face potential outcome.

⁶http://www.indialawjournal.org/archives/volume4/issue_3/article_5.html

⁷<http://www.cisg.law.pace.edu/cisg/biblio/alazemi.html>

goods when it is under his control whereas in case of SGA risk may pass when the contract is concluded by parties and purchaser will have to take a particular insurance policy to cover his risk.

It can be concluded that CISG considers transfer of risk with delivery of goods while SGA links transfer of property with transfer of risks.

3.7 Best Practices in US Defence Procurement System vis a vis India

There are six principles as understood by researcher in US defense procurement system. Otherwise we may tell the best practices if borrowed from US Procurement System should have following characteristics:

1. Defense specific procurement laws communicated by Government or formulated by defense ministry -

The US has got Federal Acquisition Regulation (FAR) System. The FAR bifurcates regulations for micro-projects valid at less than 3000 \$, simplified acquisition valid between 3000 USD and 15,000 USD, major system acquisition at more than 185,500 USD.

FAR system is maintained jointly by a council comprised by defense and civilian agencies.

2. Acquisition organization should be within each major defense services with well-trained acquisition professionals.

3. Procurement process based on open competition. Defense contracts may be awarded without competition but it can be done in limited circumstances such as:

- a. Unusual and compelling urgency
- b. Only one responsible source will meet the agency's needs
- c. Procurement is set aside for small/disadvantaged businesses
- d. Competition is precluded by international agreements
- e. Disclosure by the agency would compromise national security

4. "Best Value" acquisition based on integrated assessment of the technical, price and other factors.

Sealed bidding occurs for non-complex items where the technical parameter is not important while negotiated procurement provides the "best value" to the government in accordance with technical, costs and other factors set forth in the tender. Negotiated procurement is generally used for large acquisitions where the evaluation of the offerers technical approaches and other non-price factors is appropriate.

5. Transparent award process with de-briefing to all offerers. In the negotiated procurement process, not only award decision is transparent but even its supporting rationale is transparent and available to all competitors

.specifically, within specified period of contract award , defense and civilian agencies are supposed to provide written information to unsuccessful offerors on followings :

1. Number of offerors bided.
2. Name and address of offeror receiving award
3. Items, quantities and unit price or total price.
4. General reason the offeror proposal was not accepted.

6. Forums for challenging the procurement decision.

In the U.S, the Federal Government has waived its sovereign immunity regarding challenges to procurement decisions. As a result any bidder may protest directly with the agency or with an administrative forum (U.S. government Accountability Office) or a Judicial Forum (U.Scourt of Federal Claims).

India has also implemented all the above modules in its procurement regulation but what is missing is techniques of “ Best Value Acquisition “ in order to strengthen its Technology base i.e. depth of technology for any programme of defense services and product support and upgradation of various Armaments , Aircraft etc.

A need is felt to dispense with L1 system for highly technical equipment procurement rather should think of adopting a different evaluation techniques having weight factor of both price and non-price factors including value addition within India.

Chapter - 4

CONTRACTUAL ISSUES ARISING OUT OF DEFENCE CONTRACTS

Contents:

4.1 Major Contractual Issues: Commercial, Legal and Financial Issues

4.2 Contractual Issues arising out of DPSU Contracts vs MoD Contracts

4.3 Sanctions of Foreign Government

4.4 Obsolescence Management

4.5 International Contracts and Related Issues

4.6 Price Escalation

4.7 Integrity Pact

4.8 Technology Transfer

4.1.1 Major Contractual, Commercial, Legal and Financial Issues

It has been observed by C&AG during performance audit of license manufacturing of fighter aircraft which was procured under inter-governmental agreement between India and Russia that following are the deficiencies:

SI No.	Issue	Remarks
1.	Deficiencies in Program Management - Planning Process	Detailed Project Report (DPR) was not revised despite Compression of delivery schedule which resulted in substantial changes in material, labour and other cost components.
2.	Deficiencies in Program Management - Execution Process	Due to delays in producing 75 aircraft in place of 112 by DPSU there was a shortfall of 37 aircrafts. Thus, additional flying hours envisaged for Defence Customer(DC) was not available
3.	Holding up of Inventory	Synchronisation with foreign vendors for supplies and augmentation of facilities for phase IV did not match which resulted in extra holding up of inventory.
4.	Diversion of reserve engines	20 reserve engines to be supplied to DC have been diverted due to delay in production of engine by DPSU
5.	Under-utilization of installed capacity	Production of Engines in DPSU was much below its installed capacity
6.	Delay in ferrying out of aircraft after signalling out with	Delivery of the aircraft took place

	concessions	with no. of concessions
7.	Delay in creation of infrastructure	Entire program was delayed due to execution of civil works and shortage of funds.
8.	Delay in establishing Repair and overhaul facilities	Setting up of critical infrastructure, including for repair and overhaul has not progressed as envisaged.
9.	Delay in obtaining technical documents, tooling and spares etc.	Delay from vendor side
10.	Deficiencies in Program Management – Monitoring & Controlling Process	<ul style="list-style-type: none"> • Pre contract integrity pact not executed with vendor. • Delay in transfer of technology
11.	Quality Issues not addressed	<ul style="list-style-type: none"> • Fatigue test of airframe not conducted. • Pre-mature withdrawal of aircraft due to fuel leakage
12.	Non-imposition of Warranty clause	<ul style="list-style-type: none"> • Grounding of aircraft due to fuel leakage resulting from fitment of short length pipe • Excess vibration levels leading to scrapping of two engines
13.	Deficiencies in Contract Management	<ul style="list-style-type: none"> • Liquidated damages on delayed supplies by DC • Payment of License Fee was not negotiated • Under quoting by DC for line GHE/GSE items • Excess contingency expenditure over contract provision and same was sought by DPSU in the form of reimbursement • Execution of additional 40 aircraft contract: Additional

		<p>expenditure due to procurement of Phase I+ aircraft</p> <ul style="list-style-type: none"> • Additional expenditure due to non-adherence to original contract terms regarding price. DPSU agreed to a new price for the kits which resulted in additional cost.
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From the above it is clear that the whole project was not planned in a comprehensive way and contractual clauses in real spirit was ignored. This has happened because of lack of knowledge and perspective planning. Similarly, in other projects also C&AG have pointed many deficiencies as above. Further observations are as follows:

- **Unilateral Contracts:** It is seen that the contract in majority is unilateral in nature and appears to be hastily entered into.
- **Legal Vetting of Contracts:** Contracts should have been legally vetted by the contract consultants/advocates etc.
- **Understanding and deliberation of clauses before accepting:** Clauses like product liability were accepted without understanding the final implication and without deliberation with insurance companies in India as insurance has to be done for final product liability outside India etc.
- **Rectification of Items:** Contract should also contain provisions regarding the Ship sets despatched from India and received by them requires minor or major corrections at Foreign company end. Financial implications should have been brought out in these contracts for such type of items particularly when reshipment cost back to India is very high.
- **Capacity Constraints:** M/s Foreign Company has ordered the structural parts to be manufactured which requires long lead time to manufacture and also shipments took long time as major items can be shipped only through inland waters, then DPSU could have earned more revenue by supply of full aircraft instead of structural parts as it has led to capacity constraints.

4.2 Contractual Issues arising out of DPSU Contracts vs MoD Contracts

4.2.1 Introduction:

4.2.1.1 Government of India Contracts

- **Guidelines for Public Procurement**
- **Procurement Procedures in Ministry of Defence**
 - **Background**
 - **Scope of the DPP**
 - **Process for Acquisition under DPP**

4.2.2 Issues Arising In Contract Clauses Executed with MoD

- **Scope of the Contract**
- **Terms of delivery and transfer of title**
- **Advance Indemnity Bond, Performance cum Warranty Indemnity Bond & Bank Guarantee**
- **Pre Dispatch Inspection**
- **Exchange rate variation**
- **Liquidated Damages**
- **Payment Terms**
- **Option Clause**
- **Taxes & Duties**
- **Termination**
- **Transfer & Sub-contracting**
- **Arbitration**
- **Effective Date of Contract**

4.2.3 Contractual issues arising out of Defence Contract

- **Scope of the Contract**
- **Excess payment on account of exchange rate variation (ERV)**
- **Loss due to rejection of empty shells and consequent blocking of inventory**
- **Undue benefit to a foreign firm by diluting the conditions in Tender Enquiry and contract**
- **Conflict of interest:**
Potential or actual Conflict of interest, is an issue that can arise in many contractual situations

4.2 Contractual Issues arising out of DPSU Contracts vs MoD Contracts

4.2.1 Introduction:

4.2.1.1 Government of India Contracts⁸:

Government of India has to incur thousands of Crores of Rupees on various procurements including purchase of goods and services. There is, therefore, a need to have a uniform, systematic, efficient and cost effective procedure and hence Government of India has issued GFR 2017 apart from Manuals of Policies & procedures for purchase of goods apart from other guidelines. Recently Government has issued Gem – e procurement (Government e-Market) SPV for procurement of common use Goods and Services.

The following issues are to be taken care in Government procurement system:

- Compliance with the Time frames prescribed by each Govt. Department for each stage of procurement.
- Conclusion of contract within original validity of the tenders has to be ensured as far as practicable.
- Government e-market SPV be followed for common use goods & services.

● Guidelines for Public Procurement:

The Indian Contract Act, 1872 and the Sale of Goods Act, 1930 are major legislations governing contracts of sale/ purchase of goods in general. There is no law exclusively governing public procurement of goods. However, comprehensive rules and directives in this regard are available in the General Financial Rules (GFR), 2017, especially chapter 6 Rule 142 to Rule 206; Procurement of Goods & Services; Reserved items and other Purchase / Price preference Policy and the guidelines issued by the Central Vigilance Commission to increase transparency and objectivity in public procurement. These provide the regulatory framework for the public procurement system.

⁸ The Manual of Policies and Procedures for Purchase of Goods issued by Ministry of Finance, Department of Expenditure, dot. 31-08-2006.

- **Procurement Procedures in Ministry of Defence:**

- **Background:**

The Defence Procurement Procedure - 2002 (DPP- 2002) came into effect from 30 December 2002 and was applicable for procurements flowing out of 'Buy' decision of Defence Acquisition Council (DAC).

The scope of the same was enlarged in June 2003 to include procurements flowing out of 'Buy and Make' through Imported Transfer of Technology (TOT) decision. The Defence Procurement Procedure has since been revised in 2005, 2006, 2008, 2009 , 2011 and 2013 enhancing the scope to include 'Make' Procedure, and 'Buy and Make (Indian)' categories, concept of " offsets" and ship building procedures. As part of the review exercise and on basis of experience gained in the procurement process, Defence Procurement Procedure has now been revised to DPP-2016.

- **Scope of the DPP:**

The Defence Procurement Procedure – 2016 (DPP-2016) will cover all Capital Acquisitions, (except medical equipment) undertaken by the Ministry of Defence, Defence Services and Indian Coast Guard both from indigenous sources and import. Defence Research and Development Organization (DRDO), Ordnance Factory Board (OFB) and **Defence Public Sector Undertakings (DPSUs) will, however, continue to follow their own procedures for procurement.**

Thus the DPP provides leverage for all DPSU's to continue with their Own Procurement Procedures.

Self - reliance is a major corner – stone on which the military capability of any nation rest. It is therefore DPP 2016 has put in its Preamble utmost importance on the concept of 'Make in India 'focal point of the defence acquisition policy / procedures.

DPP2016 has also provided a chapter on Strategic Partners and Partnership apart from enhancing the role of MSME in defence sector.

- **Process for Acquisition under DPP 2016:**

In decreasing order of priority the procurement of defence equipment are categorised as follows;

BUY (Indian – IDDM); involves Indigenous content (IC) of 40% on cost basis or 60 % on cost basis of total contract value.

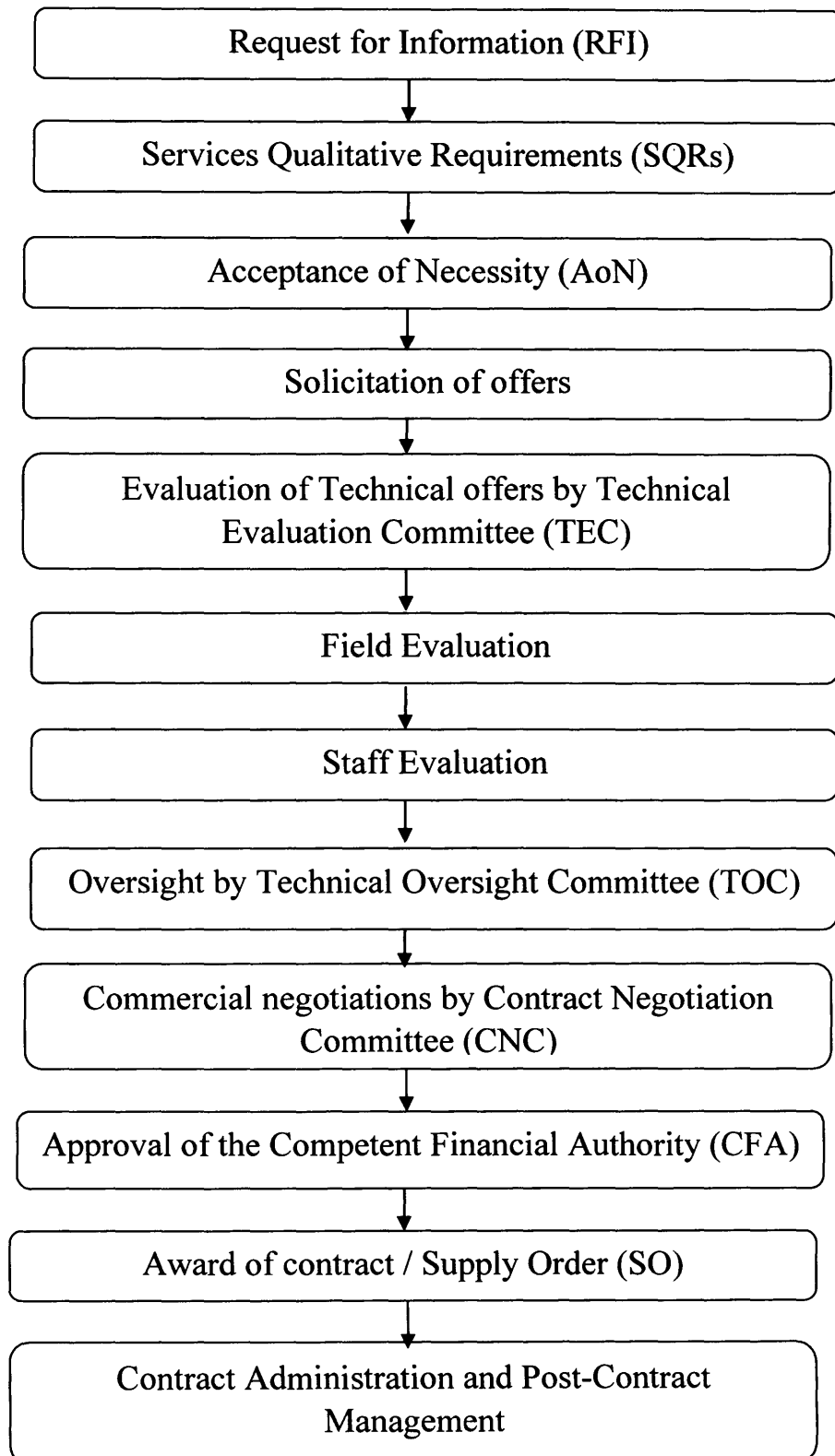
- i. **Buy (Indian)** – IC 40 % on cost basis of total contract value.
- ii. **Buy and Make (Indian)** – IC 50% on cost basis of the Make portion of the contract.
- iii. **Buy and Make** – Initial procurement in FF (Fully Formed) state from foreign vendor in quantities as necessary followed by indigenous production through an Indian Production Agency (PA). AON according authority would approve a minimum % of IC or FF, SKD, CKD and IM kits ratio.
- iv. **Buy (global)** – ‘Buy (global) categorisation refers to outright purchase of equipment from foreign or Indian vendors. This category will also cover cases of government to government route procurement for strategic requirements.

In addition to above 5 listed categories MAKE category has been formulated to cover equipment /sub –system/sub –assembly ,major components, or upgrades thereof to be designed , developed and manufactured by PA.

- Acquisition process as per DPP 2016 :

Table 12

DPP 2016 – Acquisition Process – Flow Chart



4.2.2 Issues Arising In Contract Clauses Executed by DPSU with MoD:

Sl No.	Clause	Issues Encountered	Requirement
a.	Scope of the Contract	If on the specified date the Licensor informs that material supplied against the MoD will be at extra cost	Thus, the clause should mention price implications, if any, arising out of future modifications to be carried out as per instructions of the licensor.
b.	Terms of delivery and transfer of title	Clauses at different places should synchronize with each other considering all Terms and conditions	No contradiction to be there.
c.	Advance Indemnity Bond, Performance cum Warranty Indemnity Bond & Bank Guarantee	DPSUs should submit Advance Indemnity bond for 15% of contract value in case of advance payment and 5% of the contract value towards performance cum warranty.	Same need to be waived off.
d.	Pre-Dispatch Inspection	Delay in inspection by the end user or customer, resulting in delay in overall delivery	Inspection schedule should have time bound and clarity should be built in inspection terms
e.	Exchange rate variation	Exchange rate/Currency variation impact is not envisaged at the time	Exchange Rate variation clause to be incorporated to insure that it does

		of contract	not have any impact on contract value.
f.	Liquidated Damages	These deductions are prima facie done without going into the merits of the delay, hence the Sellers amounts are held up, effecting cash flow	Delays not attributable to seller to be avoided
g.	Payment Terms	Milestone payments not envisaged at the time of contracts	Payment terms should incorporate the milestone terms
h.	Option Clause	The Option Clause has no upper limit hike. Seller need to accept the orders that are placed invoking Option clause even though the Price hike is high putting the Seller in losses	Need to cap for product price up to some mutually agreed market price hike. Same needs to be incorporated in Option clause
i.	Taxes & Duties	If the delay is not attributable to seller, contract mandates for increased taxes & duties for the delay period	If the delay is not attributable to seller, contract should give the leeway to the seller for supply of goods & services at increased taxes.
j.	Termination	If SELLER is declared bankrupt or becomes insolvent	Force majeure clause to be duly incorporated in the contract and to be considered before termination of the contract

			Delay in delivery not connected with force major.
k.	Transfer & Sub-contracting	DPSUs at times are not permitted to transfer/sub-contract their process/technology to third party	Rights of transfer/subletting may explicitly be incorporated in the contract
l.	Arbitration	Generally clause is unilateral and has no provision for DPSU to choose its choice of Arbitrator or challenge the Award etc.	Clause should have the provisions as per the needs of both the parties.
m.	Effective Date of Contract	<p>This clause stipulates that the Seller shall furnish the following documents to Buyer:</p> <ul style="list-style-type: none"> ○ Advance Bank Guarantee and invoice ○ Performance cum Warranty Bank Guarantee⁹ and ○ Export License from the Seller's Government. <p>This takes lot of time beyond signing of the contract.</p>	In order to save time, the Effective Date of contract should come into effect only after the Seller submits the above documents

⁹ It need to be Performance cum Warranty Indemnity Bond but not Bank Guarantee.

4.2.3 Contractual issues arising out of Defence Contract:

Sl No.	Clause	Issues Encountered	Requirement
a.	Scope of the Contract	If modifications are carried out to the Contract on the advice of Licensor and Licensor informs that the material to be supplied will be at extra cost. It is observed that end users are not easily agreeing for such modifications	Scope of the contract should mention the price implications if any, arising out of future modifications to be carried out as per the instructions of the licensor
b.	Excess payment on account of exchange rate variation (ERV) ¹⁰ :	Exchange rate/Currency variation impact is not envisaged at the time of contract	Exchange Rate variation clause to be incorporated to ensure that it does not have any impact on contract value.
c.	Loss due to rejection of empty shells and consequent blocking of inventory ¹¹ :	During the audit study of Ordnance factory it was observed that rejection of empty shells due to quality problems (Worth Rs.2.78 Crores) led to blocking of inventory. Further, at times improper storage at Ordnance factories led to the rusting of empty shells.	Proper SOP for disposition to be in place for avoiding unnecessary building of inventory.

¹⁰ CA No. 16 of 2012-13 (Defence Services)

¹¹ Union Government (Defence Services) Army and Ordnance Factories Report No.30 of the year 2013(Compliance Audit)

d.	<p>Undue benefit to a foreign firm by diluting the conditions in Tender Enquiry and contract¹²:</p>	<p>It is observed that in Defence many a times undue benefit is given by diluting terms & conditions which results in huge losses for the exchequer.</p> <p>One Example of Ordnance Factory is illustrated below:</p> <p>Ordnance Factory Badmal, in violation of Defence Procurement Manual, accorded undue benefit to a foreign firm by accepting the PC Sheets valuing 2.58 crore without ascertaining its manufacturing month. This led to expired inventory.</p>	<p>No dilution of basic terms & conditions of tender enquiry to be permitted.</p>
e.	<p>Conflict of interest: Potential or actual Conflict of interest, Is an issue that can arise in many contractual situations</p>	<p>To safeguard the interest of the seller company. This clause is required.</p>	<p>DPP / DPM guidelines are silent on this clause but for providing better performance for the DPSU, this clause needs to be included.</p>

¹² Union Government (Defence Services) Army and Ordnance Factories Report No.30 of the year 2013(Compliance Audit)

4.3 Sanctions of Foreign Government

4.3.1 Introduction

4.3.2 Implementation of Sanctions in the Indian Context

4.3.3 Consideration of Sanctions under Indian Foreign Policy

4.3.4 Sanctions on India

4.3.1 Introduction¹³:

Sanctions are restrictions on exports implemented for political reasons by countries and international organizations. The aim of "Sanction" is to ensure security and peace world-wide. In order to achieve this, UNSC (UN Security Council) puts a ban on trade of weapons with a specific country to isolate that country. UNSC even imposed other trade control restrictions. These embargo is put pressure on states to change their attitude. Licensable goods should not be exported without a license, otherwise it may attract provisions of criminal offense. These are one of the most popular tools of statecraft.

These day's Sanctions have not only gained acceptability but also popularity among a number of Western States.

There should not be any Long-Term Unilateral coercive measures as it generates social related problems apart from humanitarian concerns. However, U N General Assembly has taken a keen interest on the issue of sanctions.

4.3.2 Implementation of Sanctions in the Indian Context:

It is traditionally agreed that India has viewed sanctions as a diplomatic tool/instrument that "does not serve any purpose"¹⁴. However, India's support for various multilateral sanctions regimes is evident, especially the ones against terrorist groups¹⁵. India's views are given sufficient consideration at the international level, but unlike the permanent members of the UNSC, its stand on sanctions cases does not carry much weight in the UN. However, the subject of international sanctions has been amply discussed and debated by Indian leaders, policymakers and economists.

India is one of the few States in the world with a unique position, having played the roles of both sanctioner and sanctionee.

4.3.3 Consideration of Sanctions under Indian Foreign Policy:

India's foreign-policy makers have been prudent enough to recognize the importance of economic coercion as an instrument of foreign policy. Sanctions imposed by different countries play a negative role in international

¹³ An Article by Rishika Chauhan, 12 | www.orfonline.org | September 2013

¹⁴ Dipanjan Roy Chaudhury, "US wants India to act on Iran sanctions", Mail Today, July 15, 2010, available at: <http://indiatoday.intoday.in/story/us-wants-india-to-act-on-iran-sanctions/1/105461.html> (accessed on July 30, 2013)

¹⁵ Refer to Ambassador Hardeep Singh Puri's statement in New York on July 17, 2011, available at: <http://www.mea.gov.in/Speeches-Statements.htm?dtl/372/Indias+Explanation+of+Vote+after+the+adoption+of+the+two+resolutions+succeeding+1267+Sanctions+Regime> (accessed on July 22, 2013)

relationship between different countries. Details of sanctions imposed by different countries are given below:

Table 13: Sanctions Imposed

SI No	Target Country	Issue	Sanction Imposed Year
1	Japan (sanctioned by Indian National Congress)	China invasion	1939
2	South Africa (sanctioned by the Government of India)	Discrimination against Indians	1946
3	Israel	Pro-Arab/Palestine	1947
4	*Hyderabad	Integration into Indian Union	1948
5	Pakistan	Currency devaluation	1949
6	*Portuguese Goa	Integration into Indian Union	1954
7	Rhodesia	Against minority white rule	1965
8	Fiji	Restore democracy and modify Constitution	1987
9	Nepal	China proximity	1989
10	Pakistan	Action against militants	2001

*For same issue.

4.3.4 Sanctions on India:

- **Direct Sanctions:**

Effect of Pokhran Test by India leading to Certain Sanctions against it:

On May 11 and 13, 1998 India conducted a series of nuclear tests in the barren deserts of the Pokhran region. As a result thereof, the United States immediately placed India under economic sanctions but lifted all sanctions just after six months.

The various consequences of the sanctions includes:

- The suspension includes stopping of fund transfer under US bilateral aid programme.

- The termination of foreign assistance under the Foreign Assistance Act cost India \$51.3 million in aid from the United States in 1998, including \$12 million in economic development assistance and \$9 million under the Housing Guarantee program.
- Plans for an Indian electrical testing laboratory, to be partially funded by the United States Agency for International Development (USAID) and designed to implement standards for energy consumption and efficiency, were postponed.
- United States government lending institutions also severed their ties with India after the May 1998 explosions.
- The Overseas Private Investment Corporation (OPIC) also announced that it too would cease approval of new projects in India.
- The contract for a joint telecommunications venture between Hughes Network Systems and the Indian Company Ipsat was voided.
- Stalled 1000MW power plant proposal of San Francisco.

- **In-direct Sanctions:**

Besides above, there are sanctions imposed by US and EU where India is not a direct party. These sanctions were actually imposed against Iran and Russia but it had a profound impact on India.

4.4 Obsolescence Management

4.4.1 Introduction

4.4.2 Obsolescence Mitigation Measures

4.4.3 Obsolescence Forecasting

4.4.1 Introduction:

In general the term Obsolescence is the process of being passing out of use or usefulness, becoming obsolete. This state may occur when an object, service, or practice is in working condition but requirement does not exist or any replacement has become available which in totality is more advantage than the inconvenience related to repurchasing the replacement. In other words, obsolescence is something which preceded by a gradual decline in popularity.

Basically obsolescence is because of rapid technological changes, new components/design etc., are developed and launched in the market with no much time gap. Obsolescence leads to not only waste of resources but breaks down the whole supply chain because of non-availability of the component/item. Thus, it is highly important to implement and operate an active management of obsolescence to mitigate and avoid extreme costs.

In defence sector, obsolescence has become a critical issue because of basically changes in technologies in the manufacturing sector.

4.4.2 Obsolescence Mitigation Measures:

The strategy followed in the obsolescence management is usually a combination of mitigation measures. Obsolescence risk can be mitigated by taking actions in three main areas:

Table 14
Obsolescence Management

SI No	Area	Mitigation Measures
1.	Supply Chain	<ul style="list-style-type: none">• "Life-time Buy" which involves purchasing the items for life time of the project.• "Partnering Agreements with Suppliers" to ensure the continuous support and provision of critical components.
2.	Design	<ul style="list-style-type: none">• Use of open system architecture, modularity and increase of standardisation.• Use of Multi-sourced Components
3.	Planning	Technology Road Mapping: It facilitates the selection of technologies to go ahead with, while considering timeframes. It

		<p>enables the identification, evaluation, and selection of different technology alternatives. Furthermore, it identifies technology gaps, which can be regarded as the main benefit of this approach because it helps to make better technology investment decisions and preventing obsolescence issues</p>
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In addition to above, obsolescence resolution approaches and obsolescence forecasting are the tools available for effective obsolescence management. Different resolution approaches includes:

- **Same Component:**

- **Existing Stock:**

It is stock of the obsolete part available within the supply chain that can be allocated to the system. This approach is inexpensive, short-term solution and should be explored first.

- **Last-time Buy:**

The Last-time Buy (LTB) is the purchase and store of a supply of components, as a result of a product discontinuance notice from a supplier, sufficient to support the life cycle period for the product. This resolution approach differs from the Life-time Buy in the fact that the LTB is a risk mitigation measure.

- **Authorized After market Sources:**

Sometimes OEM authorises some sources from where the obsolete items can be procured. This is a beneficial solution because it is relatively inexpensive.

- **Reclamation(Cannibalization):**

The Reclamation approach, also known as Cannibalization, consists in using serviceable parts salvaged from other unserviceable systems.

- **Other Approaches: Grey Market and Secondary Market:**

The grey market is the trade of new goods through distribution channels which are unauthorized, unofficial, or unintended by the

original manufacturer. Grey market procurement is very risky due to the increasing probability of purchasing counterfeit components when using these sources; especially in sectors such as the defence and aerospace, where counterfeit components can compromise the safety of people.

4.4.3 Obsolescence Forecasting:

It is necessary to foresee proactively regarding obsolescence and following factors should be taken into account:

- Type of component (e.g. electronic or mechanical).
- Complexity of the component (e.g. low complexity such as resistors or high complexity such as microprocessors or LCD displays).
- Technology built in the component.
- Level of maturity of the technology built in the component.
- Number of suppliers of the component.
- Market trends.
- Changes in laws and regulations.

4.5 International Contracts and Related Issues

4.5.1 Introduction

4.5.2 The Legal Dimension of International Trade

4.5.3 Cultural dimension in International Contracts

4.5.4 Contractual Disputes:

4.5.5 Major issues in Negotiating Cross Border Contracts

- 1. A Neutral choice of Law clause**
- 2. A Reliable Dispute Resolution Process**
- 3. A catch all for Anti-Bribery and foreign corruption laws**

4.5.1 Introduction:

“International” contracts:

International contracts are the contract entered with more than one country and has got long term ramifications. Since it involves cross border trades it entails lot of complexities and legal issues.

4.5.2 The Legal Dimension of International Trade:

Different countries are having different legal laws and thus international contracts are interpreted by different countries in a different way. Thus, there is a need to understand the basics of the contracts and internationally accepted norms for international trade. However, National laws of contract continue to regulate the vast majority of contracts that are made. National laws are basically based on English law as Britain has a great trading history, the commodities markets have had their Centre's in the UK for many years.

Internationalization of Contract Law has been felt owing to increase in international transactions over cross border trade. In this regard, certain standards /norms were laid down by International Chamber of Commerce to ensure common understanding of general terms and conditions. Besides this, certain mandatory rules were provided by the United Nations Convention on Contracts for the International Sale of Goods (The Vienna Convention). Advantages of common standards and common laws are:

- Common standards in cross boarder contracts promote development of international trade.
- While dealing with a foreign party, both Buyer & Seller have enhanced confidence.
- The following factors help in lowering transaction costs:
 - Clarification on governing law is not required.
 - Searching of relevant rules available in other jurisdiction is done away with.

Criticism of these Conventions:

- To bring real uniformity is never possible as Indian courts take divergent approaches.
- Lack of clarity.
- Changing business scenario globally will bring changing needs for the contract management.

- an international code which is difficult to amend is unlikely to meet the demands of traders

4.5.3 Cultural dimension in International Contracts:

Cultural factors play a very important role in international contracts. Different cultures of different countries pose different challenges like:

- Negotiation of international contracts in different language
- Translation of technical terms
- Interpretation of terms differently by different countries
- Understanding of contract by different parties cannot be symmetrical and hence get into litigation.
- Relational contracting is rooted in group-oriented societies where personal ties built on trust matter more than written documents and where the preferred mode of settling disputes is out of court
- Arm's length contracting in which the agreement is paramount is the norm in individualistic societies where the preferred mode of settling disputes is through litigation

4.5.4 Contractual Disputes:

Basic contractual disputes are because of following reasons:

1. Since parties in International Contracts are far away from each other as also cultural environment & laws are different, all this lead to contractual disputes.
2. The difference of what contract law in the foreign jurisdiction stipulates.
3. Options to go to courts.
4. The problems involved in implementing a foreign court judgment enforced in the parties own country.
5. Contracts specify the governing law and dispute resolution mechanism between the parties.

All disputes between parties bring an element of claim and damage resulting into a higher liability insurance coverage requirement apart from bad publicity for the parties involved.

Alternative Dispute Resolutions:

- Parties to settle dispute
- Out of court for continuation of business relationship.
- Third Party Mediation

- Arbitration

4.5.5 Major issues in Negotiating Cross Border Contracts:

1. Choice of Law be neutral:

What has been seen that most of International Contract are adopting neutral law when negotiating the jurisdiction as one need to have a governing law which is stable and preferably similar is required. In modern times it is observed that Singaporean law is most suited for international business as it provides platform of neutral law.

2. A Reliable Dispute Resolution Process:

The vehicle adopted for resolution of Disputes needs to be reliable, neutral and cost efficient. Triggering point is very important in any contractual dispute resolution process and such resolution mechanism is to provide a clear cut process and steps. No clause on dispute resolution be open ended and be left to the parties to mutually agree & settle as litigation in court is a time consuming affair with uncertainty prevailing. Thus, these clauses must be clearly expressed.

Secondly, it is suggested that Mediation / Arbitration is a better choice rather than court litigation. Arbitration allows the parties to agree on where it will occur, what language the proceedings will be conducted in and which rules will apply to how it's run which is far better than finding oneself in the courts of a foreign land.

3. A catch all for Anti-Bribery and Foreign Corruption Laws:

It is very important that before entering into the international contract one should understand the anti-bribery and foreign corruption law which has become very stringent in recent years. The penalties include big fines and imprisonment and the only real safeguard against breach is to have rigorous anti-corruption policies in place. Contract should address the same in explicit way.

4.6 Price Escalation

4.6.1 Introduction

4.6.2 Consideration of Price Variation:

4.6.3 Consideration of Price Overheads & Profits

4.6.4 Mechanism for Computation of Price Variation

4.6.1 Introduction:

The supply of equipment involves inputs of material, labour & other resources. When the supplier quotes for the supply of equipment or a contractor quotes for a construction work or a provider of service quotes for a service he has to take into account the prevalent costs of the inputs involved - both direct and indirect i.e. overhead and margin of profit. Where the deliveries involved over a long period of time the price quoted is subject to price escalation. In the World Bank procedures, a delivery period of 18 months is the criterion for deciding whether the price should be treated as firm and fixed or as subject to price variation.

As economic conditions and price levels do not remain static and stationary, the input costs tend to vary upwards or downwards in the long term. In Defence contracts are generally with long delivery period, if the buyers were to insist for fixed and firm price contract, the suppliers would build into the price quoted, even under competitive conditions, their own estimates of upward changes that are likely to take place in price levels of commodities and wage levels. They would like to protect themselves against the risk of losses which might result if they have not adequately covered themselves for the likely variations in input costs over a long period. In the bargain, they may get an unintended benefit or excessive profits, if the provisions for variation built into their bids are more than the actual variations. To meet such a situation, parties to long run commercial contracts usually agree on a price, related to economic conditions and price levels prevailing in a month and year, termed as 'Base Level' and incorporate a price variation clause to compensate the supplier or buyer to an upward variation/downward variation respectively in price levels with reference to base level and hence in the input costs of material and labour over the period of delivery. In such contracts, the price clause is linked both to point of delivery (FOB, CIF, C&F etc.) and the base level (month/year)

4.6.2 Consideration of Price Variation:

A mechanism for calculation of the price variations that have taken place between the base level and the scheduled delivery date has to be incorporated in the contract, so that the final price payable could be arrived at and settled as per the terms of payment and mode of payment of price variation to be laid down in the contract.

The ideal mechanism which would fully adhere to the concept is for the scrutiny of supplier's books of account by the buyer for the actual input costs. It is however improbable that any supplier would offer his costs open for inspection by the buyer. The only other option available is to have a price

variation clause and look for reliable indicators of economic conditions and price levels published by an authority acceptable to both the parties, which can be vouched for their authenticity and relate them to two cost elements i.e. material and labour.

4.6.3 Consideration of Price Overheads & Profits:

The other important element of cost which forms part of the price is overheads & profit. Generally overheads & profits are charged as fixed elements over material and labour costs duly escalated at current economic conditions. However, this fixed element will also be the subject matter of negotiation between the parties. Where the range of negotiation of the fixed element is usually 5 to 25 percent, in practice the fixed element settles at 10 to 15 percent the best.

4.6.4 Mechanism for Computation of Price Variation:

Price variation mechanism is institutionalized in the contracts in order to have fair considerations for both the parties. Price variation mechanism provides a framework which is subjected to prevailing economic conditions in the supplier country so that material and labour inputs are ensured at levels close to actual prices. In modern times, price variation is introduced by two ways:

- By fixing annual escalation by 2-3%(depending upon the economic conditions of the country)
- By providing formula based on indices. For example:

$$P_n = \text{Fixed Element} + w_1 \frac{L_n}{L_o} + w_2 \frac{M_n}{M_o} + \dots$$

where, "Pn" is the Price Adjustment factor for the work carried out in the period "n".

"w1,w2....." are weightages.

"Lo, Mo, Eo....." are the Base Date Indices for the specified (adjustable) elements.

"Ln, Mn, En....." are the Current Date Indices of the specified (adjustable) elements for the period "n".

4.7 Integrity Pact

4.7.1 Introduction

4.7.2 The Mechanism

4.7.3 What are the essential ingredients of IP

4.7.4 Terms of contract

- **The Public Authority commitment**
- **The Bidder commitment**

4.7.5 Penalties

4.7.6 IP's Advantages

4.7.7 IP's challenges in its Implementation's

4.7.8 Observations

4.7.9 Integrity Pact with Government Departments

4.7.1 Introduction:

The Integrity Pact (IP) is an instrument to help Governments, businesses and civil society to fight corruption in the field of public contracting. It is originally called "Islands of Integrity".

It consists of a process that includes an agreement between a Government or Government department (to which we refer here as the Authority) and all bidders for a public sector contract while it firms up rights and obligations under the contract for the parties, it maximises social welfare by way of removing / reducing corruption in public contracting.

IP is a kind of directive to both Buyers and Sellers to refrain from corrupt activities to get the contract or to award the contract based on bribes or other activities covered under the definition of corruption in Buyers country / Sellers country. It further instructs bidders to point out in the contract commissions & other similar expenses paid by them to anybody in connection with awarding the contract. These sanctions include:

- loss or denial of contract
- forfeiture of the bid or performance bond
- blacklisting for future contracts to the bidders and criminal or disciplinary action against Government officials.

4.7.2 The Mechanism:

The purpose of IP is to make Government procurement system free from corruption or bribes and wants to establish ethical conduct in public procurement for both parties – Buyers and Sellers. Hence IP has been formatted in a way that it covers not only pre-bid & post-bid activities but also contract management till the operationalisation.

4.7.3 What are the essential ingredients of IP?

- Not to accept any illegal benefit by Principal;
- Equal treatment to all bidders;
- Bidders not to give any illegal benefit to the Principal
- Bidders should not disclose other bidders with respect to prices, specifications, certifications, subsidiary contracts, etc.
- Disclose name of and address of agents and representatives in India by foreign bidders and Indian Bidders to disclose their foreign principals or associates;

- Bidders to disclose the payments to be made by them to agents/brokers or any other intermediary; and/or any transgressions with any other company that may impinge on the anti-corruption principle.

4.7.4 Terms of contract:

The Public Authority commitment that:

- No illicit gratification,
- All information whether it is technical, legal and administrative to be made public.
- No sharing of confidential information.
- Conflict of Interest if any to be declared by the concerned officials,
- Officials will report to appropriate government authority about any breach/attempt to breach a commitment.

The Bidder commitment that:

- They will not offer any illicit gratification to obtain unfair advantage.
- They will not disclose any information with other parties to impair transparency and fairness.
- They will not accept any advantage in exchange for unprofessional behaviour.
- Disclosure of all payments made to agents and intermediaries.
- No unethical practices.

4.7.5 Penalties:

In case of violation of IP during its implementation by bidders, they will face blacklisting & liquidated damage apart from annulment of contract, bond forfeiture and other consequences as enumerated in IP, while buyers official will face penal action.

4.7.6 IP's Advantages:

The numerous advantage of IP's are enumerated hereunder:

- preventive anti-corruption measure in public procurement.
- does not allow collusion and bid rigging
- speedy contract finalisation.
- provides comforts to both Buyer and Seller

- general perception and image improvement of both contract parties
- Reduction in lawsuits
- Reduction in false complaint, increase in competition, avoid delay in vendor payment, avoidance of bribery, enhancement in satisfaction level to both parties.
- Finally brings transparency, efficiency and reduction in cost of production.
- It brings fear psychosis to adopt bribery by Buyers as stakes involved are high.

The need is to enforce IP as per CVC format and deviations are to be avoided as far as practicable.

4.7.7 IP's challenges in its Implementation:

- Public Sector Undertakings (PSUs) are all commercial organizations. Implementation of IP mandates officials of the PSU to sign IP will have adverse impact in operation, making the PSU non-competitive.
- Acceptance of IP by overseas suppliers is difficult. Foreign companies are reluctant in adoption of IP. Hence, negotiations will then take time.
- Sometimes IEMs are not having enough experience to handle IP or IEMs may not be trust worthy.
- Regarding commercial confidentiality PSUs feel that disclosure could lead to leakage of confidential information and they may lose their edge in the bidding process however, bidders feel that that disclosure by PSU is minimal.

4.7.8 Observations:

As a concept it brings transparency in public procurement. Implementation of IP brings strong willpower of both buyers & sellers. There is a need for effective implementation of IP. It should not be considered as a routine Annexure of Pre-Bid document / applicable Bid document. In these circumstances, arbitration will have limited value in the event of breach of IP.

Transparency in public procurement will improve image uplift in Corrupt Country Indices and smoothen business operation. CVC laid IP format, if implemented, in letter & spirit, no doubt, will eliminate corrupt practices followed by sellers both in-house and outside involving Agents in foreign dealing.

4.7.9 Integrity Pact with Government Departments:

Signing of an Integrity Pact is mandatory if scheme or the project of the government exceeds the value of Rs. 20 Crores.

4.8 Technology Transfer

4.8.1 Introduction

- **Why India needs technology**
- **Why is India unable to obtain ToT**
 - **The FDI Concern**
 - **Export Embargo**
 - **Way forward (Possible Solutions)**

4.8.2 Technology Inflow Routes

- **Co-development and Co-production**
- **Sub- contracting / Contract Manufacturing**
- **Joint Ventures**
- **Licensed Production**
- **Maintenance ToT and Training**

4.8.3 Issues and Challenges associated with Technology Transfer

- **Relevance and Depth**
- **International status**
- **Capability of Indian Industry**
- **Industrial Returns**
- **License Issues**
- **Determination of Multiplier Factor**

4.8.1 Introduction¹⁶:

In view of security threat perception, India is looking to refurbish its defence capabilities and as a result making the country one of the largest military spenders in the world¹⁷. 'MOD' is working on strategy management in Defence sector to enforce IP and its monitoring.

Presently 70% of defence procurement is through Imports but present Government has put the target otherwise to bring in 70% of defence procurement from indigenous sources in a time bound manner.

"Make In India" followed by DPP – 2016 prioritisation of Buy – IDDM (indigenously Designed Developed and Manufactured) etc. with stress on involving local industry in all TOT's (Transfer Of Technology) is one of the major step for indigenization.

- **Why India needs technology?**

India's Defence sector was opened from 2001 for 100% private sector participation with FDI permissible up to 26% which has been increased to 49% and even the concept of "Strategic Partner" evolved in DPP 2016 to cover large Indian Private Sector organisation in selected sector of Defence production.

'MOD' is stressing for last one decade to achieve high level of Indigenisation but it has failed to achieve the same as average import content is over from 60% to 70% in Defence Product barring a few systems & sub-systems which has been indigenised. Even present Government is giving lot of stress on Indigenisation. Even the concept of Co-development and Co-production involving Foreign companies have not been much successful barring a few cases like BrahMos Aerospace – an Indo-Russian joint venture.

Hence if India needs future generation equipment, it has to strengthen its R & D base may be on the pattern of its space programme and involve its technocrat cum designers under the monitoring of MOD with targeted timeline. India is yet to develop Engines for Aircraft while even engines for Car is also imported. India has developed capacity to absorb "TOT" – Transfer of Technology but it cannot help modernise defence industry unless it develops its own technology base.

¹⁶ An Article by Divij Kumar, E-Newsline, PSA 2010.

¹⁷ India world's sixth largest Military spender in 2015 \$ 51.3 billion and became 4th largest spender in 2016 and is expected to reach \$ 64.8 billion by 2020.

- **Why is India unable to obtain ToT?**

- **The FDI Concern:**

No Original Equipment Manufacturer (OEM) will be interested in bringing full Technology including Proprietary till it has substantial control over the management of the company; hence FDI 26% & 49% is not being welcomed by Foreign Companies. Even under License Production / TOT / Co-development Co-production is not luring them to bring into India proprietary & sophisticated technology. MOD is operating on a 'secrecy' concept that industry / organisation of Foreign Government / Foreign companies cannot be assigned full management control in Defence arena rather management control be given at best in private sector to Indian management.

However, as per the extant FDI policy, foreign investment up to 49% is permitted under the automatic route, foreign investment beyond 49% and upto 100% is permitted through Government approval. FDI in defence sector beyond 49% is subject to Industrial Licence under the Industries (Development & Regulation) Act, 1951.

- **Export Embargo:**

The issue falling under this concept requires that Export of defence product / services require clearance of concerned service HQRS & MOD. Added to this is only one buyer for defence products & services i.e. MOD in India and no purchase guarantee by MOD; however MOD for last few years enters into large contract for a programme with DPSU including Repair & overhaul and product-support. In order to allow Original Equipment Manufacturer (OEM) to survive and generate adequate ROI, it is prudent to extrapolate programme (not only manufacturing but also repair & overhaul / product support) based contract to OEM's also. This will provide some incentive to them even if Export embargo exists.

- **Way forward (Possible Solutions):**

The government is contemplating increase of FDI limit to 100 percent for production of battle tanks, military transport aircraft and armoured vehicles under the automatic route.

This liberal policy will give a fillip to self-reliance objective of the government.

Higher equity stake and reduction in export embargo will woo the foreign investor in a big way.

4.8.2 Technology Inflow Routes¹⁸:

a. Co-development and Co-production:

It is seen as one of the best mechanism in state of the art technology induction and absorption. The joint development ensures that the part of production work along with the jobs it creates is assigned to the Indian partner also.

Joint working not only brings latest technology but it also provides the Indigenous vendors with the requisite skill sets through their involvement in the joint program.

b. Sub- contracting / Contract Manufacturing:

In case of off-set obligations vendors opts for sub-contracting to foreign vendors which brings technology for the sub-contractor

c. Joint Ventures:

This concept has brought in Co-design- development & Co-production including Exports for machining works / Sub-systems systems under Defence programme like Brahmos Aerospace – an Indo- Russian Joint Venture, Multi Role Transport Aircraft – an Indo- Russian Joint Venture, SNECMA – HAL Aerospace private limited etc. All these JV's have given skill sets to Indian technicians & designers. This is a welcome step courtesy to MOD. Government of India shouldn't welcome JV for obsolete products and similar approach to be kept in mind by Indian Industry.

d. Licensed Production:

The TOT to a local defence DPSU capable of absorbing the technology, if implemented in true spirit, where both the supplier and the recipient are competent organizations, will result in leapfrog on the existing technology lag.

¹⁸ http://www.idsa.in/jds/3_1_2009_TechnologyInflows_SPRavindran6637.html?q=print/2811

Generally OEM's even under TOT does not allow full depth of technology but keeps some critical technology with them so that Indian side does not become his competitor and keeps Indian side on toe for imparting that critical technology product to build full fighter product. However only when that critical technology becomes obsolete, they agree for transfer in view of their product support commitment in their Main Contract.

Invariably, the depth of technology being transferred becomes selective at the hands of seller. Generally, seller keeps some items in his kitty which buyer has to buy as it will be related to ToT. The buyer is unable to leverage the ToT and gaps are always there.

While these aspects are primarily applicable to hardware related programs, the issues become further complicated where there is substantial software content as software transfer involves sharing of codes.

e. Maintenance ToT and Training:

Long-term customer support activities have become mandatory. Maintenance Repair and Overhaul (MRO) Facility provides a platform by which local defence industry acquires the technology and offers maintenance support to the user agency on a long-term basis. It will also be necessary to stock and maintain adequate quantity of spare parts for meeting day to day maintenance requirements.

4.8.3 Issues and Challenges associated with Technology Transfer:

Some of the critical issues related to technology transfer are the following:

- **Relevance and Depth:**

In order to ensure offer of transfer of technology is made directly related to the product or system being procured; such technology offered must be scrutinized in-depth to ensure that the technology being offered is relevant to defence applications both current and futuristic. The depth of technology being given for the systems / products is crucial to the development of local industry.

Presently outsourcing has become common phenomenon for ensuring Cost Reduction & enhancing productivity, hence it covers outsourcing of product development activities including design of sub systems, accessories, etc. Thus, it is imperative that evaluation of supplier's capability to be done assiduously.

- **International status:**

The technology on offer needs to be assessed by Service HQRS for its intended application utility life as also international market appreciation before MOD permits such TOT. We need to assess that seller is not giving us sub-standard or obsolete offers for technology transfer.

- **Capability of Indian Industry:**

It is being said that technological environment in India is progressing exponentially and possess challenge for the Indian industry for absorption of technological advances. However it is unfortunate to comment that India has got well international appreciation in IT field but in the same field of Information Technology Defence Software, India has to depend on USA, France, Russia, Israel, etc. Hence Indian defence industry / MOD to bring in policy framework / understanding to leverage TOT in related products & services to expand learning base and specialisation for field like Software appreciation, Communication & Aviation systems including Land management & naval systems and lead has to be taken by Indigenous R & D Organisations including DRDO.

- **License Issues:**

Getting latest technology is difficult as it is subject to foreign government approval. For critical technologies, foreign suppliers do not part with their technologies citing patents, IPRs etc., or may fix enormous prices for the same. In addition to this, there are certain technologies that are banned for exports to certain third world countries.

- **Determination of Multiplier Factor:**

Advantage of multiplier factor for transferring critical technologies is a key component of the Offset agreement. For certain systems and sub-systems, there is a need to revisit multiplier factor so that willing foreign suppliers can augment those fields with modern technology to be used for diversified field including under civil Aerospace. We all know that even small component in Aerospace are getting imported as Indian SME's / MSME's have not come out with latest technology in this field. However it is pertinent to mention that multipliers should be applicable only for very critical technology so that Indian industries can further develop on them.

Chapter - 5

LEGAL PERSPECTIVE

5.1 Focus on Legal Aspects of the Contract

5.1.1 Introduction

5.1.1.1 Indian Contract Act, 1872

5.1.1.2 Sale of Goods Act, 1930

5.1.1.3 Does Indian law recognize transactions carried out electronically?

5.1.2 Basics/Essential of Contracts

5.1.2.1 Intention to create legal relations

5.1.2.2 The nature of the obligation

5.1.2.3 Nature and Contractual Obligation

5.1.2.4 Classification or Types of Contracts

5.1.2.5 Does a contract have to be in writing?

5.1.2.6 The Parties

5.1.2.7 Privity of Contract

5.1.2.8 Recitals

5.1.3 Main commercial terms in Contracts

5.1.3.1 Elements of a Contract

5.1.3.2 Reality of Consent

5.1.4 Key Differences between Specific Contract Provisions

5.1.4.1 Limitations on Liability

5.1.4.2 Liquidated Damages

5.1.4.3 Agents and Distributors

5.1.4.4 Data Protection

5.1.4.5 Intellectual Property Rights Protection

5.1.4.6 IPR

5.1.4.7 Patenting Strategy

5.1.4.8 Confidential Information and Trade Secrets

5.1.5 Dealing with Government Contracts (Central / State)

5.1.5.1 Government Contracts

5.1.5.2 Position in India

5.1.5.3 'Contracts' and 'Government contracts'

5.1.5.4 Formation of Government Contracts

5.1.6 Shortcomings of Indian contract Act 1872

5.1.1 Introduction¹⁹:

In the commercial world there is an utmost need for having a law to manage the business in a proper format and sort out eventualities arising at any point of time. If the business community is not very sure of some binding rules of enforceable agreement/contract, then business cannot be managed smoothly. Hence the law relating to contracts is to be found in the Indian Contract Act 1872.

The law of contracts differs from other branches of law as it lacks precise rights and duties which the law will protect and enforce. It is said that Indian Contract Act 1872 contains a number of limiting principles subject to which parties to the contract may create rights and duties for themselves and the law will uphold those rights and duties.

Thus it can be inferred that the parties to a contract in a sense make the law for themselves. The limiting factor is that they do not transgress some legal prohibition, they can frame rules they like in regard to subject matter of their contract and the law will give effect to the contract.

It is being said that contract law is a natural area of state legislation in terms of exercising a policing role among litigating parties. Contract Law is one area of private law which is less subject to the requirement of a social order in a modern society and is often forgotten. Mr. K. P. Berger – “The creeping codification of the Lex Mercatoria” 1999—no doubt point out that the state does not precede the law “but fail to distinguish contract law from “the law”. Mr Berger wants to remind us that it has always been common ground that there are in fact general principles of law or principle of natural justice which are independent of the existence of a sovereign and state and its territory. Hence it will not be appropriate to raise concerns against the creation of a quasi independent law within business circles. This phenomenon is nothing but the consequences of the exercise of freedom of contract and party autonomy which modern western states guarantees. The modern business world and the economies of western countries are founded on party autonomy. It is one of the basic civil liberties. Contract Law, therefore, plays an ambiguous role within state legislation.

¹⁹ Extract from PGDBL, course 3, block-1, Rainmaker Training & Recruitment Private Limited, 2011.

LAWS/REGULATIONS INVOLVED IN IMPLEMENTATION OF DEFENCE CONTRACT

- The Indian Contract Act 1872
- Sale of Goods Act 1930
- Consumer Protection Act 1982
- Information Technology Act, 2000
- Arbitration Act 1996
- Product Liability
- Regularisation of use of Digital signature in e-governance guidelines issued by Department of Information and Technology, Government of India, December 2000.
- Guidelines for Public Procurement issued by Ministry of Finance.
- General Financial Rules 2017.
- Defence Procurement Procedures and Defence Procurement Manual issued by Ministry of Defence.

In respect of International Contracts

- The United Nation Convention of Contracts for the International Sale of Goods (CISG).
- Uniform Commercial Code
- English Sale of Goods Act 1979.
- United Nations Commission on International Trade Law(UNCITRAL)

TERMINOLOGIES

- CIF Contracts
- FOB Contracts
- Incoterms 1990
- Subject to Contract
- On Demand Bonds and Guarantees
- Offset credit
- ToT (Transfer of Technology)

5.1.1.1 Indian Contract Act, 1872²⁰ (ICA):

While we are aware that ICA is based mainly on English law and common law contract principles, but the Act is not a complete post contract management law as it also relies on the provisions & principles of other regulations, statutes, and trade customs etc. so long as these principles are not inconsistent with the provisions of ICA.

It needs to be noted that ICA was derived from English law principle does not mean that it will be applied in a similar way in similar situation. Even our Hon'ble Supreme Court in case of (2006) 2 supreme court case 728, BSES Ltd (Now Reliance Energy Ltd vs Fenner India Ltd & another) "when the law in India is Clear, Settled and without any deviation; whatever there is no occasion to rely upon foreign case law"& accordingly has explicitly made it clear that wherever citations of Indian Courts are there the same should be relied than placing reliance on other country case laws.

Requirements of Form

It is being clarified here that like other laws, Indian Trusts Act/Registration Act 1908 which requires creation of a trust to be in writing /has provided transfer of property or assignments of patents to be registered respectively; so is the case not with ICA. Validity of a legal and binding contract does not require the contracts to be in a particular format only like being in writing only.

²⁰

An Article by Jonathan Riley,

<http://www.mondaq.com/india/x/65442/Contract+Law/Contracting+Under+Indian+Or+English+Law+Part+1+The+Indian+Legal+Framework>

5.1.1.2 Sale of Goods Act, 1930(SGA):

While we are aware that the sale of goods Act 1930 & ICA are inter department largely for basic requirements for a valid contract like offer, Acceptance, Consideration etc. but SGA requires both buyer & Seller to perform certain duties and grants certain rights. If we extrapolate further it depicts that buyer has to accept and pay for the goods in accordance with the terms of sale Agreements while seller has to fulfil the requirements on its part to transfer the goods in such packaging & Other requirements as stipulated in the contract for sale.

SGA further provides for remedy in case Buyer does not discharge his payment responsibility in line with the contract for sale:

- Situations where goods have gone in the possession of Buyer then the unpaid seller has to sue for the dues (section 55). As the goods have been delivered and property has passed on to Buyer, the seller cannot enjoy the privilege of lien and hence cannot recover the dues.
- The other situation may be when the Buyer has become Insolvent and the goods are in transit then unpaid seller can exercise a right to stop the transit in order to recover the goods. But this right only becomes enforceable when buyer becomes insolvent.
- A situation may also exist where section 46 of SGA comes into force where seller is still in possession of goods then the seller can exercise concurrently both lien over the goods and the right to withhold delivery even if the property has passed on to buyer.

5.1.1.3 Does Indian law recognize transactions carried out electronically?

Indian Information Technology Act 2000 (ITA) read with Information Technology Amendment Act in 2008 have provided authority and legal back up for transaction carried out through electronic means this; Act has legalised e-commerce. Even this Act after amendment in 2008 has strengthened the formation of contract if communication of proposal, acceptance of proposal, revocation of proposal and its acceptance have been made through electronic means backed by Digital signatures of the parties.

5.1.2 Basics/Essential of Contracts:

Drafting a commercial contracts at the basic level requires four essential parameters:

- Offer

- Acceptance
- Consideration
- Intention to create legal relations.

Once all the above four principles have been met a legally enforceable contract will emerge provided all parties have appropriate legal capacities.

The first three of above are based on fact but the fourth is not.

5.1.2.1 Intention to create legal relations:

Even if other three elements as stated at para 6.1.2 of a contract are present the assumption in commercial contracts is that the parties intend their agreement to be legally binding. However during the course of negotiations they will typically use terms such as "*subject to contract*" to make their position clear, if their intentions are not yet firmed up for creating legal relations. In the case of *Somerfield Stores Limited v Skanska RashleighWeatherfoil (2006)*, in which an agreement was made "*subject to contract*" but was then acted on immediately to initiate services even though the detailed maintenance service contract when finalised would govern for a three year period, it was decided that the agreement was still contractually binding for that period, notwithstanding the use of those words and hence clarified the position of law on this.

5.1.2.2 The nature of the obligation:

The nature of contractual obligations is based on mutual consent incorporated into the contract as also the parties to the contract must intend to create legal relations. However there are certain statutory restrictions like unfair contract terms Act 1977.

5.1.2.3 Nature and Contractual Obligation:

The Courts are empowered to enforce a valid contract in terms of provisions in the contract unless there are grounds that restrict its enforcement. Moreover the courts may not create new contracts for the parties to the dispute.

Wherever general public is affected, statute prescribe and restricts the terms of contracts e.g. in case of insurance contracts while it protects a common carrier, it also prescribes safeguards to the general public by guaranteeing financial resources to meet the eventuality of Accidents.

Law encourages creation of valid contracts between competent parties for lawful objectives in terms of mutual agreements unless it results from fraud, duress or undue influence.

5.1.2.4 Classification or Types of Contracts:

1. Contracts under Seal:

Contract was generally understood to be legal document if it was stamped with a seal. Although it was not providing any legal benefit or detriment to any party as the seal was a symbol of the solemn acceptance of the legal effect. Earlier all contracts were required to be under seal in order to be valid, but the seal has lost some or all of its effect by statute in many jurisdictions. Recognition by the courts of informal contracts, such as implied contracts, has also diminished the importance and employment of formal contracts under seal.

2. Express Contracts:

The terms of the valid contract are agreed by the parties either in writing or oral before its formation. Consent to terms must be agreed by the parties and be demonstrated when disputes arises.

3. Implied Contracts:

Implied contracts are those contracts that may be "implied in fact" and may also be "implied in law". Quasi contracts are the best example of contracts "Implied in law". Implied contracts mostly depend on substance of its existence and hence some act or conduct of party to be bound is to arise in an "implied contract".

Mutual intention to contract backed by facts and circumstances reflects implied contract. There are certain understandings which are not expressed in words but facts and circumstances suggest the existence of intentions and agreement then it's covered under implied contract. But where the relations between the parties prevent the inference of the contracts, Implied Promise will not be derived or even where the contract would result in inequity or harm the contract cannot be covered under implied contract.

The purpose of "Contract implied in law" is to provide remedy and it is an obligation imposed by law.

4. Executed and Executory Contracts:

When all the parameters and issues of contract are completed and nothing remains to be complied with by either party or parties, the same is called "Executed Contract" when completion of all performances have happened, it virtually signifies that the contract does not exists.

While if some actions/future performance is yet to happen; the same is called "Executory Contract", like in case of manufacturing & Supply of aircraft contract, a standard term for product support for next 20 years is to be done after the last supply of aircraft in that specific contract, then at a later date after last supply of aircraft it will still be called "Executory Contract".

5. Bilateral and Unilateral Contracts:

A bilateral contract constitutes an exchange of mutual, reciprocal promises between the parties that involves performance of an act or forbearance from the performance of an act with respect to each party it is a two sided contract as it involves two promises that constitute it.

Whereas if a promise is made by only one party it is called unilateral contract. In this case offeror promises to do a certain thing if the corresponding offer performs the requested act. In this case only the offeror who promises will be legally bound as it is a one sided contract. The acceptance of offer constitutes the performance & then contract becomes executed. The offeree may not be sued for failing to perform or even for abandoning performance as there is an absence of promise on his part.

6. Void and Voidable Contracts:

If a contract does not impose legal rights or obligations upon the parties as also is not enforceable by a court, it is called a "Void Contract". Frankly speaking it is no contract at all.

Whereas a contract which may be treated as never having been binding on a party who was persisting from some legal disability or victim of a fraud at the time of execution is a "Voidable Contract" such contracts are legally enforceable agreement provided it is ratified either expressly or impliedly by the party who has the right to avoid it.

5.1.2.5 Does a contract have to be in writing?

Certain circumstances in which a contract must be in writing are generally as follows:

- A contract for the sale of land (section 2, Law of Property Miscellaneous Provisions Act 1994);
- The assignment and licenses of intellectual property rights (sections 90(3) and 222(3) of Copyright Designs and Patents Act 1988);
- Guarantees as stipulated in section 4 of Statute of Frauds Act 1677; and,
- The assignment of contractual rights as stipulated under Section 136, Law and Property Act 1925.

Certain agreements not only be in writing but also be in form of a deed and a few are as follows

- Land transfers as provided in section 52, Law of Property Act 1925;
- Leases in accordance in sections 52(2) and 54(2), Law of Property Act 1925;
- Binding agreements but where there is insufficient consideration.

And last but not the least, when the words of an agreement are ambiguous, the recitals may be used to discover the intention of the parties.

5.1.3 Main commercial terms in Contracts

5.1.3.1 Elements of a Contract:

The following are vital elements of a contract:

- Offer
- An acceptance
- Competent Parties having legal capacity to consider lawful subject matter.
- Mutual consent/ Agreement of the parties to the contract.
- Consideration
- Mutual obligations, etc.

a) Offer:

While an offer is a promise and it must consist of present intent to enter into a contract-with a definite proposal having certainty in its terms as also communication of the offer to the identified prospective offeree, it must be kept in mind that any missing element out of elements stated above can make the offer invalid and hence cannot form the basis of a contract.

b) Preliminary negotiations, advertisements, invitations to bid:

An advertisement is only to be construed as an invitation to a customer to make an offer and it should never be considered as an offer itself. The concerned organisation may not have sufficient stock to satisfy potential demand and hence it would be unreasonable to assume to expect to form a binding contract by responding to advertisements for sale of product. However situation will be different if advertisement prescribes quantity offered for sale and contains word of promise such as "First come first served" basis and at that point of time if organization/ its store refuses to comply with its promise then courts may enforce contracts. Similarly preliminary negotiation should never be considered as offer as the same does not demonstrate intention to form a contractual relations.

c) Mistake in sending offer:

Generally offeree cannot take advantage of the known mistake of transmission of an offer by accepting the offer, he or she will have to go by original terms of the offer. Similarly if an intermediary, such as postal department, commits errors in transmission of an offer, the party who selected that mode of transmission will be bound by the terms of erroneous message and accordingly applicable for acceptance also. The courts have

also held in a few cases that if there is an error in transmission there is no contract on the grounds that either telegraph company is an independent contractor & not the sender's agent.

d) Termination of an offer:

Offer made to general public can be annulled or revoked through public notice of its termination in a similar way as the offer was published.

In other cases an offer remains open for a specified period as mentioned there in or if time limit is not there, then until a reasonable time has elapsed.

e) Irrevocable offers:

An offer is irrevocable, if a person purchases the right at agreed price and terms within the specified time; however it is an exception to the general rule that an offer can be withdrawn prior to acceptance.

f) Rejection of an offer:

A counter offer or a conditional acceptance of an offer tantamount to rejection of offer. Apart from express refusal to accept an offer. A late or defective acceptance of offer is treated same as counter offers.

g) Acceptance:

Acceptance of an offer needs to be made by the offeree in a manner requested in the offer or authorised by the offeror. Such acceptance of an offer is considered as an expression of assent to its terms.

However in case of unilateral contract, acceptance requires an act rather than a promise it is not necessary to give notice of intended performance unless the offeror requested for the same.

In bilateral contract, proposition is as follows:

- Offer is effective when the offeree receives it.
- Acceptance by offeree receives is permissible till the offeree receives notice of revocation from the offeror; thereafter happens revocation of offer.

If the transmission of an acceptance is by an expressly or implied authorised procedure to the wrong address, the same will be effective only on receipt by offeror.

h) Unsolicited Goods:

It is seen from some state statutes that against unwanted solicitations, some merchandise is received as part of an offer to sell, the goods are treated as an outright gift; this is the result of modification in the common law rule to provide protection. This has provided a great relief to the recipient that he is under no duty to return or pay for them even if he or she uses the goods;

however if he or she knows that they were sent by mistake then the situation will be different.

i) Agreements to Agree:

The terminology "Agreement to Agree" does not render a valid contract. If a material term like quantity of goods left blank for further negotiations then there cannot be valid contract.

j) Competent Parties:

A natural person other than infant, insane or intoxicated & who has complete legal capacity if agrees to a transaction become liable for duties under the contract.

An infant is a natural person having under the age of 18 or 21 on the particular applicable jurisdiction. The purpose of providing such treatment to infants is due to public policy which protects immature and naive infant from liability for unfair contracts. On infant attaining the age of majority as stated above, he or she must choose either to disaffirm or avoid the contract or to ratify or accept it and if the contract is kept open beyond a reasonable time which is determined by circumstances of each case, he may be treated as implicitly ratifying the contract and bound to perform the contract.

k) Mental Incapacity:

A contract made by adjudicated incompetent by a court is void and having no legal effect. A natural person is regarded as "Mentally incapacity" if he does not comprehend the nature and consequences of contract when it is formed and a contract made by such person is regarded as voidable by him or her.

l) Intoxicated Persons:

A natural person in such inebriated condition, if enters into a contract, the contracts becomes voidable. However the person on becoming sober either promises to perform the contract or fails to disaffirm it within a reasonable time gap after becoming sober, then he is legally bound to perform it.

m) Subject Matter:

This is an important element for determining enforceability of contract by a court of competent jurisdiction. If the contract subject matter is commission of a crime or any other illegal activities, such contracts are void. While contracts formed in restraint of trade; courts will not enforce it due to hindering competition.

n) Mutual Agreement:

A Contract is supposed to be formed based on agreement between the parties or mutual assent.

There is no agreement, if any of the proposed term is not settled or if no method of settlement is provided apart from exception pertaining to sale of

goods as enumerated by Article-2 of uniform commercial code (UCC). For the enforceability of contract the quantity term must be mutually agreed as it is an essential term. However if the parties have agreed essential terms of the contract and intend the agreement to be binding although all claims have not yet been agreed; such agreement is binding.

o) Consideration:

As per common law, courts is not supposed to interfere on determining adequacy of consideration normally unless if one is trying to prove mistake, misrepresentation, fraud or duress- the inadequacy of consideration for the promise might point out significant evidence. Love and affection are not permissible formats of consideration.

In a nutshell, a valid contract requires some consideration in case of bilateral contract.

p) Mutuality of Obligation:

In case of bilateral contract, it must be mutually binding; where promises constitute the consideration. This is also known as mutuality of obligation.

If promises are illusory, then there is no enforceable contract. The contract is generally considered to be binding if the power to annul the contract is restricted in any manner. It is also learnt that oral contract for transfer of land in almost all countries are void.

5.1.3.2 Reality of Consent:

In order that the contract be a binding contract, the consent of parties must exist. There is a question on apparent consent because of fraud, mistake, innocent misrepresentation, duress or undue influence as these are used for defences to the enforcement of contract. The requirement is to the parties to the contract must mutually assent to the envisaged terms of the contract as also to the proposed objectives; in order to make the contract enforceable.

a.) Mutual Mistake:

Mutual mistake of fact is an important issue for enforceability of contract. If such mistake involves incidental quality that has no or negligible effect on the value of the, contract the contract will be binding.

Courts also determine the intension of parties on this proposition whether the parties have a meeting of minds and determines accordingly acceptance or refusal to enforce the contract.

b.) Unilateral Mistake:

An error of judgement by a contractor will not permit him to avoid the contract. A typographical error may be permitted to be corrected. Generally unilateral mistake allows no basis for avoiding a contract.

c.) Mistake of Law:

A party with full knowledge of the facts arrives at an erroneous conclusion as to their legal effect, such a MISTAKE OF LAW will not invalidate a contract or affect its enforceability.

d.) Illiteracy:

Illiteracy does not prevent the mutual consent of the parties. It does not excuse a party from learning the contents of a written contract.

Illiteracy may serve as a basis for invalidating a contract if fraud persisted. If the nominated person of illiterate misrepresents him and acts in collusion with other party to the contract, the contract may be set aside.

e.) Fraud:

The question arises what is called fraud in a contract and how does it affect a contract. Sometimes mere silence on a material fact may not constitute fraud. But the modern trend is to disclose full material facts. Fraud obstructs mutual agreement to a contract. Fraud covers issues like intentionally deceiving another, willful misrepresentation or concealment of a material fact of a contract etc.

If a contract is entered into on the basis of a fraud, then contract is void or voidable. The contract will be void abinitio if the fraud is in factum. The contract will be voidable by the innocent party if the fraud is in the inducement by which a party is persuaded falsely to enter into a contract, the term of which is known and understood by the concerned innocent party.

f.) Misrepresentation without Fraud:

If a contract was based on any innocent misrepresentation pertaining to a material fact on which one party justifiably relied, then the contract may be invalidated.

g.) Duress:

If the contract has been signed owing to blackmail, threats of physical violence signing contract at gun point without any knowledge of its contents threats to institute legal proceedings in an abusive manner etc. coming under the preview of duress, the contract will be either void or voidable depending upon the stand taken.

h.) Undue Influence:

Unlawful contract exercised by one person over another person comes under the purview of undue influence if the intention is to substitute first person's will for that of the other.

Such situation occurs when a person takes an advantage of psychological weakness of another to influence him to enter in to a contract when in normal circumstances the person concerned will not give consent to such contract. Such situation also exists when fiduciary relationship exists between the parties like in a family or professional- client relationships.

5.1.4 Key Differences between Specific Contract Provisions²¹:

5.1.4.1 Limitation of Liability: (Section 73 of ICA refers to)

Indian law considers limitation of liability clause as valid and enforceable. It debars limitations on liability arising by reason of death. Or personal injury, fraud or gross negligence, the provision for limitation of liability must be reasonable and not amount to a penalty to be enforceable.

ICA Provides for claiming damage for breach of contract is limited to actual damages or losses suffered by the party arising from the breach.

5.1.4.2 Liquidated Damages: (Section 74 of ICA refers to)

ICA Provides for both a sum reflected in the contract as the amount to be paid in case of breach like delay in supplies as also any other stipulation contained in contract by way of penalty. Hence Indian law permits both the exercise in each case should result in determining reasonable compensation entitlements. The leading case law available on the subject are Manla Box vs. Union of India (1969) and ONGC Vs saw pipes (2003).

5.1.4.3 Agents and Distributors:

The term "Agent" is reflected in ICA it cover agent can be allowed to do all such acts as the person himself can do except personal services as also the acts of agents are being considered as the acts of Principal. In India the terms 'Agent', 'representative' and 'distributor' are used interchangeably and are paid commission. Hence care needs to be taken when incorporating clause on the same in the contract clarifying the term in accordance with commercial agent's regulations.

²¹ <http://www.mondaq.com/india/x/65440/Contract+Law/Contracting+Under+Indian+Or+English+Law+Part+2+Key+Contract+Differences>

5.1.4.4 Data Protection²²:

Currently India does not have Data Protection Laws like European Union (EU). However sometimes reference is made to section 43 A of IT Act 2000 and IT Rules 2011 for data protection. The provisions put responsibility for data protection on organisations failing which they are held liable for compensation to those affected. Penalty is in the form of civil liability. Presently matter is getting heard at the Apex Court till the laws/ regulations are firmed up, Defence forces are using incorporation of appropriate clauses in the contract.

5.1.4.5 Intellectual Property Rights Protection:

India is a member of World Trade Organisation and is a signatory to GATT/TRIPS agreements. India has Patents Act 1970 amended in 2006, copyright Act 1957 amended in 2012, Trade mark Act 1999, Design Act 2000, Geographical Indications of Goods Act 1999, semiconductors and integrated layout design Act 2000 etc. However India is still harmonizing with correspondence laws of other countries of world.

5.1.4.6 IPR:

- Paris Convention for the protection of Industrial Property as amended upto Sept. 28, 1979: contains 30 articles enumerating therein scope of Industrial Property, Patents Utility Models, Industrial Designs, Marks, Inventors Certificates, Mention of Inventor in the Patent, Patentability in case of Restrictions of sale by Law, failure to work, Patented devices forming part of Vessels, Aircrafts or Land Vehicles, well known marks, Service Marks, Nature of Goods to which Mark is Applied, Trade names, Unfair Competition, Disputes, etc.
- Patent Co-operation Treaty (PCT) done at Washington on June 19, 1970 as modified on Oct. 3, 2001 – The prime object of this Treaty is in respect of contracting states desiring to make a contribution to the progress of science & technology and to ensure perfect legal protection of inventions, to simplify and render more economical

²² An Article by Neeraj Dubey, http://psalegal.com/upload/publication/assocFile/TMTBulletin-IssueXIV.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original

protection of inventions in multiple Countries with a purpose to foster and accelerate economic development of developing Countries through the adoption of measures designed to increase the efficiency of their legal systems.

- There are 69 Articles in PCT which covers issues like International Application, filing date & effects of International Application, International Search, International Publication, International Preliminary examination, issues of Regional Patent Treaties, Patent information services, Disputes, Revision of Treaty etc.,
- The PCT Application Guide for International phase covers routine information on the Patent Co-operation Treaty (PCT) and is intended for filing International Patent applications specifically. The PCT is a multi lateral Treaty and is administered by International Bureau of the World Intellectual Property organisation and its headquarters are in Geneva (Switzerland). Applicants have advantage of choosing in which Countries to further pursue the application as also in seeking protection for an invention in a number of Countries. There are two main phases of PCT procedure. It commences its journey with the filing of an international application and ends with grant of number of national or regional patents; hence results into “international phase” and “national phase”.
- The PCT application guide for national phase contains information on the “national phase” of the PCT procedure. Out of the two main phases of the PCT procedure, national phase is the second. It is also observed that the national phase of processing the international application by the designated office is usually delayed until the termination of international phase on the expiration of specified time limits. The commencement of “national phase” emerges only if the applicant performs certain acts, either before expiration of a certain

time limits or together with an express requests that it wants to start earlier,; Act to be performed for entering into National phase is separately elaborated therein.

- As far as copyrights are concerned, International convention for the protection of performers, producers of phonograms and broadcasting organisations have framed certain guidelines at Rome on October 26, 1961 and the contracting states have agreed through 34 Articles for safeguarding of copyright proper (other than copyright in literary and artistic works). The laid down guidelines in 34 Articles covers issues on protection given by convention, performances protection, protected phonograms, protected broadcasts; performers acting jointly, variety and circus Artists, duration of protection with permitted exceptions, withdrawal of reservations, performers right in films, special agreements, denunciation of the conventions settlement of disputes including intergovernmental committees.
- In order to develop and ensure maintenance of the protection of the rights of authors in their literary and artistic work as also to frame new international rules and amplifying certain existing rules for providing adequate solutions to the question raised by new economic, social cultural and technological developments, World Intellectual Property Organisation (WIPO) Copyright Treaty convention adopted in Geneva on December 20, 1996. The said WIPO copyright Treaty covers multiple issues including scope of copyright protection, computer programs, right of communication to the public, duration of the protection of photographic works, obligations concerning technological measures and Right Management Information, enforcement of Rights, eligibility for becoming party to the Treaty, right and obligations under the Treaty, relation to the Berne Convention etc., comprising in 25 Articles. As far as this Treaty is concerned, it is a special agreement

as per Article 20 of the Berne Convention for the protection of literary and artistic work.

- USA President signed “The Digital Millennium Copyright Act (DMCA)” on October 28, 1998. This law implements two world Intellectual property Organisation (WIPO) treaties. The WIPO copyright Treaty and WIPO performances and phonograms Treaty. The DMCA also cover a number of other significant copyright related issues which includes “online copyright Infringement liability limitation Act” “Computer Maintenance Competition Assurance Act” and “miscellaneous provisions” – like function of copy right office, distance education, exception in the copyright Act for libraries and for making ephemeral recordings, webcasting etc.,
- Government of India through Ministry of Human Resource Development has published “A handbook of copyright Law” which is not a substitute for the copy right Act, 1957 and copyright Rules 1958 but act as an information booklet for enforcement agencies as well as the general public.
- Government of India has promulgated on 12th May 2016 “National Intellectual Property Rights Policy” to spur creativity and stimulate innovation. This policy also aims at IPR related service-delivery mechanism of the Government besides encompassing research and development organisations, educational institutions, corporations, MSMEs, start ups etc., in the creation of an innovation – conducive ambience. This is based on input provided by “IPR Think Tank”.
- World Intellectual Property Organisations (WIPO) Geneva has issued a “Guide to the International Registration of Marks” under the Madrid Agreement and the Madrid Protocol. Primarily it helps applicants and competent administrations of the Member States of the Madrid Union for ascertaining various steps in the international registration

procedure and essential provisions of the Madrid Agreements, Madrid protocol and the common Regulations. "The Guide" provides for Basic features – like Madrid Agreement and Madrid Protocol, eligibility for using the system, applicable Treaty; Issues involved in becoming party to the Agreement a protocol, declarations by contracting parties – like Notifications, territorial effect, limitations concerning existing marks, Intention to use the Mark; public information on International registration/application; procedure on communications with the International Bureau, Representation before International Bureau, International Application, International Registration, Grounds for Refusal, time limits for Refusal; Status of a "Mark" in a designated contracting party, changes in the International Registration. The Madrid system of international registration of marks is administered by the International Bureau of the World Intellectual Property Organisations (WIPO) in Geneva, Switzerland and may be used only a natural person or a legal entity which has a real and effective industrial or commercial establishment in or is a national or is domiciled in a country which is party to the Madrid Agreement or Madrid protocol or which has such an establishment in or is domiciled in, the territory of an intergovernmental organisation which is a party to the protocol or is a national of a member state of such an organisation. Whereas an application for international registration needs to be presented to the International Bureau through the office of origin and if the application complies with the applicable requirements, the "mark" is recorded in the International Register and published in the "WIPO Gazette of International Marks".

- As far as India is concerned, "The Trade Marks Act, 1999" covers law relating to trade marks to provide for registration and protection of trade marks for goods and services and for the prevention of the use of fraudulent marks. It covers wide range of spectrum like manpower

planning, procedure for and duration of Registration, effect of Registration, Assignment & transmission, Use of Trade Marks and Registered Users certification of Trade Marks, Appellate Boards, offences, penalties and procedure, powers of various Authorities under the Act etc.,

- The Trade Marks (Amendment) Act 2010 has incorporated in new chapter IV-A to bring into force the Madrid Protocol in India as well as also removed the discretion of the Registrar to extend the time for filing a notice of opposition for published applications and provided uniform time limit of four months in all cases.
- India was requiring a law for the product and process inventions. The Patent Act 1970 was enacted to consolidate the law relating to Patents and extends to whole of India. It consists of XXIII Chapters and 163 Sections, Section 3 of the Act provides, for Inventions not Patentable like an invention, the primary or intended use or commercial exploitation of which could be contrary to public order or morality, mere discovery of a scientific principles, mere arrangement or rearrangement or duplication of known devices each functioning independently of one another in a known way, method of agriculture, any process of medicinal, surgical, curative, diagnostic, therapeutic or other treatment of human beings, mathematical or business methods or algorithms, frivolous invention. Act vide sections 6 prescribes persons entitled to apply for patents. Inventions relating to atomic energy not patentable. Section 8 of the Act permit application for patent outside India by single or jointly. Section 9 of the Act prescribes submission of provisional specification and filing of complete specification within 12 months. Section 11 & 12 deals with publishing of patent and its examination at the patent office on the request of applicant or any other person. Section 14 of Act prescribes procedure

to dispose of the application. Section 15 to Section 20 enumerates power of controller. Chapter V of the Act deals with opposition proceedings to grant of patents. Chapter VI /Section 29 deals with anticipation by previous publication. Chapter VII vide section 35 prescribes for secrecy directions relating to inventions for defence purposes. Vide section 43 Controller has the right to grant or refuse patent. Patent can also be granted subject to certain conditions as enumerated in Section 47. Section 48 confers certain rights to the patentee. Terms of patent shall be twenty years in line with the provisions of section 53. Chapter IX vide section 54 to section 56 deals with patent of addition i.e., improvement in or modification of an invention. It appears from Section 66 of the Patents Act 1970 that this section provides either patent office or the Department of Industrial Policy and Promotion under Ministry of Commerce through the seal of the President of India, has the power to review grant of patents for "Revocation of patent in public interest" vide Section 159, the Central Government may, by notification in official gazette, make rules for carrying out the purpose of the Act and vide section 160, Rules to be placed before each house of Parliament.

5.1.4.7 Patenting Strategy:

Indian and US Laws are not in tandem as US Laws requires filing of a patent must be made in US, 6 months in advance before a foreign filing; while Indian law requires written permit granted by the comptroller before making any application outside India with criteria for making application in India six weeks before filing application outside India.

5.1.4.8 Confidential Information and Trade Secrets:

As India has no specific trade secrecy laws, so in defence procurement a Non-Discloser Agreement (NDA) is signed at the stage of RFQ /Tendering only and also appropriately covered under classified/ confidential clause.

5.1.5 Dealing with Government Contracts (Central / State)²³:

Government is one of largest spender in infrastructure sector, welfare measures, defence procurements etc. hence government contract is equally of great importance and it needs some arbitrary powers also. It has to maintain utmost transparency, reasonableness, public probity, fairness etc. Government has issued multiple guidelines like GFR 2017, DPP, DPM, CVC guidelines etc. But still it is a matter of deliberation.

5.1.5.1 Government Contracts:

A 'Government Contract' is a contract to which central government or state government is a party.

5.1.5.2 Position in India:

The Indian Contract Act, 1872 is silent on the format of a contract. A contract may be oral or in writing, be expressed or be implied from the circumstances of the case and the conduct of the parties.

Government Contracts are different ball game. The Central or State Government has to comply with Article 299 of the Indian Constitution.

5.1.5.3 'Contracts' and 'Government contracts':

Government Contracts has perse to comply with provisions of Article 299(1) of Indian Constitution apart from the provisions of the Indian Contract Act.

The Hon'ble Supreme court held In the case of State of Bihar vs Abdul Majeed (AIR 245, 1954) that; "It may be noted that like other contracts, a Government Contract is also governed by the Indian Contract Act, yet it is distinct a thing apart. In addition to the requirements of the Indian Contract Act such as offer, acceptance and consideration, a Government Contract has to comply with the provisions of Article 299. Thus subject to the formalities prescribed by Article 299 the contractual liability of the Central or State Government is same as that of any individual under the ordinary law of contract."

The interpretation of contract, involves no distinction between the contracts to which one of the parties is the Government and the other private parties.

There is no distinction in a contract between private parties and Government contract so far as enforceability and interpretation are concerned yet some

²³ <http://www.manupatrafast.com/articles/PopOpenArticle.aspx?ID=a4122e98-7362-4e05-87ce-bed7af3b9b2f&txtsearch=Subject:%20contract>

special privileges are accorded to the Government in the shape of special treatment under statutes of limitation.

Government gets some privilege in respect of its ability to impose liabilities with preliminary recourse to the courts and is because of doctrines of executive necessity and public interest.

5.1.5.4 Formation of Government Contracts:

Reference is made to Article 298 and Article 299 of the constitution of India which provides framework for Government contracts.

I. Article 299 provides:

"(1) All contracts made in the exercise of executive power of the union or a state shall be expressed to be made by the President or by the Governor of the State as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such person and in such manner as he may direct or authorize.

(2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purpose of any enactment relating to Government of India hereto before in force, nor shall any such contract or assurance on behalf of any of them be personally liable in respect thereof".

Three conditions have been laid down by Article 299 which the contracts made in the exercise of the executive power of the Centre or a State must fulfil to be valid. It must be expressed to be made by the president or the Governor as applicable.

Contracts made in the exercise of the executive power are to be executed on behalf of the President/Governor as the case may be and the execution must be by such person and in such manner as the President or the Governor may direct or authorize.

Hon'ble Supreme Court has held in the case of BhikarajJaipuria vs. Union of India (AIR 113, 1962) it is clear from the words "expressed to be made" and "executed" that there must be a formal written contract. Article 299(1) are mandatory in character and any contravention thereof nullifies the contract and makes it void. Article 299(1) have not been enacted for the sake of mere form but they have been enacted for safeguarding the Government against the unauthorized contracts. Provisions are embodied in the constitution on the ground of public policy and these formalities cannot be waived or dispensed with.

While a contract is made by tender and acceptance, the acceptance must be made by a duly authorized person and on behalf of the President, and a valid contract may result from correspondence.

The finalised contract complying with the Article can be enforced by or against the government and is subject to the general provisions of the contract law and its terms cannot be changed by resorting to Article 14 of the Constitution. The contract if not complying with any of the conditions of Article 299(1) of the Constitution is not binding on or enforceable by the Government, and is absolutely void, though not so for collateral purposes, and cannot be ratified. Damages cannot be claimed for breach unless the contract is complete under this Article.

These provisions are to protect the general public as represented by the government. Terms of the Article have therefore been held to be mandatory and not merely directory.

II. Implied Contract with the Government:

Article 299(1) empowers for having no implied contract between the government and another person, the reason being that if such implied contracts between the government and another person were allowed, they would in effect make Article 299(1) useless, for then a person who had a contract with the government which was not executed at all in the manner provided under Article 299(1) could get away by saying that an implied contract may be inferred on the facts and the circumstances of the particular case.

Honourable Supreme Court has held in the case of *K.P.Chowdhary vs State of Madhya Pradesh* (AIR 203, 1966) that, "In view of the provisions of Article 299(1) there is no scope for any implied contract. No contract can be implied under this Article, if the contract between the Government and a person is not in compliance with Article 299(1), it would be no contract at all and would not be enforceable as a contract either by the Government or by the person."

This strict view was justified by saying that if implied contracts between the government and other persons were allowed, they would in effect, make Article 299(1) a dead letter, for then a person who had a contract with the government which was not executed at all in the manner provided under Article 299(1) could get away by pleading that an implied contract be inferred from the facts and circumstances of the case.

Article 299 has sought to balance following motivations: the Government may be protected from unauthorized contracts and to ensure safeguard the interests of unsuspecting and unwary parties who enter into contracts with government officials without fulfilling all the formalities laid down in the Constitution.

The compliance with these strict conditions may be inequitable to private parties, and accordingly make government operations extremely difficult and inconvenient in practice. As a result, in the context of the facts of some cases, the courts have somewhat mitigated the rigours of the formalities contained in Article 299(1), and have enforced contracts even when there have not been full, but substantial, compliance with the requirements of Article 299(1).

Under Article 299(1) the contract has to be in writing. However, it may not mean that there should always be a formal legal document between the Government and the other contracting party for the purpose. The contract could emerge through correspondence or through offer and acceptance, if all conditions of Article 299(1) are fulfilled and will be called a valid contract.

III. Principles Underlying Government Contracts Reasonableness, Fairness:

Article 14 of the constitution of India projects the principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness and it may characterize every State Action, whether it be under the authority of law or in exercise of executive power without making of law. Therefore a state Act cannot arbitrarily enter into relationship, contractual or otherwise with a third party, but such action must conform to some standard or norm which is rational and non-discriminatory. Executive Government action should be informed with reason and should be free from arbitrariness.

In a democracy which is governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. All actions of the executive Government needs to be informed with reason and be free from arbitrariness. This is the very essence of the rule of law and its bare minimal requirement. It is to be noted that no difference is made whether the exercise of the power involves affection of some right or denial of some privilege.

State Actions and its instrumentality are supposed to be fair and reasonable. And are liable to be tested on the touchstone of Article 14 of the Constitution of India. The State and its instrumentality cannot function in an arbitrary manner even in the matter of entering into contracts. The decision of the State must be fair and reasonable. On entering or non-entering into contract it has restrictions on choosing the persons and entrusting the contract according to its whims and fancies. In addition to all actions, the action even in the contractual field is bound to be fair. It is a settled law that the rights and obligations arising out of the contract is regulated by the terms and conditions of the contract itself after entering into contract.

Fairness involves followings

- Administrative Authority (AA) to act in good faith.

- AA to work without bias.
- AA to apply its mind to all relevant consideration and should not be swayed by irrelevant considerations.
- AA must not act arbitrarily or capriciously.
- AA must not come to conclusion which is perverse or such that no reasonable body of persons properly informed could arrive at.
- India being a democratic society it is to be governed by Rule of law and to prevent failure of justice where the action is administrative in nature. The state to ensure legitimate claim of the citizen.

Public Interest:

Public interest involves the following:

- No absolute discretion of the executive.
- Observance of certain precepts and principles.
- It is of paramount consideration.
- Reasons for departure from the laid down rule must be retained and should not involve discriminations.
- Appearance of public justice be ensured.
- Bias Nepotism or jobbery should not appear.

Wherever there is departure from the public interest standard or norms, the court intervenes to safeguard and uphold the equality clause in accordance with Article 14 of constitution of India.

Contractual Liability:

Hon'ble president, Governor or other person executing any contract on his behalf gets immunity under Article 299(2) of the constitution of India from any personal liability in respect of Government contract. However as said above, the above immunity is personal and in no way immunizes the govt.

The courts have held that in case of Govt. deriving any benefit in an agreement without fulfilling compliance of Article 299(1) of the Constitution of India, the government is equally liable under section 70 of ICA.

Three conditions under section 70 of ICA are as follows:

- Lawfully a person should do something for another person or deliver something to him;
- He must not intend to act gratuitously while doing so; and
- Other person for whom something is done or to whom something is delivered must enjoy the benefit thereof.

These views of courts are on practicable considerations. Present government is a vast organization. Government officials have to enter into a variety of petty contracts, many a time orally or through correspondence without strictly complying the provisions under Article 299. In such a case, if what has been done is for the benefit of the government for its use and enjoyment, and is otherwise legitimate and proper, Section 70 of the Act should step in and support a claim for compensation made by the contracting parties notwithstanding the fact that the contract in question has not been made as per the requirements of Article 299. If Section 70 was to be held in applicable, it would lead to extremely unreasonable circumstances and may even hamper the working of government. Like ordinary citizens even the government should be subject to the provisions of Section 70.

A person if under a contract with a government, has obtained any benefit, he can be sued for the dues under Section 70 of the Act though the contract did not confirm to Article 299, and if the Government has made any void contracts it can recover the same under Section 65 of the Act.

Section 70 of ICA Provides for following:

- A person has done something not intending to act gratuitously and the other enjoys it. Or
- The person doing something for another cannot sue for specific performance of contract nor can he ask for damages for breach of contract owing to not having a valid contract between the parties. But the section 70 of ICA in both the situations as stated above provides for arising of liability.

Judicial Review in Contractual Matters:

Contracts of Government must meet the criteria of reasonableness, without discrimination and without unfair procedure and its actions are subject to judicial review under Article 14 of the Constitution of India.

Government cannot use its power of discretion arbitrarily and in such matters must confirm to certain standards or norms which are not irrelevant or irrational.

The principles of judicial review also include the manner in which decisions have been taken and other issues which can be classified as under:

- Illegality
- Procedural impropriety
- Irrationality
- Infirmity in the "decision making process".

Certain citations as enumerated hereunder depict Judicial view on different provisions of The Indian Contract Act, 1872:

- If an implied term is inconsistent with express term of contract where the condition of the contract is reduced in writing then such implied term is not valid. Section 2(h) of The Indian Contract Act, 1872; *V.C.K. Bus Service v. Regional Transport Authority* AIR 1957 SC 489: 1957 SCR 663: 1957 SCJ 409.
- As far as revocation of proposal under Section 5 of Indian Contract Act, 1872 is concerned, oral withdrawal of bid must be made to a Competent Authority; *S.M. LachiaSetty and Sons Ltd. v. Coffee Board* (1980) 4 SCC 636: AIR 1981 SC 162: (1981) 1 SCR 884.
- As far as Acceptance under Section 7 of Indian Contract Act, 1872 is concerned, acceptance on protest is not covered in the said section; *Leela Hotels Ltd. v. Housing and Urban Development Corporation Ltd.*, (2012) 1 SCC 302: AIR 2012 SC 903.
- Section 10 of Indian Contract Act, 1872, states what agreements are contracts and Hon'ble Courts have held in case of *State Bank of India v. MulaSahakariSakkarKarkhana Ltd.* (2006) 6 SCC 293: AIR 2007 SC 2361: 2007 AIR SCW 4182, impermissibility of import of words in contract. Similarly, in an international commercial contract, clauses cannot be subjected to strict interpretation but meaning and purpose; *Sumitomo Heavy Industries Ltd. v. Oil and Natural Gas Commission Ltd.*, (2010) 1 SCC 296; AIR 2010 SC 3400: 2010 AIR SCW 5171.
- So is the case with a contract in which authority is vested in a party to decide commission of breach by other party, by the party alleging breach, is not a valid contract in terms of Section 10 of Indian Contract Act, 1872; *J.G. Engineers v. Union of India*, (2011) 5 SCC 758: AIR 2011 SC 2477: 2011 AIR SCW 2849.
- Standard contractual terms between private parties and Government or its instrumentality will be subject to judicial review only if terms are unreasonable, unfair or irrational; *Life Insurance Corporation of India v. Consumer Education and Research Centre* (1995) 5 SCC 482; AIR 1995 SC 731.
- Effect of mistake as to law in force in India cannot make a contract voidable. In the same understanding, mistake of law of Registration as per Section 21 of Indian Contract Act, 1872 on the Assignment Deed, if any, will not make the same deed as void; *Kalyanpur Lime Works Ltd. v. State of Bihar*, AIR 1954 SC 165: 1954 SCR 958: 1954 SCJ 99.
- In accordance with citation of *AmritBanaspati Co. Ltd. v. State of Punjab*, 1992 AIR SCW 953: AIR 1992 SC 1075: (1992) 2 SCC

411. Notification by Government, if in contravention of statute and is opposed to public policy as per Section 23 of Indian Contract Act, 1872, which permitted refund of Sales Tax, as levy of Sales Tax is a constitutional mandate towards welfare of the Society and not for benefit of an individual.

- Similarly citation *HarshadChiman Lal Modi v. DLF Universal Ltd.*, (2005) 7 SCC 791: AIR 2005 SC 4446: 2005 AIR SCW 5369, it was held that conferring of jurisdiction on a Court not having jurisdiction is opposed to public policy as per Section 23 of Indian Contract Act, 1872, even if agreement arrived at between parties.
- Citation: *SureshDhanuka v. SunitaMohapatra*, (2012) 1 SCC 578: AIR 2012 SC 892 points out that use of trade mark by respondent in the course of carrying out of her trade or business in which trade, the appellant had acquired 50% interest arising out of agreement entered into with respondent, does not amount to agreement in restraint of trade within Section 27 of Indian Contract Act, 1872.
- Similarly, in case of *Gujarat Bottling Co. Ltd. v. Coca Cola Co.* (1995) 5 SCC 545: AIR 1995 SC 2372: 1995 AIR SCW 3521, it was held that restriction imposed on the franchisee stating not to 'manufacture bottle, sell, deal or otherwise be concerned with products, beverages or any other brands or trademarks/trade names during subsistence of the agreement including the time period of one year notice' in a contract cannot be called to be in restraint of trade as provisioned by Section 27 of Indian Contract Act, 1872.
- There are judicial pronouncements which have decided non-applicability of restraint of trade/lawful profession. Provision as per Section 27 cannot be brought to the aid of an employee in case of leaving of service by the employee without due service notice thereto. Wherever the provision is, either party to provide a specific period of notice in terms of condition of employment; *Managing Director, Indian Airlines v. Binod Kumar Sinha*, (2001) 8 SCC 722: AIR 2001 SC 3988: 2001 AIR SCW 3967.
- There are citations which suggest for conferring of exclusion of jurisdiction of one Court by another Court by parties to a contract in order to adjudicate dispute cannot be contemplated, as proceedings in restraint of legal proceedings as contemplated by Section 28 of the Indian Contract Act, 1872; *Cholamandalam Investments and Finance Co. Ltd. v. Radhika Synthetics*, (1996) 2 SCC 109: AIR 1996 SC 1098: 1996 AIR SCW 628.
- Similar citation is also available in respect of international agreement of trade where conferring of jurisdiction of a Court by parties to the

contract are done, is not in restraint of legal proceedings within the meaning of Section 28 of the Indian Contract Act, 1872; *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries*, (1900) 3 SCC 481: (1990) 2 UJ (SC) 47.

- There are also citation which suggest for conferring of jurisdiction on one of the Courts between parties to the agreement cannot be said to be in contravention of the provision of Section 28 of Indian Contract Act, 1872; *New Moga Transport Co. v. United India Insurance Co. Ltd.*, (2004) 4 SCC 677: AIR 2004 SC 2154: 2004 AIR SCW 2379.
- Similarly jurisdiction of Court, if backed, by unambiguous, explicit and clear terms in a contract arising out of cause of action which can fall under multiple jurisdiction of Courts cannot be in restraint of legal proceedings within the meaning of Section 28 of Indian Contract Act, 1872; *Angile Insulations v. Davy Ashmore India Ltd.*, (1995) 4 SCC 153: AIR 1995 SC 1766: 1995 AIR SCW 2763.
- There are citations, which provides for Principles of Construction, as to be made applicable in the course of interpretation of contract for the purpose of determination of obligation or intention of the parties in accordance with the provisions of Section 37 of Indian Contract Act, 1872; *Hindustan Fastners (P) Ltd. v. Nasik Workers Union*, (2007) 11 SCC 670.
- There are also citations which suggests that correspondences exchanged by the contracting parties along with their conduct, are relevant considerations as material factors for the purpose of its interpretation in respect of finding out obligations of the parties in accordance with Section 37 of Indian Contract Act, 1872; *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181: 2006 AIR SCW 3276: 2006 CLC 1122.
- There are also citations which provides for manner of assignment in terms of Section 37 of Indian Contract Act, 1872 and speaks of unilateral assignable by promisor to promisee which the promisor owed to promisee; *ICICI Bank v. APS Star Industries Ltd.*, (2010) 10 SCC 1: AIR 2011 SC 1521: 2011 (2) Civ LJ 651.
- It is also observed that termination of agreement by seller arising out of failure on his part towards obtaining permission for sale including statutory clearances within the stipulated period cannot be sustained in view of absence of any positive effort to meet the obligation by the seller in terms of Section 37 of Indian Contract Act, 1872; *Ratan Lal v. S.N. Bhalla*, (2012) 8 SCC 659: AIR 2012 SC 3094.
- A specific performance of contractual obligation of parties towards all kinds of specific performance is not provided for in Specific Relief Act,

1963. Such obligations may be in accordance with Section 37 of Indian Contract Act, 1872; *Ashok Kumar Srivastava v. National Insurance Co. Ltd.*, (1998) 4 SCC 361: AIR 1998 SC 2046: 1998 AIR SCW 1904.

- There are citations which provide for consistent readiness and willingness towards obligation of a party in line of Section 37 of Indian Contract Act, 1872, in respect of performance of contract, though the same was not capable of performance, amounts to readiness and willingness of acceptance of its part performance; *Surjit Kaur v. Naurata Singh*, 2000 AIR SCW 3261: AIR 2000 SC 2927: (2000) 7 SCC 379.
- It is also observed that Sale Officer is having an obligation in accordance with Section 37 of Indian Contract Act, 1872 and under statutory duty and responsibility towards mentioning of place and date of public auction in the Notice, for giving it a due publication according to relevant Act and Rules; *Lakshmanasami Gounder v. Commissioner of Income Tax*, (1992) 1 SCC 91: (1991) 2 SCALE 966: 1992 AIR SCW 551.
- Section 55 of the Indian Contract Act, 1872 provides for effect of failure to perform at a fixed time in contract in which time is essential and accordingly, the Court have held that failure on the part of the appellant to get the agreement renewed within the stipulated period of 3 years amounts to non-compliance of essence of time as per Section 55, resulted in denial of relief sought by the appellant for non-renewal of agreement; *Hardesh Ores (P) Ltd. v. Hede and Co.*, (2007) 5 SCC 614.
- While Section 56 deals with agreements in respect of Impossible Act, it has been held by the Court that in case of enforceable of performance of agreement to sell joint family property within the meaning of Section 56 of Indian Contract Act, 1872, by the plaintiff against the Karta alone of the said property, in view of absence of willingness on the part of plaintiff towards payment of entire consideration, cannot be allowed; *Balmukand v. KamlaWati*, (1964) 6 SCR 321: AIR 1964 SC 1385: (1964) 1 SCWR 494.
- As far as effect of novation, variation and alteration of contract is concerned, the Courts have held that unilateral alteration of the contract carried out by the respondents cannot be permitted in view of absence of express authorisation in the contract document even if appellant has signed the letter with the term 'modified', which term is intended for the terms and conditions contained in the agreement;

Build India Construction System v. Union of India, (2002) 5 SCC 433: AIR 2002 SC 2437: 2002 AIR SCW 2676.

- It has been also held by the Court that any change or variation of terms of contract cannot be effected without mutual agreement of both the parties; *Polymat India (P) Ltd. v. National Insurance Co. Ltd.*, (2005) 9 SCC 174: AIR 2005 SC 286: 2004 AIR SCW 6924.
- The Courts have held the distinction between 'waiver' and 'estoppel' in accordance with of Section 63 of Indian Contract Act, 1872, is that 'estoppel' is a rule of action while 'waiver' may contain cause of action as it is contractual; *Krishna Bahadur v. Purna Theatre*, (2004) 8 SCC 29: AIR 2004 SC 4282: 2004 AIR SCW 4758.
- There are certain obligations of persons enjoying the benefit 'non-gratuitous act' in terms of Section 70 of Indian Contract Act, 1872, which means an act done by one party for another which were voluntarily accepted by another party without any subsisting contract thereto; *State of West Bengal v. B.K. Mondal*, AIR 1962 SC 779: (1962) 2 SCA 375.
- The Court have held that sufferance due to indirect or remote cause is not subject to payment of compensation as per Section 73 for breach of contract, but what can be paid is only towards direct consequences flowing from such breach; *PannalalJankidas v. Mohanlal*, AIR 1951 SC 144: (1950) SCR 979: 1951 SCJ 149.
- The Court have also held in case of substantial variance between particulars of timbers as to its quality and quantity available at site and those mentioned at the time of Auction Sale of Forest Coupes, giving rise to breach of contract but appellant was barred from claim of compensation thereto, in view of existence of specific clause in the contract prohibiting such a claim; *Syed IsrarMasood v. State of Madhya Pradesh*, (1981) 4 SCC 289: AIR 1984 SC 2010.
- The Court have held that claim for damages in terms of Section 73 of Indian Contract Act, 1872, need not be based on invoice, but can also made in claims through correspondence or in meetings; *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181: 2006 AIR SCW 3276: 2006 CLC 1122.
- Section 74 of Indian Contract Act, 1872, deals with compensation for breach of contract where penalty is stipulated for. Courts have held that forfeiture of security money deposited by the respondent by way of penalty within the frame work of Section 74 cannot be permitted on the ground of supply of stipulated quantity of goods at the same rate by the respondents themselves thereby resulting in no loss to the appellants following commission of breach of contract by the

respondents; *Union of India v. Rampur Distillery and Chemical Co. Ltd.*, (1973) 1 SCC 649: AIR 1973 SC 1098: (1973) 1 SCWR 383.

- The Court have also held that unless a special equities in favour of plaintiff is shown, or irretrievable justice is made out, imposition of injunction against enforcement of bank guarantee in terms of Section 126 of Indian Contract Act, 1872, cannot be ordinarily be permitted; *State Trading Corporation of India v. Jainsons Clothing Corporation*, (1994) 6 SCC 597: AIR 1994 SC 2778: 1994 AIR SCW 4331.
- While Section 196 of Indian Contract Act, 1872, deals with right of person as to Acts done for him without his authority, the Courts have held where contracts are void *ab initio*, then such contract cannot be permitted to be ratified in terms of Section 196 of Indian Contract Act, 1872; *Mulamchand v. State of Madhya Pradesh*, AIR 1968 SC 1218: (1968) 3 SCR 214: (1968) 2 SCWR 397.
- Courts have also held that absence of express ratification as provided in Section 197 of Indian Contract Act, 1872, the minutes of the earlier meeting is not ratified at a subsequent meeting does not render the minutes of the earlier meeting as invalid; *Kerala State Electricity Board v. Hindustan Construction Co. Ltd.*, (2006) 12 SCC 500.
- While Section 230 deals with Agent cannot personally enforce nor be bound by, contracts on behalf of Principal. But the Courts have held where suit of proceedings against agent when principal unknown in terms of Section 230 of Indian Contract Act, 1872; then such suit can be maintained; *National Textile Corporation Ltd. v. Nareshkumar Badrikumar Jagad*, (2011) 12 SCC 695.

5.1.6 Short Comings of Indian Contract Act 1872

5.1.6.1 Introduction

5.1.6.2 Grey Areas of Indian Contract Act 1872 (ICA) Provisions

- **Product Liability Vs ICA**
 - **Conditions and Warranties**
 - **Remedies for breach of warranty**
 - **Buyer's right to recover interest**

5.1.6.3 Information Technology (IT) Act 2002 – International Applicability

- **Relevant IT Act provisions**
- **Legal Validity of Electronic Contracts**
- **Usage of Digital Signature**

5.1.6.4 Enforceability of Non-Compete Clause in India

5.1.6 Short Comings of Indian Contract Act 1872

5.1.6.1 Introduction²⁴:

The enactment of Indian Contract Act, 1872 (herein after referred to as ICA) happened on 25th April, 1872 and subsequently became enforceable from the first day of September 1872. The India Contract Act is based on the English Law. The ICA brings within its ambit the contractual rights that have been granted to the citizens of India, endowing rights, duties and obligations on the contracting parties to help them to successfully conclude regular business transactions including the businesses of multinational companies.

The ICA provides the basic framework the way we enter into a contract, execute a contract and implement provisions of a contract and effects of breach of a contract.

The ICA was enacted in the exercise of the power by the Indian legislature to govern matters of contract. However, if inconsistent with fundamental rights, would be void under Article 13 of the Constitution.

We need to appreciate the requirements of modern consumers and try to bring co-relation with law of contracts unlike the classical model which focuses on procedural justice at the expense of substantive justice and its inability to reflect the day to day world of contracts. However, this aspect can be safely interpreted by the Courts, as they are guided by the wisdom of the learned Judges.

In case of conflict between the preamble & section, it is the section that prevails. The preamble cannot limit or change the plain words of a statutory provision. A litigant cannot dispute the recitals in the preamble. The terms of contract cannot over-ride the statutory provisions. Generally the contract will be governed by the law of country where it is made but if contract is prepared in one country and is performed partly or wholly in another country, the applicable law may be of the law of the country where the contract is performed. However where the parties have expressed themselves, the intension, so expressed over-rides any presumptions.

²⁴[lawteacher.net / free-law-essays/contract-law/history-of-the-indian-contract-act-1872-contract-lawessay](http://lawteacher.net/free-law-essays/contract-law/history-of-the-indian-contract-act-1872-contract-lawessay)

5.1.6.2 Grey Areas of ICA Provisions:

The ICA does not contain basket provisions which can provide complete coverage of the risks in changing/expanding business scenario. Thus, in order to mitigate the various risks we need to incorporate several clauses from different sources of laws.

- **Product Liability²⁵ Vs ICA :**

The Indian Contract Act is silent on product liability. The product liability laws are basically to keep safe / provide safeguard / to defend from dangerous or defective products. The manufacturers, distributors and retailers are supposed to put in the market non-dangerous or defective products. The following laws generally govern product liability:

- a. The Consumer Protection Act 1986
- b. The Sales Of Goods Act 1930
- c. MRTP Act 1969
- d. The Law of torts
- e. Indian Penal Code
- f. Prevention Of Food Adulteration Act 1954

- **Conditions and Warranties:**

In accordance with Section 12 of the Sale of Goods Act, a buyer is having the right to repudiate the contract and sue for damages in case of breach of a condition, whether relating to quantity, quality or description. Breach of warranty, on the other hand, entitles the buyer, to sue for damages but not repudiate the contract. Offer of a different thing from what was contracted for is not a breach of one term, but a total failure to perform the contract.

- **Remedies for breach of warranty:**

While a breach of warranty does not entitle the buyer to reject the goods and it only give remedy as stipulated in Section 59 of the Sale of Goods Act., namely to set up against the seller the breach of warranty in diminution or extinction of the price or to sue the seller for damages for breach of warranty but as per

²⁵ Article on Product liability In India by Karnik Seth, Seth associates.

Section 13 of the Act, a buyer may treat a breach of condition as a breach of warranty and claim damages instead of rejecting the goods²⁶.

○ **Buyer's right to recover interest:**

Buyer entitlement is limited to recover interest when he is entitled to recover the purchase price. Buyer cannot recover interest when his only remedy is to sue for damages, for breach of warranty even though damages may be sufficient to extinguish the price, and this must be ascertained by reference to the market price at that time, whether it has fallen or arisen since the date of the contract. However, the buyer has a duty to act reasonably in mitigating the loss or damage.

5.1.6.3 Information Technology Act – International Applicability²⁷:

Information Technology Act 2000 (IT ACT) enacted from 17 October 2000 is to provide legal reorganization apart from security to the transactions executed electronically. The basis of this law is UNCITRAL's MODEL LAW. Several deficiencies were found immediately after the enactment of IT ACT. It included departure in many respect from the spirit of model law, important provisions were also missing.

The IT Amendment Act 2008 came into effect from 29th October 2009 with following variations:

- (1) To bring into coherence protection of personal data and information and implementation of IT enabled services including e-governance, e-commerce and e-transactions with the provisions of the IT Act.
- (2) Incorporation of additional penal provisions in the IT Act, IPC, Indian Evidence Act and the Code of Criminal Procedure to provide provisions for new forms of crimes

²⁶ Commissioner of Income tax v prafullakumarmallik AIR 1969 Orissa 187, Bengal corppvt ltd v the commissioner of port of Calcutta AIR 1971 Cal 357

²⁷ Emerging Legal Issues of E-Commerce IT ACT 2008, an Article by Farooq A. Mir & M. Tariq Banday, University of Kashmir, India.

including publishing illegal materials in electronic form, video messages and breach of confidentiality and leakage of data by intermediary, e-commerce frauds like personation commonly known as phishing, identity theft and illegal messages through communication services.

- (3) To incorporate alternative technology of electronic signatures for bringing harmonization with the Model Law on Electronic Signatures adopted by the UNCITRAL and to fall in line with the resolution No.56/80, dated 12th December 2001 recommending that all states accord favourable consideration to the said Model law on Electronic Signatures.
- (4) To permit service providers to set up, maintain and upgrade the computerized facilities and also collect, retain and appropriate service charges for providing such services at such scale as may be provided by the Central Government or the State Government.

There is a need for an analytical evaluation to identify the issues raised by the IT relating to contract formation, impact of the IT Act on the principles relating to contract formation provided in the Contract Act, and impact of non-inclusion of the principles governing e-commerce, provided in the Model Law but not reflected in the IT Act.

- **Relevant IT Act provisions:**

As far as authentication of electronic records by affixing a digital signature is concerned, it is permitted by IT Act.

The Information Technology Act, 2000 vide chapter IV & sections 11, 12 and 13 provides for Attribution, Acknowledgment and Dispatch of Electronic Records.

- **Legal Validity of Electronic Contracts²⁸:**

IT Act 2000 was to legalize e-commerce. This has been repeated in the objectives of the IT (Amendment) Act, 2008 also. While it was observed that there was a Lack of express provision in the original IT Act validating contracts executed electronically, but Model Law was having such express provision. This omission has happened in original IT Act, 2000.

²⁸Farooq A. Mir & M. Tariq Banday - Emerging Legal Issues of E-Commerce

Now the IT (Amendment) Act 2008 has explicitly clarified that where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form or by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

The incorporation of above provision clarifies a plain statement to the effect that electronic contracts are legally valid without further spelling out attendant principles of contract formation which raise many questions than the answers provided by this amendment.

- **Usage of Digital Signature:**

In e-Governance (Guidelines issued by Department of Information Technology, Government of India, December 2010)

Indian IT Act 2000 was enacted to promote the use of Digital Signatures for authentication in e-commerce and e-governance. To facilitate the same the Office of Controller of Certifying Authorities (CCA) was established during the year 2000. In order to issue Digital Signature Certificates under the said Act, the office of Controller of Certifying Authorities (CCA) licences Certifying Authorities (CA). Section-5 of the Act provides legal back up to Digital signature based on asymmetric cryptosystems. This has led to the acceptance of Digital signature at par with hand-written signatures and the Electronic documents that have been digitally signed are treated at par with Paper based documents. The term Electronic signatures have been introduced in IT Amendment Act in 2008. This Digital signature certificate proves identity electronically. Some of the e-governance applications already using the Digital Signatures are like Income Tax e-filing, IRCTC, DGFT, RBI Applications (SFMS), e-Procurement, e-Office etc.

Conclusion:

It can be concluded that E-commerce is having much acceptability throughout the globe because of its ease, flexibility and speed. It is to be kept in mind that Internet is essentially global in character and the legal issues raised by its use have global impacts. No doubt it is relevant to mention here that e-commerce will not flourish in an uncertain legal environment. Legal principles need to be well formulated. Thus, the IT Act has to be given wider interpretation to be in harmony with the international standards/laws.

Notwithstanding the original IT Act had many questionable provisions, many areas were left uncovered and many grey areas were there; however, IT Act amended in 2008 brought major changes in the IT Act. No doubt many grey areas still to be addressed. The issue relating to common law principles relating to contracts evolved by the court over a period of time and their applicability to electronic contracts has to be determined. The Contract Act is still continue to be the fundamental law for contract formation. In case of inconsistencies with the provision of Contract Act, then only if express provision has been provided in the IT Act, then only the IT Act will apply.

5.1.6.4 Enforceability of Non-Compete Clause in India²⁹:

Non-compete Provisions: It is to be noted that in an agreement involving Restrictions pertaining to exclusivity which are operational during the period of the agreement are valid. Section 27 of the Indian Contract Act, 1872 prohibits any post termination restrictions of a non-compete nature which restrain from exercising a lawful profession, trade or business of any kind. The contracts of this nature are not enforceable, void and against the public policy.

The Indian Contract Act, 1872, deals with the legality of such agreements as stated above and also provides that an agreement, which restrains any one from carrying on a lawful profession, trade or business, is void to that extent. The Indian Contract Act 1872 vide Section 27 clarifies Agreement in restraint of trade & its applicability. It is a common culture in competitive industry to providing for restraint on employment in the employment contracts of the employees in the form of confidentiality requirement or in the form of restraint on employment with competitors.

Hence it can be summarized that the non- compete covenants are usually opposed to freedom of contract and are likely to be easily charged as agreement in restraint of trade.

Conclusion:

Thus, the following points may be considered:

1. When buyer purchases a business (and along with it, the goodwill), reasonable restraints may be permitted.

²⁹ Enforceability of Non-compete Clause In India An Article by Monica lakhanpal, <http://www.jdsupra.com/legalnews/enforceability-of-non-compete-clause-in-i-24814/>

2. Similarly a shareholder can be prevented from setting up a competing business (as it is reasonable restriction) in accordance with shareholder agreement.
3. Immediately after the termination of the shareholders' agreement, a shareholder may be prevented from setting up a competing business only if it would cause irreparable injury to the existing business.

Hence it may be summarised that while restraining covenants would be valid during the subsistence of the agreement, however, only in exceptional circumstances depending upon the facts and merits of each case can a post termination restrictive covenant be held to be valid.

5.2 ARBITRATION / DISPUTE RESOLUTION ISSUES

- **5.2.1 Relief under Arbitration and Conciliation Act 1996 Vis A Vis the Jurisdiction of Specialised Tribunals**
- **5.2.2 International Commercial Arbitration**
 - **What Is International Commercial Arbitration**
 - **International**
 - **Commercial**
 - **Choosing Different Dispute Resolution Methods**
 - **Important Aspects to Consider When Negotiating and Drafting an International Arbitration Clause**
 - **Institutional vs. *Ad Hoc* Arbitration**
 - **Seat of the Arbitration**
 - **Applicable Substantive Law**
 - **Selection of Arbitrators**
 - **Language of the Arbitration**
 - **Finality of the Arbitral Award**
 - **Enforcement of Foreign Awards**

5.2.1 Relief under Arbitration and Conciliation Act 1996 Vis A Vis the Jurisdiction of Specialised Tribunals³⁰:

Introduction:

Arbitration proceedings is a manner of dispute resolution which is allowed by the state, possibly desired, but not managed and supervised by the state. Arbitration seems to be desired as far as the legislature expresses his wish to create an attractive forum for arbitration. This implies that positive efforts are expected to result from the activities of private dispute resolution. There is another way to look at it on the part of litigants as Arbitration provides them the aspect of confidentiality and greater flexibility compared to state litigation. We also accept the fact that not always arbitration procedures are not necessarily cheap and fast. Mr. Mankowski has well described the interest of the business world.

The state law does not provide the appropriate environment for the specific needs of international trade dispute settlement. The deficiencies are observed in the lack of recognition of the fundamental difference between domestic and international commercial contracts regarding the subject matter on the part of national legislators. The other lacunae is in the fact that the original source of contract law (partly autonomy and freedom of contract) is not recognised by many practitioners within the domestic legal services. State legislators allow arbitration proceedings by offering state proceedings to help with the enforcement of awards. The enhanced compliance rate of arbitration reflects the success of this policy. It helps to point out that deregulation and self governance are what is needed in international and also domestic commercial dispute settlements.

Indian government has formed several specialized tribunals to help in ease of doing business. But where the agreement is having a separate clause on Arbitration as their dispute resolution mechanism; then the issue is a matter of interpretation by various courts on various occasions. This leads to jurisdictional interpretation. In order to understand the arbitration and the intent of the legislature for such enactment, one can refer to the preamble of the Act.

The preamble of the Arbitration Act, 1996 reads as follows:

30 An Article by Karan GandhiSingh& Associates

"An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto.

WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985:

AND WHEREAS the General Assembly of the United Nations has recommended that all countries give due consideration to the said Model Law, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice;

AND WHEREAS the UNCITRAL has adopted the UNCITRAL Conciliation Rules in 1980;

AND WHEREAS the General Assembly of the United Nations has recommended the use of the said Rules in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation;

AND WHEREAS the said Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations;

AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules;"

In International Commercial trade parties are willing to settle the issue generally amicably. While Black's law Dictionary explains "Arbitration" as a method of resolution of dispute which involve one or more neutral third parties, so also preamble to the Arbitration Act 1996 speaks Arbitration is a "right in personam " which builds two parties agreeing to go for such mechanism for dispute resolution. Since court proceedings are costly and long drawn, hence parties in Commercial trade generally opt for Arbitration which is out of Court affair and results into an efficient settlement of disputes, through a process of conciliation.

Code of civil Procedure vide amendment in the year 2002, section 89 provides for Alternate Dispute Resolution. This relief is available to the parties in Disputes to refer the matter to Lok Adalat, Conciliation, Mediation and Arbitration even when the matter is pending in the court.

Important feature of arbitration is that parties to the dispute voluntarily agree to get the disputes decided by one or more persons, rather than the Court. Though the Indian Arbitration and Conciliation Act, 1996 does not contain a definition of "arbitration", Statement of Objects and Reasons contained therein gives an indication of the general principles on which arbitration is founded. These are:

- The object of arbitration is to ensure a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.
- The parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest.
- Intervention of the courts should be restricted".

Thus, the Courts have not been the only forum for conflict resolutions.

1. In the absence of Arbitration agreement in the Contract there is no provision in the Arbitration and Conciliation Act, 1996 whereby court may refer the matter to Arbitration :-

P. AnandGajapathi and others Vs P.V.G Raju and others, (2000) 4 SCC 539

2. The conditions which are required to be satisfied under Section 8(1) & 8(2) of the Arbitration and Conciliation Act, 1996 before the court can exercise its powers are:-

- i. There is an arbitration agreement;
- ii. A party to the agreement brings an action in the court against the other party;
- iii. Subject-matter of the action is the same as the subject-matter of the Arbitration Agreement;
- iv. The other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

3. Normally, arbitration takes place between the persons who have, from the outset, been parties to both the arbitration agreement as well as the substantive contract underlying that agreement. But, it does occasionally happen that the claim is made against or by someone who is not originally named as a party. This may create some difficult situations, but this is not an

absolute obstruction to law or the arbitration agreement. Arbitration, thus, can be possible between a signatory to an arbitration agreement and a third party.

4. The arbitrator being a creature of the agreement between the parties, has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. However, it must be clarified that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error.

In the case of Joint Venture Agreement (JVA) involving some dispute but having a clause of Arbitration, the Hon'ble Delhi High Court in SANCORP CONFECTIONARY PRIVATE LIMITED & ANOTHER VS M/S GUMLINK A/S, Case No.CS (OS) 2400/2012 held as follows:-

- i. In fact, prima facie it appears to me that the scope of the arbitration agreement contained in the JVA extends to the current disputes between the parties. No irreparable loss would be caused to the plaintiffs in case the defendant is not restrained from continuing with the arbitration to in as much they have an opportunity to establish before the Arbitrator that the current disputes between the parties are beyond the scope of the arbitration clause contained in the JVA. In case their plea is not accepted by the Arbitrator, they would be entitled to raise plea when execution of the award which may be passed against them, is sought.
 - ii. Hon'ble Supreme Court in ANANTHESH BHAKTA REPRESENTED BY MOTHER USHAA.BHAKTA & ORS.VS NAYANA S.BHAKTA & ORS. Civil Appeal No.10837 of 2016 has held:
 - a. When the partners and those who claim through partners agreed to get the dispute settled by arbitration, it is not open for the appellants to contend that partnership being unregistered partnership, the dispute cannot be referred".
5. An arbitrator is a creature of the contract and must act within the four corners of the agreement. He cannot rewrite, modify or amend the contract between the parties.
 - i. Food Corporation of India v. Chandu Construction;(2007) 4 SCC 697
 - ii. Govt. of A.P. v. PV Subba Naidu; MANU/AP/0329/1989.

The arbitrator being a creature of the agreement between the parties, has to operate within the four corners of the agreement and if he ignores the specific terms of the contract, it would be a question of jurisdictional error on the face of the award, falling within the ambit of legal misconduct which could be corrected by the court. However, it must be clarified that if the arbitrator commits an error in the construction of contract, that is an error within his jurisdiction. But, if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error.

6. Disputes properly brought under Section 397/398 of the Companies Act, 1956 (241 of the Companies Act, 2013) are not arbitrable in nature.

i. Rakesh Malhotra v. Rajinder Kumar Malhotra; 2014 SCC OnLine Bom 1146.

ii. Avigo PE Investments Pvt. Ltd. v. Tecpro Engineers Ltd.; 2016 SCC OnLine CLB 18

7. An arbitration clause in an agreement between the parties cannot bar the statutory remedy available under Sections 397/398 of the Companies Act, 1956 (Section 241 of the Companies Act, 2013) and any agreement that ousts statutory jurisdiction of the CLB (NCLT) would be void in view of Section 9 of the 1956 Act (Section 6 of the Companies Act, 2013 is the equivalent provision)

8. An arbitrator is not on higher footing than a Court. If a dispute goes before the Court, the Court would have to adjudicate the dispute in accordance with the terms and conditions of the contract, unless, of course, it is found to be invalid for one or the other reason. Merely because a dispute is referred to arbitrators in terms of the agreement, all other terms of the agreement do not become extinct. An arbitrator cannot award any amount, he likes, either on grounds of mercy, kindness, or otherwise. If he is permitted to do so, the very sanctity of contract disappears. The contract between the parties becomes meaningless and irrelevant. His award must abide by the general law of the land.

Conclusion:

Hence it can be concluded that disputes between the parties in the nature of right in personam, if it has been appropriately covered by a clause on Arbitration in accordance with Arbitration Act 1996 (duly amended in 2015) then the dispute resolution mechanism will be as per agreement clause amongst the parties. No doubt the need will be to understand the difference between rights in rem vs. right in personam to decide the forum for adjudication.

5.2.2 International Commercial Arbitration:

- **What Is International Commercial Arbitration?**

“International”

Resolution of cross-border transaction disputes are covered under “International Arbitration”. In terms of Article 1(3) of the *1985 United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration* (the Model Law) depicts that an arbitration is international if:

- The parties are having their places of business in different states; or
- Major part of performance of the contract or, the subject matter of the dispute or the place of Arbitration is most closely connected, is in another state.

“Commercial”

As per Art 1 of the Model Law, “Commercial” refers to the law “applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States”. As also followings:

“The term commercial include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods and services; distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business corporation; carriage of goods or passengers by air, sea, rail or road”.

- **Choosing Different Dispute Resolution Methods:**

ADR are multiples and is a means to alternative to court adjudication. Some of ADR's are enumerated here under:

- Certification by an engineer
- Expert determination
- The use of Dispute Boards
- Dispute Adjudication Boards
- Dispute Review Boards
- Mediation
- Arbitration.

“Certification by contract engineer/superintendent is seen to be a partial player whose decisions will tend towards or be in favour of the employer/principal.

An Expert selected by parties in advance comes under the category of “Expert Determination” the expert does not totally rely on submissions made by the parties but he investigates and reports on the issue. This is generally binding and cannot be appealed.

An independent committee comprising of one chosen by each party and the third chosen but two nominees is called a “Dispute Boards”. This committee is put in place from the commencement of the project.

DRB (Dispute Review Boards) makes non-binding recommendation and is a roving band of reporters charged with responsibility of acting impartially and independently.

DAB (Dispute Adjudication Boards) is more formal and structured than DRB and decision is binding unless challenged by a notice of Dissatisfaction. Both the decisions of DRB and DAB are admitted before an Arbitrator, if disputes move to that stage.

In case of international commercial dispute third party selected to mediate dispute is supposed to have an expert knowledge of the concerned Industry. Terms of resolution are agreed by parties. Mediation involves neutral third party assistance.

“Arbitration” is seen to have following advantage apart from others:

- Involvement of less time & less costs than litigation.
- Guaranteed to reach a binding determination.
- Maintaining confidentiality.
- Flexibility to decide on the procedure.

- **Important Aspects to Consider When Negotiating and Drafting an International Arbitration Clause:**

While this has got worldwide acceptance but care needs to be taken while drafting the clause.

A.) Institutional vs. *Ad Hoc* Arbitration:

It is suggested that, institutional arbitration is strongly recommended in large or complex arbitrations, or whenever a high degree of predictability and dependability is required – such as where one or both parties are relatively unsophisticated and need institutional support, or where the parties do not (or may not, when a dispute arises) have a good or longstanding relationship, are not familiar with one another, and/or have a high risk of non-cooperation during the proceedings.

While *ad-hoc* arbitration is recommended in arbitrations involving smaller or simpler matters),

- It should spell out the important procedural rules that will govern the arbitration, or
- To Submit the procedural aspects of the arbitration
- Where Parties who choose *ad-hoc* arbitration (to govern the procedural aspects of their disputes) often select the well-known and accepted rules of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law ("UNCITRAL Rules or UNCITRAL Model Law").

Examples of some domestic and international arbitration institutions commonly used are as follows:

- International Chamber of Commerce ("ICC")
- American Arbitration Association ("AAA")
- International Centre for the Settlement of Investment Disputes ("ICSID")
- London Court of International Arbitration ("LCIA")
- Indian Centre for Arbitration & Dispute Resolution ("ICADR")
- Hong Kong International Arbitration Centre (HKIAC)

B.) Seat of the Arbitration:

"Seat" or "Forum" where the arbitration shall take place and where the award must be issued is one of the most crucial elements of an arbitration clause. Because the law of the forum will either determine or materially affect a number of all-important issues, such as the procedural rules that may apply to the arbitration, under what circumstances (as how the award will be enforced) and to what extent the award may be reviewed and vacated, the degree of the local courts' intervention in the arbitration, and the availability of discovery and other evidentiary matters.

When selecting the place of arbitration Considered in a transaction involving Indian parties followings issues are considered:

- (1) The important determining factor is the place of arbitration be within the territory of a party to such Convention in order to facilitate enforcement of the award;
- (2) Jurisdictions allowing broad judicial intervention in arbitration proceedings, or providing for broad grounds for vacating the award be avoided.
- (3) Geographically convenient place and provide adequate facilities, services and support;

(4) To assess the availability of discovery and testimonial evidence pursuant to the laws of the place of arbitration; and

(5) To consider whether the forum's laws applicable to the arbitration contain some procedural safeguards such as the right to consolidate separate arbitration proceedings if necessary, the availability of injunctions or provisional remedies, and perhaps the arbitrators ability to decide questions concerning their own jurisdiction.

C.) Applicable Substantive Law:

Selection of substantive body of law governing the disputes that may arise under the contract is an essential element of every arbitration agreement, as it will determine the merits of the dispute and the contractual rights and obligations of the parties. Generally choice of law is not included in the arbitration clause itself but constitutes a separate provision of the agreement. The main considerations in choosing the substantive law applicable to a contract include the parties' familiarity with the relevant law.

Generally it has been seen that during the course of negotiation of the contract, the respective parties stresses for their domestic laws governing the relevant agreements. In Indian parties also ask for the same initially. But foreign parties are apprehensive of Indian legal system which relatively takes longer period in arriving at finality. Hence, finally they agree for a third country law applicability.

D.) Selection of Arbitrators:

While method of selection of arbitrators do not vary significantly depending on the geography of the transaction (India or other country) but suggestions are:

- (1) Incorporate the number of arbitrators in the arbitration clause;
- (2) Three arbitrators are suggested for high value matters and one arbitrator is suggested for small value matter.
- (3) If there are only two parties only to an agreement and a three arbitrator tribunal is provided, it may be useful (and is in fact quite common) for each party to appoint one arbitrator and for the third one to be nominated by the party-appointed arbitrators or by the relevant appointing authority;
- (4) In case of multi-party Arbitration all three arbitrators shall be appointed by the Arbitration Institution or designated Authority.

It is also seen in in case of Service Industry to opt for a professional from the Industry with neutral nationality.

E.) Language of the Arbitration:

If the parties to a transaction speak different languages, and if the seat of arbitration is in a country with a different language, the arbitration clause should specify the language in which the arbitration shall be conducted. While choosing the language of the arbitration, the parties should consider, among other things, the authoritative language of the relevant contracts and other significant documents; the language spoken by those individuals who will serve as key witnesses in the arbitration; the substantive law governing the contracts; the language of the place of arbitration; and the availability of arbitrators and local counsel who are fluent in the relevant language.

The parties should try to foresee the usually high expenses incurred in translations and interpretation of documents, testimony and proceedings, and determine who will bear these costs. Language-related issues other than translations and interpretations can also be remarkably costly to the parties.

F.) Finality of the Arbitral Award:

The statement of Arbitration clause speaks that the arbitration award shall be final, binding and not subject to any recourse or appeal by the parties. It would be welcome step if the finality of the award as contemplated by the relevant institutional rules adopted by the parties or in the procedural laws of the place of arbitration, contracting parties should expressly provide such statement in the arbitration clause for greater certainty. Where the laws of the country where arbitration takes place otherwise allow parties to appeal an arbitral award issued in that country it is necessary to put a finality clause.

Right of appeal is provided in a few countries in respect of arbitral awards. Then, the right to appeal may generally be waived by the parties in the arbitration clause.

The vacation of award may be done only by the courts of the country where the award is issued, as also pursuant to the arbitration laws of such country. The grounds for vacating an award are a major consideration when deciding the place of arbitration, as the laws of place of Arbitration will govern the Award.

Indian Law differs as to the grounds for nullifying arbitral awards. Generally Indian courts will vacate an arbitral award issued in their respective countries if:

- (a) A proof is furnished by the party--
 - (i.) he/ it was under some incapacity, or

(ii.) The clause on arbitration is not valid under the law to which the parties have subjected it. Or

(iii.) Proper notice was not given of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iv.) The arbitral award deals with a dispute outside its purview,

(v.) The arbitral tribunal composition or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate.

(b) Findings by the court that—

The subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

The arbitral award is in conflict with the public policy of India.

- **Enforcement of Foreign Awards:**

Since most of the countries have signed New York convention, normally, New York convention awards are enforceable in India.

In order to enforce a foreign award, party has to produce the arbitral award and agreement of arbitration [original or its certified copy] to the district court having jurisdiction over the subject matter of the award, [Section 47]. The court can refuse enforcement only in cases specified in section 48. Otherwise, these awards are enforceable through court as if it is a decree of the court [Section 49]. If the court declines to enforce the arbitral award, appeal can be made to the court where appeal normally lies from the district court. However, no further appeal can be made (except appeal to Supreme Court) - (section 50). [Probably, the aggrieved party may be able to approach International Court of Justice, as the convention is an international convention, signed by many of the member countries].

One advantage of foreign award, according to foreign parties, is that Indian courts come into picture only at the time of implementation of award. The courts can refuse to implement the award only on limited grounds.

5.3 Non-Disclosure Agreement – Applicability of Laws of Different Countries

5.3.1 Introduction

- **What are NDAs and when should they be used.**
- **Which are the commonly used provisions in NDAs.**
- **Restricting the use of the information to a specific purpose**
- **Limiting the disclosure of information**
- **Listing the information not covered by confidentiality obligations**
- **Defining the length of the obligation to keep confidence**
- **Determining the choice of law and jurisdiction**
- **Limitations and risks**

5.3.2 What is a 'Trade Secret'

- **Keep it Secret**
- **Duration of Trade Secret Protection**
- **Managing One's Trade Secrets**
- **Employee Management**
- **Trade Secrets and Other Forms of IPR**

5.3.3 Trade Secrets in Different ASEAN Member Countries

- **How long does legal protection last in ASEAN countries**

5.3.1 Introduction³¹:

Now a days it is prevalent in most of trade as also in Defence procurements to have confidentiality agreements. The resultant “high-tech” revolution, the short life span of new technology and products, and the perceived inadequacies of patent and copyright protection, in recent years have impacted an exponential increase in the use of trade secret principles to protect technology or confidential information. Recent trend reflects that virtually every employee of a technology-related company, and many consultants, independent contractors, licensees, partners and joint ventures, have signed confidentiality agreements. These types of agreements are in use outside the high tech field to protect confidential business information, such as customer lists, marketing plans and financial data. One can analyse the principal elements of such agreements both from the point of view of the owner of confidential information and from the point of view of the recipient.

There are varieties of names for confidentiality agreements and may be called “Non-Disclosure Agreements,” or “Trade Secret Agreements,” or “Technology Protection Agreements”, Employment Agreements, Technology Transfer or Licensing Agreements are also under the broad category of confidentiality Agreements.

- **What are NDAs and when should they be used³²?**

Modern trend for last decade reflects that in Defence procurement NDA’s (Non-Disclosure Agreements) are one of the first step in various development contract and are legally binding contracts establishing the conditions under which one party (the disclosing party) discloses information in confidence to another party (the receiving party). It is observed that, NDA’s may be “one-way” (also known as unilateral) with one party disclosing information and other party receiving information or “two-way” (also known as bilateral or mutual) when there is a bilateral disclosure. If the two parties wish to disclose information instead of relying on a “two-way” agreement, it is also possible to sign two unilateral NDA’s, which may sometimes facilitate negotiations on the drafting of such an agreement. Multilateral NDA’s, with more than two parties involved is found in DPSU’s when new manufacturing or development program emerges.

³¹ An Article by Jere M. Webb, A Practitioner’s Guide to Confidentiality Agreements

³² An Article published in European IPR Helpdesk c/o infeuurope S.A. 62, rue Charles Martel L-2134, Luxembourg

Information can be transmitted in these agreements, such as ideas, know-how, description of inventions, chemical formulas, research or business information and negotiations, among others. The disclosed information is valuable for the disclosing party to the extent that it must be kept away from the public domain.

It is better to conclude an NDA before engaging in negotiations for license agreements and R&D projects or whenever one needs to show one's innovative ideas, products or technologies to potential business partners or other persons. Confidentiality obligations may also be part of a larger agreement, such as license agreements, consortium agreements and employment contracts.

- **Which are the commonly used provisions in NDAs?**

Since NDA should be adapted to the concrete circumstances of the case and the applicable law.

Defining what is meant by **“confidential information”**:

Definition of terminology is the common feature of any agreement naturally NDA cannot be exception. NDAs will have a definition of “confidential information”, which often covers determined information and documents that the parties have identified beforehand. It is not always possible to define in solid terms such information, in particular during R&D projects and other long-term partnerships. It requires to protect all the information regardless of whether it is in written, oral or electronic format; although, one may find it more appropriate to limit the confidential information to that information which has been marked as having a confidential nature and consequently requiring oral information to be recorded in writing after the disclosure.

Best options depend on gravity of risks involved. Let us appreciate it would generally be easier not to require documentation of the information when it is to be handled by Researchers in long-term projects, because they may be more likely to forget the marking of information, which would then be unprotected. Rather, the obligation to record information makes it more unlikely to ignore the secret nature of determined information and to show evidence of what is confidential. Requirement is to remember that when requiring recording, all people per se handling the information (including employees, researchers, students) must be aware of the obligation to mark the information as “confidential”.

- **Restricting the use of the information to a specific purpose:**

NDA's is having concern how the receiving party can use the confidential information (the so-called "permitted purpose"). If one is using an NDA to protect the information one will disclose during the negotiations for the conclusion of a license agreement or a consortium agreement, it is natural that one impose the receiving party to use the information for the sole purpose of evaluating and entering into that agreement. A point to be noted that users other than for the permitted purpose (e.g. performing research) should therefore be explicitly prohibited.

"Permitted purpose" may include

- Evaluation of the technology.
- Evaluation of the parties interest in developing research collaborations concerning.
- Discussing the possibility of the parties entering into a consortium agreement.
- Evaluation of the information to assess entering into a joint venture.

- **Limiting the disclosure of information:**

NDA's is main obligation concerns the need to keep information in confidence and not to disclose it (or permit its disclosure) to any third party. While disclosing information to companies and other organizations such as Universities, it is important to remember that in practice these entities will need to share the information with their employees, students (in the case of Universities) and even external consultants, and hence therefore accommodate this possibility. Some limitations are often imposed to avoid an indiscriminate disclosure to all these individuals.

This is the reason NDA's a clause requires the information to be disclosed in a "need-to know" basis to employees, students (in the case of Universities) and sometimes external consultants, as long as the individuals are aware of the confidential nature of the information and are also under equivalent obligations to keep it in confidence.

- **Listing the information not covered by confidentiality obligations:**

In most NDA's some information is excluded from confidentiality. Like, without the inclusion of a clear exception in the NDA, the receiving party could breach the contract even when disclosing the information under a legal

obligation, for example at a court proceeding. Following information is typically excluded to avoid such situations:

- That is part of the public domain at the time of disclosure;
- That becomes part of the public domain after the disclosure, provided that it does not;
- Result from a breach of the NDA;
- Already known by the receiving party at the time of disclosure;
- Required to be disclosed by law or a competent authority.

- **Defining the length of the obligation to keep confidence:**

What I have seen that Non-Discloser Agreements defines the period of confidentiality, which varies from 10 to 15 years beyond which party is allowed to disclose the information without breaching the contract except in case of Missile technology/critical Communication/Aviation systems.

- **Determining the choice of law and jurisdiction:**

It is extremely important to mention in any agreements, the applicable law and jurisdiction, for applying in case of dispute. ADR (Alternate Dispute Resolution) clause in any agreement between parties whether domestic or International is the order of the day to avoid heavy costs of litigation as also to settle the dispute expeditiously.

To Note:

- Definition of confidential information
- Permitted purpose
- Limitation of disclosure
- Information excluded from confidentiality
- Term
- Choice of law and jurisdiction

- **Limitations and risks:**

Although NDAs are very useful to protect one's information; but to be noted that these agreements also have some limitations one should consider before using them.

- The best way to protect confidential information is not to disclose it at all NDAs are not locks. Indeed, these documents merely establish contractual obligations that if breached can certainly entitle one to recover the damages. Yet, that means one would require to initiate litigation

proceedings, which may be costly, take time and even put at risk the confidential nature of the information. It is therefore advisable to keep in mind not to use NDAs as a mere formality. In fact, one should make use of these agreements only when disclosing truly confidential information and always consider whether one really need to share the information to reach one's goal. In order to understand whether one need a NDA one should ask one's own self how it can help to maximize one's aims while minimizing the risks. This is a strategic consideration.

- NDAs should be used as a supplement to other tools like Physical & Digital restrictions.

5.3.2 What is a 'Trade Secret'³³?

"Trade secret" is a common phenomenon across industries and individual organisations in any field. The strength of "Trade Secret" makes the success or failure of an organization. DPSU's are also keeping a close watch on its "Trade Secrete". Trade secrete while generally refers to formulae/contents of the product but my study/discussion with officials of public sector & private sector reflected that it is not only formulae of product but even strategy on "add on" over "Existing formulae" during development and production as well as in marketing and pricing also. Pricing of product or quoting for a product is equally a 'Trade secrete' as Individual DPSU's know where they have to supply on competitive basis following even at bare "Marginal cost plus" & where they can charge monopoly or duopoly price. Although "MOD" put lot of restriction on methodology of 'Pricing' but growing DPSU's also know how to manage the situation and be profitable on overall basis. Each supply of goods & services cannot be profitable even in private sector or international organisations. Even certain foreign countries supply goods & services at different rates to Government and to DPSU's unless one bind them with "Fall Clause" in the contract. There are different 'pricing mechanism' which each large organisation follows to kill others in the same sector if they have large cash/wealth through "Penetrating Pricing Mechanism". Even DPSU's supplies same product/services at different prices to different services like IAF, Army, and Navy. However generally Trade secret is being used for formula of product. While if such 'trade secret' is used in an unauthorised manner the concerned country law protects them through a provision in their civil/criminal law or I P Law. It is being said "Coco-cola" formula has been closely guaranteed by their organisation for decades together which was not

³³ An Article on GUIDE ON TRADE SECRETS Protecting Your Trade Secrets in Southeast Asia www.asean-iprhelpdesk.eu

possible had its 'patent' been registered as the lifespan of such 'patent' could have been at the most 20 years. This is being said as the best example of the long term benefits of a well-protected trade secret.

Three general standards exist (which are referred to in Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)), and a trade secret is usually defined as information that:

- (a) is not generally known to the public (kept as confidential);
- (b) confers some sort of economic benefit on its holder (where this benefit must derive specifically from the information not being generally known, not just from the value of the information itself – in other words: it must have commercial value because it is a secret);
- (c) is the subject of reasonable efforts by the rightful holder of the information to maintain its secrecy (e.g., through confidentiality agreements).

- **Keep it Secret:**

Certain basic requirements are there to call a particular information as 'trade secret' and are given below as per available literature & articles available:

- (a) be non-public – not known to one's competitors;
- (b) have actual or potential commercial value; and
- (c) Be safeguarded by confidentiality measures including clauses in employee contracts and non-disclosure agreements.

Simply not disclosing any information is not a trade secret.

However, if a researcher feels even the process of manufacturing a particular product can also be a 'Trade secret'. Even certain confidential policies of internal management, be it in the area of "Pricing" "Marketing" etc. can also be 'Trade secret'.

- **Duration of Trade Secret Protection:**

While IP rights of "patents" and "copyrights" have a finite term, but 'Trade Secret' can be for an infinite period provided the law protects them by way of multiple tiers of internal management through internal documentation of "Official Secret Act", "Defence Internal Rules" & "Binding Contracts" with its officials and so on & so forth.

- **Managing One's Trade Secrets:**

Any information in public domain is not a 'Trade secret'. Hence most laws have desired to put restrictions to safeguard the confidentiality of the information. Every organisation put some systems in place to guard such information in multiple ways: putting clause on classified information in DPSU, Putting technical systems embargo, physical control over information, keeping pen drive/l-pad etc. with a password protected lock, physical security check, marking information as confidential etc.

Available literatures suggest for following methods to protect 'Trade Secrets:

- ✓ **Physical Barriers**

This may include marking documents as confidential. The other ways are to keep documents under lock & key or on an undisclosed location, restriction on employee movement in safe vault room where such documents are kept, Limiting accessibility of company officials, Putting CCTV in that Room & strict security watch on CCTV, Signing of Non-Discloses Agreements with outside organisation when they have to look at the Input/such document. In case of DPSU, they even put numbers of copy make & each copy with a separate identification mark. Such information are kept in a strong room with fireproof arrangements. Authorised officials have to use their finger points to go inside the room. Internal management circular with civil & criminal liability is act as a backup.

- ✓ **Technical Barriers**

It is the most effective and efficient means in DPSU. Most of the ToT data, license production data, Design data, Upgrade of Technology data etc. are all sensitive & classified information from a Defence customer point of view and so also from DPSU Point of view. The confidentiality of master data is maintained through multiple layers of IT controls apart from routine control while using data like user login ID, Password, OTP etc. Even back up data is kept at a far off place to protect from multiple dangers.

✓ **Contractual Barriers**

Method employed for the purpose

- Signing of Non-disclosure Agreements
- Signing of confidentiality Agreements

While Agreements signed to come over such situations with officials of internal company is confidentiality Agreement in English & Local Language with civil & criminal liability where as such Agreements signed with vendors, subcontractors, and Associates etc. are called Non-Discloser Agreements.

Trade secret regulations must be properly documented.

● **Employee Management:**

It is a grey area from organisation point of view and in case of DPSU it is applicable both in respect of existing employee and superannuated employee. Now almost all DPSU's have signed an agreement which is generally enforceable for a year for the superannuated employee (Board level members plus two scales below officials & now it is going even up to four level official below Board) that they will not join any private sector or other organisations including a foreign company with whom he was involved in the service life in DPSU's and if he joins, he has to pay the bond amount and somewhere now they are even putting civil and criminal Act applicability. Similarly in the DPSU appointment letter appropriate condition for maintaining "Confidentiality" is also covered. In spite of that some scrupulous employee does violation considering leniency of court in case of youngsters to earn their livelihood when the DPSU Remove them.

However in case of private sector organisation, it is learnt that list of clients are very 'Confidential Documents' and if the employees copy those data & provide to its competitors then they are held liable in jurisdictional courts. Otherwise courts in Southeast Asia protect a former employee to redeploy his skills for his livelihood.

The systems & procedures need to protect such "Confidential Information/Trade secret" by way of multiple check & Balances. The achievement is not to allow 'Trade secret' to go to public domain.

It is being said that formal registration for "Trade secret" is not existing and hence they are also called as "Unregistered rights"

● **Trade Secrets and Other Forms of IPR:**

To keep one's information secret rather than patenting one's know-how is always an issue. Comprehensive disclosure of patenting to the public of

valuable information before patent protection can be granted. For a limited duration of twenty years, Patent protection is available. Patenting their original formula in 1893, the owners of Coca-Cola chose not to patent the new formula and instead chose to use secrecy to protect it until this day. Only a viable option is trade secrecy when reverse engineering (the process of discovering the technological principles of a device, object, or system through analysis of its structure, function, and operation) is impossible and the business in question practices a regime that establishes and maintains secrecy over confidential information. It may be more beneficial for the company to use patent protection to protect its IP even if voluntary disclosure to the state is necessary for a protection period of twenty years (Where reverse engineering can be easily carried out).

5.3.3 Trade Secrets in Different ASEAN Member Countries³⁴:

Some ASEAN countries are relatively underdeveloped in its legal systems in terms of protecting trade secrets. Cyber-crime laws (if available) might be more effective solution in these countries.

- The protection of trade secrets in South East Asia can only be achieved when the following criteria are met:
 - Cited information must not be available to the public.
 - Cited information must offer real or potential advantages to business in question.
 - It is to be provided that one took measures to protect the confidentiality of the information (confidentiality clauses, password protection, restricted access to important information/buildings etc.). Related Regulations of businesses should also stipulate how the trade secret is kept and who is responsible for its secrecy.

- **How long does legal protection last in ASEAN countries?**

It can be concluded that trade secrets will last forever as long as the information does not enter the public domain. It is classified as 'unregistered rights' in some ASEAN countries. However trade secrets are recognized in most ASEAN countries and can therefore be enforced provided that one can prove that the trade secrets are not known to the public, the abuse of which

³⁴ An Article on GUIDE ON TRADE SECRETS Protecting Your Trade Secrets in Southeast Asia www.asean-iprhelpdesk.eu

is to the detriment of one's business, and one need to take measures to protect their confidentiality.

Some ASEAN countries like Singapore, Thailand, Malaysia, Philippines, and Indonesia have laws that protect un-authorized access to computer systems. These laws can add to combating the theft of protected information. It is said that Advances in computer forensics have also made it harder to avoid all traces of improper computer access by, amongst others, departing employees. E.g. in Singapore several ex-employees of a bank were prosecuted for downloading customer information prior to joining a competitor bank.

CHAPTER - 6

CONTRACT MANAGEMENT IN DPSUs

6. Introduction

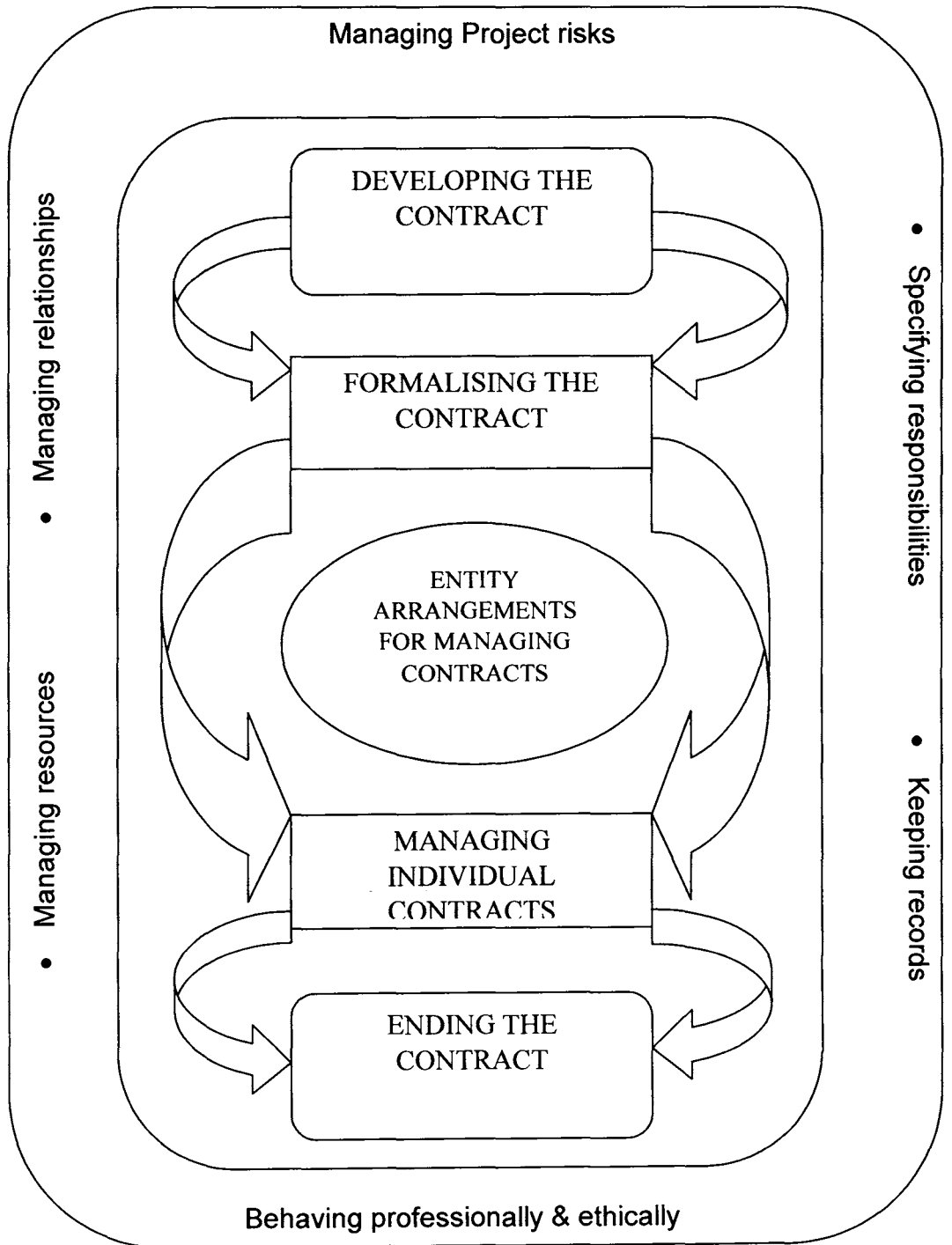
- 6.1 Case Studies of Import Contract, Export Contract,
MoD Contract with DPSUs and DPSU vs DPSU Contract**
- 6.2 Contract Management and Practice – A Review**
- 6.3 Suggested Contractual Terms and Conditions for DPSU's**

6 Introduction:

Contract Management is a long drawn process which starts from Request for Information (RFI) and ends with completion of supply of products/services. It passes through multiple channels including technology management and legal channels. It ensures both parties to the contract fully understand their respective obligation including fulfilment of the obligation efficiently and effectively to provide the best value for money/goods/services. It is being said that the role of a contract manager is supervisory and co-ordination with an obligation to meet the target date. Both the parties to the contract are interested in having extra added value which includes process, innovation, cost reduction and services improvement. Contract management also involves documentation which provides the input of being active management relationship between the client and contractor over the term of the contract for the provision of goods and services to the agreed standard. A flow chart explaining the Management approach to contract management is depicted herein below:

Table 15

Management approach to Contract Management – Flow Chart



The good contract management practices also reflect some key areas which help in performance management of contract.

Planning and governance

Market management

People

Supplier relationship management

Administration

Supplier development

Good practice framework

Relationships

Contract development

Performance

Risk

Payment

The role of modern contract manager involves the following:

- Request for Information
- Tender
- Evaluation, Negotiation and Execution
- Contract Drafting
- Legal vetting (may be internally or externally)
- Serve as the point of contact for customers/suppliers on contractual matters
- On all standard and non-standard contracts, provide recommendations

- Maintain contractual records and documentation such as receipt and control of all contract correspondence, customer contact information sheets, contractual changes, status reports and other documents for all projects
- Provide guidance on contract matters to project managers, including training to new project managers and other employees in contracting procedures
- Develop and implement procedures for contract management and administration in compliance with company policy. As appropriate, contribute to influence company policies
- Monitor compliance by company employees with established procedures
- Work with Risk Management Department to coordinate contractual insurance requirements
- Work with Finance to ensure adherence to broader finance and risk requirements such as revenue recognition, pricing and discounting policies, export controls etc. This may include 'financial engineering' and understanding/evaluation economic impact of terms and term options
- Support Product Management/Marketing to ensure company products and services are offered with appropriate, competitive terms and conditions
- Monitor competitive terms. Monitor customer satisfaction with our terms and conditions and contracting practices and recommend changes
- Ensure that signed contracts are communicated to all relevant parties to provide contract visibility and awareness , interpretation to support implementation
- Handle on-going issue and change management

- Monitor transaction compliance (milestones, deliverables, invoicing etc.)
- Oversee Service Level Agreement Compliance
- Ensure contract close-out, extension or renewal

Contract manager also have to prepare some Strategy

'Strategy' has entered the management literature much later than its use in defence. Game theorists have also used this term 'Strategy' which earlier was being called 'Policy'. The concept of 'Strategy' and various actions involved some time lack of clarity. However, military science used this concept for a very long time. In Business School, the term 'Strategy' is generally defined as follows:

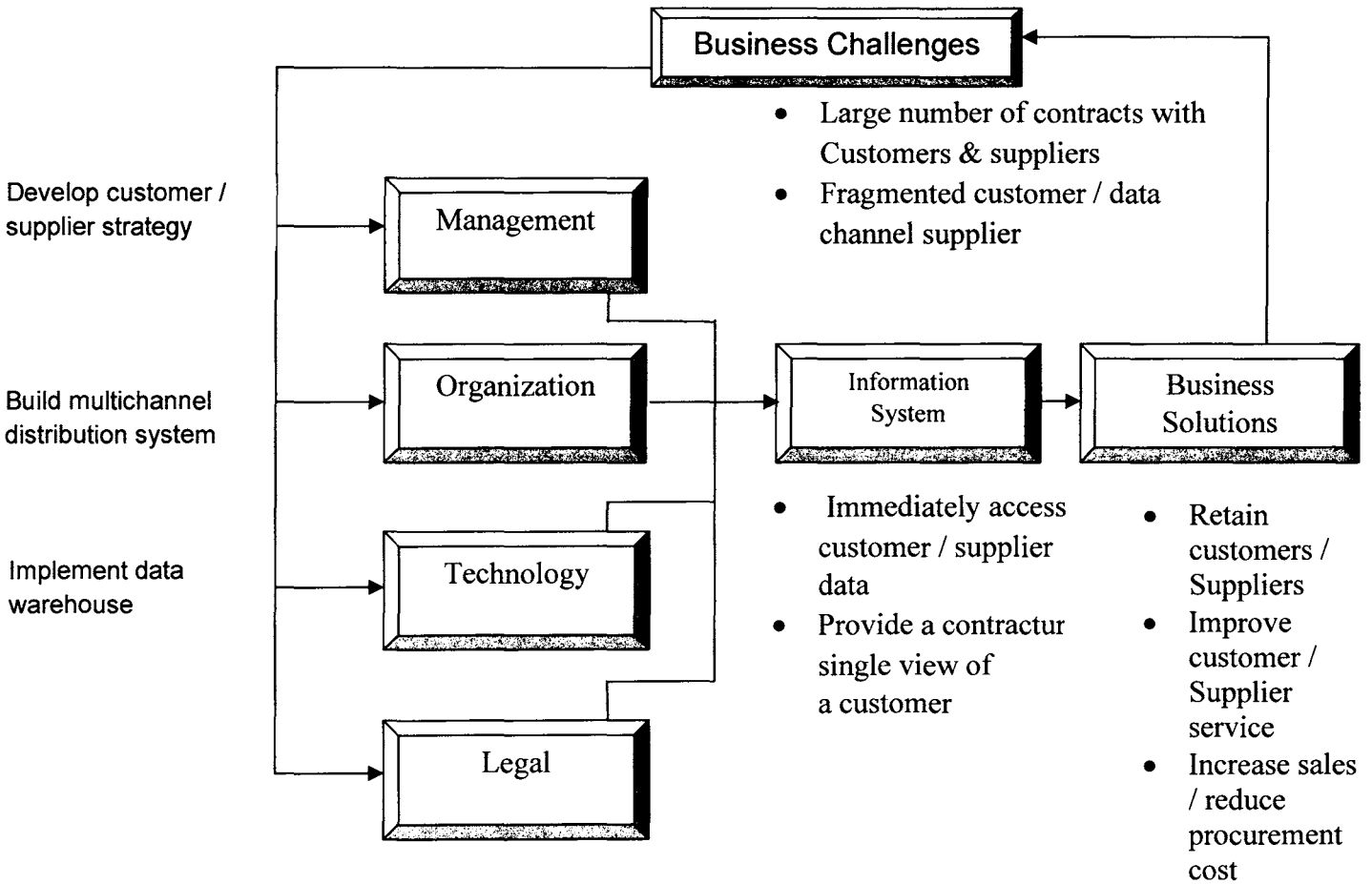
'Strategy is the pattern of objectives, purpose or goals and major policies and plans for achieving these goals, stated in such a way, so as to define what business the company is in or is to be and the kind of company it is or is to be'.

Hence, contract manager or acquisition manager in Defence will have to prepare contract management strategy for each area.

Presently, Researcher has presented a flow chart based MIS, for the contract management strategy in the following format:

Table 16

Contract Management Strategy – Flow Chart



6.1 Case Studies of Import Contract, Export Contract, MoD Contract with DPSUs and DPSU vs DPSU Contract

The Researcher while being in a DPSU at a very senior position faced a legal-cum-management problem in a Sales Tax disputes with a State Government involving thousands of crores of tax liability. The issue was: DPSU was treating that the job which it is doing for a Defence customer is not a sale rather entrustment job and getting reimbursement of these expenditures with a percentage of profit or Fixed Price contract. However, such reimbursement was included in its Turnover in its Audited Accounts. Disputes was going on between DPSU and Sales Tax Department of concerned State for more than 3 decades for treating the job work reimbursement & percentage of profit as sales . Its Bank Accounts were ceased by Sales Tax Department. Matter went to Hon'ble High Court. Hon'ble High Court passed an order for releasing certain percentage of outstanding payment for defreezing the ceased Bank Account. Matter went upto Hon'ble Supreme Court. The Researcher was informally told by its legal Counsels that DPSU case is not strong. It was suggested to its senior legal Counsel for a closure of the case with formation of a High Level Committee comprising high officials of Central Government and concerned State Government. As normally happens, Hon'ble Supreme Court agreed with DPSU Counsel for formation of such High Level Committee to sort out the issue and report to Hon'ble Supreme Court within 3 months. Both Govt. high level officials convened two meetings and determined the modus operandi for closure of the issue. After few such meetings between operating level officials of Central and State Govt. including DPSU & Defence customer, matter got resolved with "WIN-WIN" situation for both. Amount sorted out in 1/3rd of tax dispute and State Govt. also started getting regular tax. This is a case of mediation under the supervision of Court'.

Sl. No.	Case Studies
1	Substantial variations in terms of Contract after finalisation of tendering procedure – Import Contract
2	Change in Payment & Other Terms demanded by vendor after conclusion of contract – Import Contract
3	Amendment in payment & other terms to accommodate demand of the vendor – Indigenous Contract with DPSU's Associates
4	Improper drafting of Force Majeure Clause – Import Contract

5	Contract with One-sided clauses against the supplier's interest – Export Contract
6	Setting up dedicated manufacturing facilities without firm commitment – Export Contract
7	Improper assessment of cost of production while quoting resulted in loss of Rs 20.21 crores in the production and export of 10 ship sets – Export Contract
8	Flaw in the contract regarding the methodology in calculating price escalation clause leading to additional financial burden to the importer – Import Contract
9	Un-realistic technical specification leading to subsequent relaxation as well as escalation of development cost – Foreign Design and Development Contract
10	Variation in standard clauses of integrity pact to conclude the contract – Import and Indigenous Contract
11	Improper assessment of man-hour requirement and total cost leading to submission of lower quote and loss to supplier – Indigenous Outsourcing Contract
12	Undue waiver of liquidated damages to ensure maintenance supplies of the CNC Jig Boring Machine – Import Contract
13	Inadequate data submitted by the foreign supplier leading to delay in design and procurement action – Import Contract
14	Lack of clarity in the contract specification – ToT Contract
15	Delay in execution due to Inordinate delay by the foreign vendor to provide the required technical documentation – Import Contract
16	Ambiguous details regarding training period time schedule in the contract – ToT Contract
17	Delay in deliveries and huge cost overrun due to deficiencies in planning, execution, co-ordination in contract management – ToT Contract
18	Contract entered without liquidated damages clause resulting in huge financial loss due to project delays – Import Contract

19	Deficiencies in planning, execution, co-ordination in contract management resulting abnormal delay and cost escalation of the whole project – ToT Contract
20	Deficiency in contract management – improper planning to augment infrastructure facilities – ToT Contract
21	In-adequate support services from the licensor leading to difficulties in Repair & Overhaul program of Aircraft – ToT Contract
22	In-ordinate delay in engine development program – Foreign Design and Development Contract
23	Delay in project execution due to not resolving the pricing issues between the parties – ToT Contract
24	Delay in project execution due to non-submission of critical documents, items by the foreign supplier – ToT Contract
25	Inability to terminate the contract and recover advances given to supplier in absence of termination clauses in the contract – Import Contract
26	Inability to execute the contract in absence of clarity in scope of work – DPSU to DPSU Contract
27	Non-inclusion of supply of critical spares in the contract leading to acute shortage of fittings
28	Case study on determination of L-1 in a large Defence Contract - Indigenous Contract – MoD – DPSU Contract – tender process in Government contract
29	Lessons learnt from failure to perform an Export contract by a DPSU – Export Contract

This chapter focuses and highlights all the major problems that are encountered by DPSU's in executing their regular business contracts and the lessons learnt thereby. The Defence Contracts involve multi-system requirements and collaborations to build a fighter Aircraft/Weapons etc., This is a big challenge before the Buyer i.e., for Manufacturing, Supply,

Installations, Commissioning, and Maintenance. This multi-system requirement needs unique interface of all Vendors' supplies/services including DPSU'S team involvement and drafting the contract Terms and Conditions considering the same plays a vital role.

The purpose of this chapter is to implement in the defence contracts, the lessons learnt based on case studies, all the recourses that have taken in course of overcoming the issue/problem and to follow the same as a standard in the forthcoming contracts by every DPSU.

1. SUBSTANCIAL VARIATIONS IN TERMS OF CONTRACT AFTER FINALISATION OF TENDERING PROCEDURE

1.1 BACKGROUND:

A Purchase order was placed by a DPSU with approval of its Board to UK Vendor for supply of IN16U Ejection seat and related accessories, GSE, recommended spares for aircraft. Vendor was selected on single technical qualified offer basis against limited tendering.

1.2 ISSUE:

i. CHANGE IN VARIOUS TERMS OF CONTRACT ASKED BY THE SUPPLIER AFTER THE CONTRACT PROCEDURE WAS FINALISED

While acknowledging the Purchase order, UK Vendor have requested for change in terms and condition of the PO in line with their remarks/conditions provided in their commercial offer against DPSU's commercial terms and conditions and subsequently qualified by their Best and Final offer forwarded to DPSU.

UK Vendor had requested for new terms such as NRE payment based on mile-stone and late payment charges which was not part of their initial or final commercial offer. The issues were taken up during discussion and were informed that DPSU cannot have different commercial terms and conditions for various projects finalized with UK Vendor.

1.3 CONSEQUENCE:

AMENDMENT OF CONTRACT TO AVOID DELAY IN COMPLETION OF THE PROJECT

Subsequently, the Contract was amended covering the following points:

- Change in Payment terms of Non-Recurring Cost to Mile-Stone payments.
- Changes in commercial terms and conditions are w.r.t clauses: Condition of item, Inco-terms, packing date.
- Transfer of Technology for Manufacture, Escalation Formula, Delivery schedule, Option Clause,
- Warranty period, Warranty repair period extension,

- **Defect investigation, Technical assistance, Liquidated Damages,**
- **Spares and product support, Short closure of contract,**
- **Indemnity against patent rights,**
- **Title, Ownership & Risk, Fall Clause**

1.4 LEARNINGS:

- 1. Selection of vendor particularly on the basis of single acceptable offer with abundant care and caution to avoid subsequent pressures by the vendor.**
- 2. Scrutiny of Background and Performance of the vendor thoroughly before final selection.**
- 3. Regular updating of the vendor directory and development of vendor base to invite competitive tendering and selection of reliable vendor.**
- 4. Specifications for the product should be generic and tailor made specs be avoided.**

2. DESIGN AND DEVELOPMENT CONTRACT:

CHANGE IN PAYMENT & OTHER TERMS DEMANDED BY VENDOR AFTER CONCLUSION OF CONTRACT

2.1 BACKGROUND:

1. A Contract with UK vendor was entered for providing consultancy service for stall & spin test to a DPSU on single tender basis with approval of Board. Vendor having domain expert in the relevant field, the Consultancy work was given.
2. As per terms of contract, the work should be completed by T0 + 13 Months. There were 14 work stages covered in the contract including 6 payment milestones.

2.2 ISSUE :

1. Six (6) work stages were to be completed at same schedule i.e. to+10 Months covering two payment milestones. Out of these 6 work stages, 3 work stages were completed. Though UK Vendor had submitted Invoices towards completion of two milestones, the payments were not released since the certain stages of other work stages (also at the same time schedule to+10 months) were yet to be completed.
2. Vendor insisted for payment and proposed for Updating the Scope of Work covering under milestones, Updating the description, Updated Schedule from To+13 months to To+21 months & Re-defining of payment milestones.

2.3 CONSEQUENCE:

AMENDMENT TO CONTRACT TO ACCOMODATE VENDOR'S DEMAND

To meet the project schedule, the Contract was amended covering the following points:

- i. Updated Scope of Work
- ii. Updating the description of one of the milestone
- iii. Extension of Schedule from to+13 months to to+21 months without levy of LD.
- iv. Re-defining of payment milestones (10 milestone from existing 6 milestone) -
(By splitting the collective amount of payment milestones)

2.4 LEARNINGS:

1. Proper Strategic decisions and drafting of the right RFQ/contract to avoid change in financial parameters after finalization of contract.
2. The Payment Terms/phasing of expenditure should be worked out, inter-alia, duly linked with defined milestones and tangible deliverables, in consonance with the anticipated physical progress of the project, so that the proposal does not appear to be expenditure driven and the release of payments is not resulting into parking of funds with the vendor concerned.

3. AMENDMENT IN PAYMENT & OTHER TERMS TO ACCOMMODATE DEMAND OF THE VENDOR

3.1 BACKGROUND:

A Purchase Order was issued by the DPSU, for development and supply of Display Systems (IADS) for Light Combat Helicopter developed by them against Open Tendering on a joint venture company promoted by same DPSU.

3.2 ISSUE:

After receipt of PO, vendor has requested for amendments to PO:

- **Payment terms -Development Phase:**

Amend the clause as follows "10% of the order value to be paid on finalization of system requirement. The same would be paid on submission of technical specifications and Interface control Document (ICD) signed by both parties Design Representatives".

- **Performance Bank Guarantee (PBG):**

Though compliance provided in the offer for PBG (Development & series production), vendor asked for PBG clause shall be applicable only on series production phase.

- **Intellectual Property Rights:** The same may please be amended to "IPR will reside with both JV Company of DPSU and DPSU".

- **Transfer of Technology (ToT):** ToT clause is not acceptable to vendor though compliances provided in the offer.\

3.3 CONSEQUENCE:

AMENDMENT OF CONTRACT TO AVOID DELAY IN COMPLETION OF THE PROJECT

Contract was amended to accommodate the requirements of the supplier.

3.4 LEARNINGS:

1. To ensure that the contract terms are clear and unambiguous, thereby ensuring both the parties work with mutual trust and with a common objective for completing the Contractual requirements.
2. Avoidance of changes in contract terms subsequent to issue of purchase order, particularly a contract finalised with open tendering.

4. IMPROPER DRAFTING OF FORCE MAJEURE CLAUSE

4.1 BACKGROUND:

A DPSU signed a Contract on 30.03.2012 with Russia Vendor for supply of 208 lines of GHE/GSE spares for fighter aircraft project.

4.2 ISSUE:

The Equipment's were to be delivered within 15 months from the date of coming of the present Contract into effect. Russian vendor vide letter dated. 14.05.2012, informed the completion of internal procedures and accordingly the due date of delivery was considered as 14th August 2013.

Subsequently, vendor claimed Force Majeure (floods) at its works, Komsomolsk-on-amur on 12.08.13 and submitted a certificate dated. 25.11.2013 of Chamber of Commerce to that effect, vide letter dated. 06.12.2013. Vendor informed that part of equipment to be delivered under subject contract was stored in their factory located at Komsomolsk-on-Amur which was struck by a natural disaster (flood) and as a result, it was impossible to despatch the equipment from the warehouse due to blocking of the access roads.

However, the DPSU could not fully verify the claim by Russian vendor. DPSU's Moscow Office confirmed the occurrence of floods. As per the submitted Force Majeure Certificate, the force majeure circumstance came into effect from 12.08.2013, whereas the due date for delivery of items against Contract was 14.08.2013 i.e. only after a gap of 2 days.

4.3 CONSEQUENCE:

Division was not in a position to verify the impact of force majeure on the delivery of current contract. However, considering the possibility that force majeure may have affected the delivery as claimed by M/s Russian vendor, delivery extension & LD waiver was considered.

CONTRACT MANAGEMENT – IMPROPER DRAFTING OF FORCE MAJEURE CLAUSE:

Force Majeure clauses did not clearly bring out the methodologies for verification of the event. It did not indicate the nature of documents to be submitted in support of the event. Also the name of the independent authority to verify happening of the event was not clearly mentioned.

4.4 LEARNINGS FROM THE CONTRACT:

Force Majeure clauses should be clearly defined in the contract. Documents required to declare/ accept any event as Force Majeure should be mentioned in the contract within the stipulated time period. Contract should also mention the name of independent agency to authenticate the happening of the Force majeure event. The force majeure is decided based on the representation of vendors and based on the analysis of the data.

EXPORT OF DEFENCE GOODS OUTSIDE INDIA

5. CONTRACT WITH ONE-SIDED CLAUSES AGAINST THE SUPPLIER'S INTEREST

DPSUs engaged into entering into contract with foreign Defence companies for exporting their products outside India. It was observed that in number of cases the contracts suffer from unilaterally biased towards the foreign buyer, Cost and Risk analysis not properly made as also other shortcomings. Ultimately it boils down to the substantial financial burden to the Indian exporter.

5.1 BACKGROUND:

Contract for supply of 57 sets of Structures for DO 228-212 Aircrafts to a German based Company by the DPSU

I.A DPSU supplier entered into a contract with a foreign Defence MNC for manufacture and supply of the items and shipsets including support activities such as certification and continued airworthiness.

5.2 ISSUES:

However a scrutiny of the contract reveals that the subject Export Contract by the defence DPSUs contain several one sided clauses heavily favouring the buyer at the expense of the Indian Supplier as follows:

a. The contract entered into was unilateral in nature, favouring the Buyer extensively.

b. Most of the terms and conditions provided in the agreement are one-sided, unreasonable and unfair. Most of the terms and conditions make the supplier vulnerable to third parties.

c. Through this agreement, manifold obligations have been imposed on the supplier which makes the agreement unnecessarily tilted towards the buyer.

5.3 CONSEQUENCE:

SIGNIFICANT DEFICIENCIES IN THE CONTRACT AGAINST THE SUPPLIER

A. ONE-SIDED CLAUSES AGAINST THE SUPPLIERS (DPSU)

i. Contract without firm commitment from the buyer:

Contract specified the estimated quantity of 57 Ship sets for a period of 10 years. But there was no guarantee that actual requirements will be as estimated. Buyer was free to place order at any time on their will and as per their convenience.

ii. Buyer to keep the facilities ready even without firm commitment:

As per this clause, supplier has to keep all the facilities always ready to meet the requirement of the buyer even without any commitment and also against intermittent order placement by the foreign company.

iii. Backup ship set to ensure uninterrupted production having additional cost burden:

Further, the scope of deliveries and services also include-Backup Ship set as per contract. For supplier, keeping the option of Backup Ship sets 01 (one) Ship set at supplier's site and 01 (one) Ship set at purchaser's place to ensure uninterrupted production at buyer's place was additional burden on DPSU without any payment.

iv. Requirement for maintaining Quality Control Approval without any firm commitment entailing huge additional cost implication:

EASA PART 21 G Component Approval was a prerequisite to this Agreement. Supplier shall obtain and maintain such approval throughout the lifetime of the Agreement. It is to be noted that agreeing to such open commitment is only in favour of the Buyer. Even without any order in hand, maintaining EASA PART 21 G approval and also other requirements throughout the lifetime of the Agreement shall be a huge burden for supplier.

B. FAULTS IN NEGOTIATIONS WITH THE SUPPLIER:

i. Stringent and unfavourable warranty clause:

Any warranty claim shall cover all damages, including consequential, indirect, incidental, special or punitive damages, costs and expenses incurred as a result of the warranty. It is to be noted that this clause is open ended and extends the application of warranty clause to all damages, including consequential, indirect, incidental, special or punitive damages.

ii. Unfavourable Liquidated damages clause for delay in delivery:

Contract stipulated Liquidated damages of 0.5% percent of the price of the Item for each Day of delay in the delivery commencing on the second week after the Due Delivery Date up to a maximum of 15% of the price of the Item which is so delayed.

C. INADEQUATE RISK MANAGEMENT:

i. Difficult and risky termination Clause

Supplier shall reimburse the Buyer for all costs, expenses, losses and damages incurred by the Buyer to remedy the Supplier's default and all cost incurred by the Buyer in relocating the manufacturing of, or support activities for, the Items, including any additional cost or expenses of Buyer resulting from such relocation but limited to the prevailing price of one Ship set.

The Supplier shall be entitled to terminate the Agreement upon 2 years prior written notice of termination, which shall not be given prior expiration of 3 years as from first delivery of Ship set under this Agreement. During the termination period, Buyer is

free to place any further Purchase Orders at any time. Any Purchase Order which has been firmly placed with Supplier within the 5 years period must be completed by Supplier.

It is to be noted that condition stating that notice of termination shall not be given prior to expiration of 3 years as from first delivery of Ship set is unreasonable and restricts the right of Supplier to serve notice.

ii. Un-limited Liability Clause:

It was provided in the agreement that the Supplier would be liable to the Buyer for:

- a. the timely and proper performance of its obligations under the Agreement and shall be liable for all costs, losses, damages.
- b. Supplier shall hold harmless and indemnify the Buyer from and against all claims.

It is to be noted that the liability included in this clause is uncapped in nature and hence exposed the Supplier to events not only arising in the direct and natural course of business but also to events that are indirect in nature.

iii. In-appropriate and Irrational Insurance Coverage:

It was provided in the agreement that the Supplier would effect and maintain a Product Liability Insurance including third Party Liability. The limit of coverage of such insurance shall be not less than five hundred million USD per event and per year.

Buyer shall be entitled to the full benefit of Suppliers insurance.

It is to be noted that inclusion of such huge limit on coverage of insurance is inappropriate and irrational. Insurance Cover should be equivalent to the total contract price (items and Ship sets)

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Buyer shall be entitled to the full benefit of Suppliers insurance.

It is to be noted that inclusion of such huge limit on coverage of insurance is inappropriate and irrational. Insurance Cover should be equivalent to the total contract price (items and Ship sets)

5.4 LEARNINGS FROM THE PROJECT:

i. Agreement with the contract terms:

Contract terms offered by the supplier should be properly analysed in detail with respect to the legal implications, anticipated responsibilities & rights of buyers and sellers.

ii. Adequate Cost and risk analysis:

Terms of the contracts should be properly evaluated in terms of Costs vis-à-vis risks involved. It is necessary to ensure adherence to broader finance and risk requirements and to assess economic impact of terms and conditions before entering into a contract.

iii. Avoidance of terms which are one-sided and adversely tilted to one party:

A contract where one party feels they are disadvantaged by the terms and conditions, or the commercial terms, of the contract may lead to more adversarial contract management need to be avoided. Clauses of a contract which are one-sided, benefitting one party at the expense of the other party should also be avoided.

iv. Negotiation with parties before finalizing the contract:

Adequate negotiations should be effected between the contracting parties to mitigate the avoidable risks and removing un-favourable clauses.

EXPORT OF DEFENCE GOODS OUTSIDE INDIA

6. SETTING UP DEDICATED MANUFACTURING FACILITIES WITHOUT FIRM COMMITMENT

6.1. BACKGROUND:

- i. In February 2006 M/s FOREIGN COMPANY Ltd., expressed their interest for outsourcing critical rotating components to one of the division of a DPSU.
- ii. In July 2006 DPSU agreed to manufacture these components by setting up a dedicated facility and to undertake export orders from M/S FOREIGN COMPANY Ltd.
- iii. In Sept 2006 DPSU Board approved Rs 100 Crores towards Capital Commitment for procurement of machines.

PLAN FOR EXECUTION & IMPORTANT TERMS OF AGREEMENT:

DPSU entered into a Long-Term Purchase Agreement with M/S FOREIGN COMPANY Ltd., during February/March 2007.

As per the agreement:

- c. The project would generate an export sale of Rs.2500 Crore (USD 600 MUSD) and a profit of Rs.300 Crores (65 MUSD) over a period of ten years with a margin of 14%, commencing from 2008-09 to 2017-18.
- d. Prices of these components to be delivered would be valid for an initial period of three years.
- e. Machines for producing the components were to be procured from the sources designated by FOREIGN COMPANY Ltd. to ensure quality and conformity with the proven parameters.
- f. Manpower requirement would be around 152 personnel for execution of the export order.

6.2 ISSUES:

I. SUBSEQUENT ACTION BY DPSU:

- i. DPSU initiated procurement action from the sources designated by M/S FOREIGN COMPANY Ltd., for imported machines worth Rs.75 Crores.
- ii. Subsequently, DPSU procured all the machines/equipment's required for dedicated facilities worth Rs.90 Crores. Machines valuing Rs. 40 Cr were installed and commissioned.
- iii. DPSU also transferred fifty (50) personnel and incurred Rs. 40 Crores towards manpower cost.

- iv. Division also incurred Rs. 10 Crore towards interest on borrowed funds.

II. CANCELLATION OF CONTRACT BY FOREIGN COMPANY & SUBSEQUENT ACTION BY DPSU:

- i. On July 2009 M/S FOREIGN COMPANY Ltd. Cancelled the orders placed by them on the DPSU unilaterally.
- ii. On May 2010 DPSU preferred a claim of Rs 150 Crore towards compensation for cancelling the order.
- iii. Nine number Machines costing Rs. 40 Crore were diverted to other project.
- iv. However Tooling, Consumables and Spares worth Rs 60 Crore were lying idle.

6.3 CONSEQUENCE:

I. LOSS ON THE PROJECT:

i.	Blocking up of funds on idle machines	-	Rs.60 Crores
ii.	Man-power Cost	-	Rs.40 Crores,
iii.	Interest on Borrowed funds	-	Rs.10 Crores
	Total	-	Rs.110 Crores

II. CONTRACT MANAGEMENT:

Contract management is the process that ensures both parties to a contract to fully comply their respective obligations as effectively and efficiently as possible.

Examining the case boils down to the following in-adequacies in the contract management:

a. Drafting of the contract :

- i. There was no clause in the Agreement that in case of cancellation of order there would be payment of compensation by FOREIGN COMPANY Ltd. to safeguard the company's interests.
- ii. DPSU did not ensure that the investment in the project would be shared by FOREIGN COMPANY Ltd., so that they had stake in the project.
- iii. There was no firm commitment from FOREIGN COMPANY Ltd. for Export Orders so that the investment could be recovered.
- iv. The agreement contained a clause for cancellation of orders by FOREIGN COMPANY Ltd. and payment for inventory holdings and

Work-In-Progress, but not recovery for Investments in capital Expenditure and DRE.

b. Contractual Incompleteness:

Contractual incompleteness signifies that real life contracting can fail to produce contracts that are as precise and detailed as possible. This failure comes from information asymmetry. The incompleteness can be literal. A contract is literally incomplete if an event or contingency can arise that is not anticipated by the contract. Accordingly the contract is silent with respect to what should happen given this event or contingency. The literal completeness can be achieved by adding suitable clause that states "if an event (contingency) other than listed above occurs, then the outcome shall be"

However the contract with FOREIGN COMPANY Ltd. not only have contractual incompleteness (i.e. not mentioning remedies regarding the important contingencies like withdrawal of parties) but also not attempted to fill such gap by incorporating suitable clauses in the contract.

c. Risk management:

It is essential to ensure proper risk management both in the contracting and post contracting stage to protect the interest of DPSU. This should be done through proper financial engineering and evaluating impact of terms and options.

The provision of withdrawal of M/S FOREIGN COMPANY Ltd., without adequate compensation clause to the contract weakens the risk management case for DPSU.

6.4. LEARNINGS FROM THE PROJECT:

- a) Agreement for participation in a project by DPSU jointly with any other party/parties must contain clauses to adequately safeguard the interest of the exporter in case of sudden withdrawal by the other party from the project.
- b) The contract should have adequate provision to compensate exporter if there is any cancellation of order by the other party.
- c) For contract envisaging investments in Export Oriented Project, there should be firm commitment of Export Orders from the other participating party so that the investment could be recovered.
- d) Contract should ensure commitment for investments in fixed Assets by both the parties so that other party have stake in the project.
- e) There should not be any clause of withdrawal from the project by the other party unilaterally.
- f) Clauses compelling to procure machines (for producing the components for the project) from the sources designated by M/S FOREIGN COMPANY Ltd.

appear to be prejudicial to the interest of the Indian exporter and may be avoided.

EXPORT OF DEFENCE GOODS OUTSIDE INDIA

7. IMPROPER ASSESSMENT OF COST OF PRODUCTION WHILE QUOTING RESULTED IN LOSS OF RS. 20.21 CRORE IN THE PRODUCTION AND EXPORT OF 10 SHIP SETS.

7.1 BACKGROUND:

There appears to be lack of scientific assessment of the various cost components involved, commensurate with the futuristic requirements. In the absence of proper assessment, the financial implications projected for initial quotation often turn out to be unrealistic and underestimated resulting in a loss to the exporter.

1. Consequent to a request for proposal (RFP) issued by M/S foreign company, for manufacture, assembly and supply of 200 ship sets of Aft Fuselage Assembly' of G150 aircraft, M/S SDC Ltd, an Indian DPSU submitted its quotation in January 2006.

After negotiations (June 2006), a contract was entered into (December 2006) between M/S SDC LTD and M/S AAA Ltd stipulating the price for each ship set at USD 140000.

2. **PLAN:** The cash flow statement as projected to the Board of M/s SDC Ltd., assumed that sale would commence from 2007-08 and at the rate of 24 Aft Fuselage per annum from 2008-09, M/S SDC Ltd would complete manufacture and supply of 200 sets by 2016-17. At that rate, the project would yield a net surplus from the third year (i.e. in 2008-09) onwards.

7.2 ISSUES:

M/S SDC LTD received orders from M/S AAA LTD. for three ship sets in May 2007 and seven ship sets in January 2008 and delivered four ships sets during 2011-12 and six ships sets during 2012-13. It was noticed that against the cost of Rs.20 crore incurred on the manufacture of the 10 ship sets, M/S SDC LTD received Rs.10 crore as per the terms of the contract, thereby incurring a loss of Rs.10 crore including Rs.8 crore on the prime cost (direct material plus direct labour).

7.3 CONSEQUENCE:

a. CONTRACT MANAGEMENT:

Contract life cycle management is the process of systematically and efficiently managing contract creation, execution and analysis for maximising operational and financial performance with minimising risk. Examining the case boils down to the following in-adequacies in the contract management:

b. Drafting of the contract :

- 1) While submitting (January 2006) its quotation to M/S AAA LTD., M/S SDC LTD had initially considered USD 150000 as material cost and USD 120000 towards labour and other costs. However after negotiations (June 2006) and at the time of finalization of prices, M/S SDC LTD had accepted the contract for material cost USD 60000 per ship set and USD 70000 towards labour cost per ship set.
- 2) M/S AAA LTD. has an irrevocable option, exercisable at its discretion at any time and from time to time, to issue purchase orders for Production Ship sets and spare parts, upon the terms and conditions of the Agreement.
- 3) There was no minimum quantity requirement for any purchase order for production ship sets and M/S AAA LTD. was not obligated to any minimum and maximum rate of delivery. The delivery rate will be based on market requirements.
- 4) The prices were firm and fixed throughout the duration of the programme.
- 5) The contract shall become effective upon its signature by both parties and shall remain in effect thereafter unless or until terminated by M/S AAA LTD. in accordance with the terms hereof.
- 6) Though the contract was for supply of 200 Aft Fuselage sets which, as per M/S SDC LTD's projections, was expected to extend for 10 years, there was no escalation clause in the contract to protect the company from financial loss.

c. Contractual incompleteness:

Contractual incompleteness means that real life contracting can fail to produce contracts that are as precise and detailed as possible. This failure comes from information asymmetry. The incompleteness can be literal. A contract is literally incomplete if an event or contingency can arise that is not anticipated by the contract. Accordingly the contract is silent with respect to what should happen given this event or contingency. The literal completeness can be achieved by adding suitable clause that states "if an event (contingency) other than listed above occurs, then the outcome shall be"

However the contract with M/S AAA LTD. not only have contractual incompleteness (i.e. not mentioning remedies regarding the important contingencies like withdrawal of parties) but also not attempted to fill such gap by incorporating suitable clauses in the contract.

d. Risk management:

It is essential to ensure proper risk management both in the contracting and post contracting stage to protect the interest of M/S SDC LTD. This should be done through proper financial engineering and evaluating impact of terms and options.

However although the contract was expected to extend for 10 years, there was no escalation clause in the contract to protect the company from financial loss.

It was observed that though the orders were received in May 2007 and January 2008, the delivery schedule prescribed was only from 2011-12. Thus, with no escalation clause in the contract and no minimum order quantity clause, M/S SDC LTD was left with no option but to absorb the excess costs.

As such the duration of the programme was not definite and was to be decided by M/S AAA LTD. Thus agreeing to execute a fixed price export contract without escalation clause and main terms and conditions detrimental to the interest of M/S SDC LTD resulted in loss of Rs.20.21 crore in the production and supply of 10 ship sets.

7.4. LEARNINGS FROM THE PROJECT:

- i. Not to quote below the prime cost as the same will result in more production more loss.
- ii. Prices should not be Firm and Fixed throughout the period of contract. To have appropriate Escalation clause in the contract to cover increase in cost, when the contract is for a long period.
- iii. Contract should have minimum and maximum rate of delivery specified therein.
- iv. Duration of the program should be definite and not to be decided by the purchaser alone.
- v. Purchaser should not have irrevocable option, exercisable at its discretion at any time to issue purchase orders for Production Ship sets and spare parts.

8. FLAW IN THE CONTRACT REGARDING THE METHODOLOGY IN CALCULATING PRICE ESCALATION CLAUSE LEADING TO ADDITIONAL FINANCIAL BURDEN TO THE IMPORTER

8.1 BACKGROUND:

A contract was signed with Board approval by a DPSU with M/S PCDA Ltd, France on 11th July 2006 on single technically acceptable offer against limited tender basis for development and supply of 84 sets of Mistral-2 Air to Air Missile System (ATAM).

M/S PCDA Ltd. was a proprietary and major supplier for the DPSU.

8.2 ISSUE:

I. Ambiguous Price Escalation Formula:

Contract Prices are subject to escalation formula with cap of 3%.

The contract escalation clause was silent on the methodology of escalation to be adopted and whether negative escalation is to be considered.

There was a difference in opinion regarding methodology to be adopted for price escalation (whereas point to point or year to year basis).

Even after lot of communications/ discussions, M/s PCDA has not agreed to adopt methodology of price escalation (i.e. year to year basis) suggested by DPSU.

II. ADDITIONAL FINANCIAL IMPLICATION:

Under the above circumstances and considering the fact that M/S PCDA Ltd. France is a proprietary and major supplier, DPSU had no option but to accept the point to point basis method for escalation payment.

There is a substantial difference in escalation amount if point to point basis method of escalation is adopted with a cap of 3% pa instead of year to year basis with a cap of 3% p.a. for two production orders executed by M/s PCDA Ltd., France as on date for supply of ATAM. The total difference in escalation amount was for Euro 1,398,008 or Rs.10.90 Crores to be paid for all the orders placed on M/S PC

8.3 CONSEQUENCE:

M/S PCDA Ltd was a proprietary and major supplier for the DPSU, non-acceptance of M/S PCDA Ltd request will affect the entire program. Hence the DPSU had no option but to accept the same, on point to point basis/method for escalation payment.

8.4. LEARNINGS:

- i. Contract terms should be clear and unambiguous,
- ii. Price variation formula and its parameters, price indices such as base price, cost index, methodologies to be adopted for calculation should be clearly defined and included in the contract.
- iii. In case of high value contracts, it should be vetted by a team of experts in project Management & external experts in Legal/ International Contracts to take care of Company's objectives.

DESIGN & DEVELOPMENT CONTRACT

9. UN-REALISTIC TECHNICAL SPECIFICATION LEADING TO SUBSEQUENT RELAXATION AS WELL AS ESCALATION OF DEVELOPMENT COST

9.1 BACKGROUND:

A DPSU placed a Development phase purchase order dt.11.12.2010 was placed on M/s. WRD Limited for design, development and supply of 3 sets of IR Suppression Systems for a project at value of CAD 1.5 Million US \$ (Rs.8 Crores, CIF) with firm and fixed price till completion, and annual production order after successful development (total – 81 sets valued CAD 7 Million) US \$ subject to escalation.

PO was placed by DPSU subsequent to acceptance of single offer received against global tender.

9.2 ISSUE:

SHORTFALL WITH RESPECT TO THE PERFORMANCE REQUIREMENTS INDICATED IN THE DPSU'S TECHNICAL SPECIFICATION

During preliminary design, IR performance did not satisfy the requirement as per technical specification. Since M/s WRD Ltd., was not able to meet the DPSU technical specification, preliminary design review (PDR) planned in May 2011 for the project was put on hold and no payment had been made.

The predicted results show the shortfall with respect to the performance requirements indicated in the DPSU's technical specification. A status paper was made in June 2011 and submitted to customer. In March 2012, the ultimate user granted go ahead for the project with the indicated shortfalls in performance and to ensure that the lock-on ranges are kept as less as possible.

Further during flight testing of the project in April 2012, it was found that significant lateral projections (especially related to Engine Cowlings) from the base helicopter profile induced flight stability issues on the helicopter. In this context, a detailed analysis was carried out which has predicted adverse effect of developed item on flight stability.

The options available to continue with the project were explored i.e. a) to short close the existing PO and go for a re-tender or b) continue with the present PO considering amendments if necessary.

9.3 CONSEQUENCE:

i. RELAXATION IN SPECIFICATION TO SAVE THE CONTRACT:

Option (b) was considered with relaxed specification considering limitation of re-tendering. The vendor has to re-launch the project with present configuration of the project and conduct once again PDR etc. The vendor has to redesign the IRS configuration & supply prototypes unit. Subsequently physical integration and testing will be carried out.

ii. ADDITIONAL COST IMPLICATION DUE TO INCREASE IN DEVELOPMENT PHASE COST:

The amount (CAD 0.20 Million) claimed by vendor includes amount till PDR stage and partial work completed between PDR to CDR stage i.e. work conducted up to the point when the project was suspended, besides increase in Development Phase price (i.e. total increase CAD 0.28 Million). This system is mandatory for the project.

DPSU has modified cowling configuration to overcome the flight stability issues and vendor has also confirmed that it is feasible to modify IR suppressor with similar performance to what was achieved with the original design.

iii. CONTRACT AMENDMENT TO RELAX THE SPECIFICATION AND ADDITIONAL DEVELOPMENT COST:

Amendment to PO, as no option available, though resulting to change in scope with relaxed specification, and increase in price

9.4 LEARNINGS:

- i. In case of design and development projects, the system reliability, its viability as well as confidence level of the developing agency, with regard to project outcomes and outputs, need to be deliberated in consultation with all stakeholders including the ultimate user.
- ii. Specifications requirement should be clear and achievable considering all the accompanying factors and need of the particular program.
- iii. It should be ensured that the technology involved in the proposed procurement is state-of-the-art/futuristic and acceptable, and does not require any re-assessment due to incompetence causing time overruns/ delays.

- iv. If the specifications projected had been finalized or approved long ago, their validity with regard to the present requirement should be specifically confirmed

10. VARIATION IN STANDARD CLAUSES OF INTEGRITY PACT TO CONCLUDE THE CONTRACT

10.1 BACKGROUND:

A DPSU entered into a contract with M/S CBS Ltd. for supplying Line Replacement Items for manufacturing equipment.

10.2 ISSUE:

For the Open tender issued for servers, the vendor did not agree for the below two clauses which are in integrity pact. They are:

a) **Sanction for violation** (clause 1): To recover all sums already paid by the Buyer, and in case of an Indian Bidder with interest thereon at 2% higher than the prevailing Prime Lending Rate. This clause further entitles DPSU to recover such amounts from any outstanding payment which is due to the bidder under any other contract which the bidder might have with DPSU.

b) **Sanction for violation** (Clause 2): If the Bidder or any Employee of the Bidder or any person acting on behalf of the Bidder, either directly or indirectly, is closely related to any of the officers of the Buyer, or alternatively, if any close relative of an officer of the Buyer has financial interest/stake in the Bidder's firm, the same shall be disclosed by the Bidder at the time of filing of tender.

10.3 CONSEQUENCE - CLAUSES FINALLY AGREED AFTER NEGOTIATIONS:

- 1) They are agreeable to recovery under this clause from the payments due to the successful bidder under the purchase contract but not from any payments due to the bidder under any other contract which the bidders might have with DPSU.
- 2) They are agreeable to such disclosure under this clause, subject to the Employee or persons acting on behalf of the bidder be limited to those directly involved in this particular engagement.

10.4 LEARNINGS:

- 1) Contracts should as far as possible not be loaded for or against one party and should result in a win-win situation of both the parties.
- 2) During contract negotiations, it may be required to become flexible to some of the terms and conditions though not entirely favourable. It is essential to analyse the effect of not conceding to such terms and trade off against the similar counter terms to ensure that net impact is acceptable.
- 3) Modification of such a clause may provide scope of manipulation to win contract and sometimes to bring angle of corruption unless it is a regular well established supplier.

11. IMPROPER ASSESSMENT OF MAN-HOUR REQUIREMENT AND TOTAL COST LEADING TO SUBMISSION OF LOWER QUOTE AND LOSS TO SUPPLIER

11.1 BACKGROUND:

M/S TSL Limited, a DPSU tendered to registered vendors during 2003-04, for outsourcing five types of assemblies.

Purchase order for fabrication and supply of different assemblies were placed, after negotiation with L-1 vendor (M/s. DTC Ltd., Bangalore) against multiple offers received from vendors for 60 sets (initial order of 6 sets and entering into Long Term Business Agreement(LTBA) for 54 sets after successful completion of initial 6 sets.

11.2 ISSUE:

CONDUCTING THE INTERMEDIATE PROCESS OPERATION (I.E. ANODIZING & PAINTING FOR CANARD ASSEMBLY) BY THE CONTRACTOR WHICH WAS NOT IN HIS SCOPE OF WORK:

- a) M/. DTC Ltd.'s scope of work involved manufacturing of 68 detail parts and Canard assembly.
- b) As per POs for Canard Assembly, all the intermediate process operations were under M/S TSL scope of work as M/s DTC did not have any intermediate process operation facilities at the time of PO.
- c) However, by time the Canard Assembly was developed M/s. DTC Ltd. got its vendor at Mysore approved by DGQA for anodizing operations and themselves set up their own painting facilities. Therefore, the anodizing and painting operations for 53 components were carried out by vendor for all the sets instead of at M/S TSL.
- d) M/s DTC vide letter dt.6.3.2009 requested the DPSU to credit the anodizing and painting costs to them for all Canard assemblies supplied so far.
- e) As per the order all intermediate operations was in the contractor's scope. Change of scope now i.e. after placement of order, will be a deviation.
- f) No breakup prices for process were in PO/or available. No formal, quote was called for these operation in tendering stage.

VENDOR REQUEST FOR REVISION IN PRICES:

a) Vendor, vide letter dt.15.04.2009, requested for revision of the prices citing the following reasons:

- i. i) At the time of quoting in 2003-04, M/s. DTC Ltd. was not experienced in the complexity involved in the manufacture and assembly of these assembly packages.
- ii. ii) Prices quoted were estimated based on their limited understanding of the Russian technology.
- iii. iii) Since, the time required is much higher than estimated earlier, they are incurring loss in the manufacture and supply of these assemblies. The hours involved in manufacturing of the assemblies submitted by the vendor based on his understanding of the Technology was quite low in comparison to Russian hours with a factor of multiplier as a result thereof the vendor was suffering loss.

REVISED TECHNICAL ESTIMATES BY THE CONTRACTOR:

The tendering was done based on the technical estimates prepared by the Division, for which the SMH content assessed based on the drawings and technology available for the components in 2003-04.

The Divisional committee made an assessment of the SMH involved and made the revised estimates. The additional financial implication works out to Rs.4.43 Crs, upto 60 sets based on revised estimates.

Over the past 5 years, during the manufacture and build of over 24 aircraft sets of assemblies, manufacturing and assembly processes have been stabilized. During this period, it was observed that the actual time involved is higher than what was estimated, negotiated and agreed in 2003-04.

Vendor delivered 27 sets and continued supplies with same terms & conditions. PO placed do not have provision for revision of prices as also commercial guidelines and outsourcing procedure of DPSU does not permit such revision of prices.

11.3 CONSEQUENCE:

M/S TSL the contractee did not agree for amendment of contract as it was awarded on compitive bidding.

11.4 LEARNINGS:

- i. The terms of contract should be precise, definite and practicable
- ii. Contracts should as far as possible not be loaded for or against one party and should result in a win-win situation.

v. Contractual incompleteness:

A contract is literally incomplete if an event or contingency can arise that is not anticipated by the contract. Accordingly the contract is silent with respect to what should happen given this event or contingency. The literal completeness can be achieved by adding suitable clause in the contract.

12. UNDUE WAIVER OF LIQUIDATED DAMAGES TO ENSURE MAINTENANCE SUPPLIES OF THE CNC JIG BORING MACHINE

12.1 BACKGROUND:

A Purchase order dt.04.12.2004 was placed by M/S CBS Ltd. (a DPSU) on M/s. SDI SA, Geneva for supply, installation & commissioning of Jig Boring machine, against open tender on L1 basis.

12.2 ISSUE:

TWO YEARS NINE MONTHS DELAY IN COMMISSIONING:

The lead delivery time of the machine was March 2005. However due to several reasons the machine was finally installed / commissioned and RR (Receiving Report) finalized on 19th December, 2007.

M/s. SDI requested vide letter dt.21.12.2004 for pre-despatch inspection, wherein PDI was schedule from 10th Jan'05 onwards. However, there was delay in sending team for PDI, PDI was completed on 18th April'05.

Letter of Credit was opened in Feb'2005 and subsequently amended. Vendor dispatched the machine on 05.05.2005 and received at Division on 12.07.2005.

Initially, the machine was planned to be commissioned in the Jig Boring Room of Machine Shop where Air- conditioning was already available. Due to the machine height (exceeding to the lintel ring of Machine Shop building) the machine was commissioned at Seaking Hanger where no AC facilities was available. However, M/s. SDI insisted on Air-conditioning to prove out the NAS test for which subsequently Air-conditioning was made and NAS test was carried out in December 2007.

The delay in installation/commissioning includes 7 months of delay from vendor side because of closure of their factory due to bankruptcy. Machine was installed / commissioned and RR finalized on 19.12.2007.

12.3 CONSEQUENCE:

AMENDMENT OF DELIVERY SCHEDULE POST COMMISSIONING:

Proposal for amendment of delivery schedule was put up, considering the vendor's assistance required by the purchaser in future for supply of spares, maintenance and breakdown requirement. Accordingly Liquidated damages earlier deducted was released.

12.4 LEARNING:

- a. Any relaxation in the contract terms / conditions should be discouraged. In exceptional cases where the modification / amendments are absolutely essential, the same should be allowed only after taking into account the financial implications for the same.

- b. There should be proper monitoring mechanism for ensuring performance of the contract as per terms and strict adherence of delivery schedule.

13. INADEQUATE DATA SUBMITTED BY THE FOREIGN SUPPLIER LEADING TO DELAY IN DESIGN AND PROCUREMENT ACTION

13.1 BACKGROUND:

A contract was entered by M/S BCB Ltd. (a DPSU) with M/S PTD Aviation, France to upgrade the existing Aircraft manufactured by the Indian company with license granted by the French company.

As per Contract with M/S BCB Ltd.:

- i. The final Data Pack delivery for Electrical & Mechanical modification kits was to+32 Months.
- ii. In the Contract, it was indicated that Preliminary Data Pack information will be provided as per following milestones:
 - To+9M: Bills of Materials with preliminary list of suppliers and lead time.
 - To+15M: First Batch of drawings for mechanical kits.
 - M denotes Months.
 - To denotes commencement date of contract

The above two milestones were introduced to facilitate the Indian manufacturer to complete procurement of raw materials and start fabrication of kit parts.

13.2 ISSUE:

The data provided by OEM against above milestones was too hazy and Division could not proceed with any actions.

- Against Bill of Materials, Raw materials list was provided without quantities and also stated that the list was not firm/final.
- The Drawings provided had several changes subsequently, some have been cancelled and many did not have full information required to proceed with fabrication.
- The Data Pack did not contain Tooling Drawings and Process Layouts.
- OEM's Management stated that the Data Pack provided was preliminary and changes are inevitable.

13.3 CONSEQUENCE:

Due to these gaps, the procurement actions could not be initiated in time for the Modification Kits and procurement actions were delayed resulting into programme slippage.

13.4 LEARNINGS:

1. The Buyer should have appropriate and effective mechanisms at sufficiently high levels for monitoring of physical and financial progress of the project at regular intervals, with a view to anticipating slippages, forecasting and minimizing likely time and cost over-runs.
2. The delivery schedule/milestones envisaged for the project should factor in the production capacity and limitations, if any, of the vendor concerned in meeting the commitments.
3. Contract should have suitable penalty clause to make good the buyer against un-reasonable delay in executing the contract terms by the supplier.

14. LACK OF CLARITY IN THE CONTRACT SPECIFICATION

14.1 BACKGROUND:

A contract was entered by M/S BCB Ltd. (a DPSU) in November 2013 with M/S VST Aerospace, France to upgrade the existing Aircraft manufactured by the Indian company with license granted by the French company.

As per Contract

- Pre-installation Bench was to be supplied for “Go/No Go checks” of Mirage Upgrade LRUs.
- End user clearly stated that the same was not brought out in the Contract specifications.

14.2 ISSUE:

- During review of progress of Bench, it was understood that self-test was not incorporated in the Bench.

14.3 CONSEQUENCE:

- OEM initially did not agree to incorporate ‘Self-Test’ in the Test Bench but finally agreed after a lot of pursuance.
- Self-test for Interface Adaptors of the Bench is not agreed till 2015 and is being pursued.

14.4 LEARNINGS:

1. Specifications and other terms of the contract should be clearly defined and acceptable to both the parties leading to no room for ambiguity in future execution.

15. DELAY IN EXECUTION DUE TO INORDINATE DELAY BY THE FOREIGN VENDOR TO PROVIDE THE REQUIRED TECHNICAL DOCUMENTATION

15.1 BACKGROUND:

M/S DEC Ltd. (a DPSU) entered into a contract in October 2010 with M/S LEG, UK for establishing Repair & Overhaul facilities of the Line Replacement Units (LRUs) of the Aircraft manufactured by the DPSU with license from the UK Company.

As per terms of contract the contractor was to provide the technical documentation relating to CMMs (Component Maintenance Manual) consisting guidelines for Repair & Overhaul services facilities:

15.2 ISSUE – INORDINATE DELAY BY THE FOREIGN VENDOR TO PROVIDE THE REQUIRED DOCUMENTATION:

- CMMs (Component Maintenance Manual) supplied did not cover the information for the 3rd & 4th level servicing.
- OEMs updated the CMMs, after long pursuance, but to provide updated CMMs they took more than three years.

15.3 LEARNINGS:

Proper remedies should be available in the contract to cover against financial loss to the Indian manufacturer due to delay in fulfilling contractual requirements by the foreign supplier within the time frame of the contract.

16. AMBIGUOUS DETAILS REGARDING TRAINING PERIOD TIME SCHEDULE IN THE CONTRACT

16.1 BACKGROUND:

M/S DEC Ltd. (a DPSU) entered into a contract in October 2010 with M/S LEG, UK for establishing Repair & Overhaul facilities of the Line Replacement Units (LRUs) of the Aircraft manufactured by the DPSU with license from the UK Company.

As per Contract:

- Training schedule is to be mutually agreed.
- Query answering service against Technical Assistance is to be provided by OEM and the response time for reply, is to be mutually agreed.

16.2 ISSUE:

The contract did not clearly mention the timing of the Training schedule etc to be provided by the foreign contractor.

16.3 CONSEQUENCE:

OEM delayed training by 6 months as their facility was being shifted.

OEM also delayed the response and sought more than 3 months' time for response.

All this delayed concerned projects by years.

16.4 LEARNINGS:

1. Contract should define the scope of work in clear terms, freezing technical specifications.
2. Contractors responsibilities as well time schedule for execution should be clearly specified in the contract defining mile-stone based deliverables,
3. Proper remedies should be available in the contract to cover against financial loss to the Indian manufacturer due to delay in fulfilling contractual requirements by the foreign supplier within the time frame of the contract.

17. DELAY IN DELIVERIES AND HUGE COST OVERRUN DUE TO DEFICIENCIES IN PLANNING, EXECUTION, CO-ORDINATION IN CONTRACT MANAGEMENT.

17.1 BACKGROUND:

- M/S CAB Ltd., Nasik (a DPSU) received orders (January 2001) from its customer to supply 140 Aircrafts at a cost of Rs 22122.78 Cr. based on certain mix of production phases where numerous numbers (75 Aircrafts) were from Raw Material phase.
- M/S CAB Ltd. in turn signed a separate General Contract with M/S OTH Ltd., Russia for license production of Aircrafts based on above stated production mix.
- In March 2006, considering the sharp depletion in combat aircraft force levels, the deliveries were advanced to 2014-15 by revising the project cost to Rs.39605.95 crore by changing production phases with less numbers from Raw Material phases, (30 Aircrafts), Revised contracts were signed.

17.2 ISSUES:

a) DELAY IN COMPLETION OF D&D ACTIVITIES BY THE VENDOR:

Delay in completion of D & D activities by Russian side by 3 years. Delay in supply of drawings for tooling & technology, NSE & tooling from Russia by 2.5 years.

b) NO PROVISION FOR SIGNING OF INTEGRITY PACT AND LD CLAUSE IN THE CONTRACT:

c) Repeated postponement of supplies.

d) Russian side is adopting dual pricing policy for DPSU and IAF while forwarding commercial offers for supply of Ground Support equipment and Group set spares.

e) Increase in prices of Associated Equipments (GSE-GHE & Role Equipment)

f) Delay in supplies due to price escalation agreement: The price escalation protocol for year 2013 onwards was signed in 2015.

17.3 CONSEQUENCE:

- **DELAY IN DELIVERIES:**

Up to 2012-13, total no. of Aircrafts planned for delivery as per revised contract was 112 Aircrafts in the Compressed Contract, out of total 140 Aircrafts to be delivered to IAF. As against planned deliveries, only 75 Aircrafts could be delivered upto 2012-13 which was less than even the Original Contract of 2001 80 Aircraft up to 2012-13.

- **COST-OVERRUN:**

The original planned schedule was compressed to advance the delivery of aircraft by agreeing additional cost implication of Rs17483 crs being 44% higher cost implication than the original cost envisaged (Rs.22123 Cr

17.4 LEARNINGS:

- i. i. Liquidated Damages clause to be included in the contract
- ii. ii. Risk purchase clause to be included in the contract.
- iii. iii. Penalties for non-fulfilment of other important clauses of contract
- iv. (other than delivery schedule) should also be defined in the
- v. contract.
- vi. iv. Terms of Deputation of foreign experts and Training of personnel
- vii. should be defined for full project life cycle.
- v. Technological changes should be clearly specified through a well-defined procedure & updated Material list, if any, should be simultaneously forwarded.
- viii. vi. Price Escalation should be defined for full contract period.
- ix. vii. Once Price escalation is defined in General contract, signing of
- x. supplementary contracts / placement of PO's should be on fast
- xi. track basis without obtaining fresh offer from OEM.
- xii. viii. Increase the Indigenization efforts and the steps to be taken for
- xiii. increasing Indigenous Content in Defence supplies. The issues
- xiv. identified as constraints for indigenization and the Road map for
- xv. overcoming the same.
- xvi. ix. Analysis of Project Time and Cost overrun encountered if any,
- xvii. needs to be reviewed and reasons to be identified and corrective
- xviii. measures to be suggested.

18. CONTRACT ENTERED WITHOUT LIQUIDATED DAMAGES CLAUSE RESULTING IN HUGE FINANCIAL LOSS DUE TO PROJECT DELAYS

18.1 BACKGROUND:

M/S CAB Ltd., Nasik (a DPSU) signed (December 2012) a separate General Contract with M/S OTH Ltd., Russia for supply of technical kits for manufacturing additional 42 Aircrafts by the DPSU.

18.2 ISSUE:

I. DELIVERY SCHEDULE NOT KEPT UP

The contract stipulated supply of six aircrafts in 2012-13. M/S CAB Ltd. made available to the ultimate customer all six aircrafts between September 2013 and November 2013.

I. DEFICIENCIES IN CONTRACT MANAGEMENT: PROVISIONS IN THE CONTRACT

i. Liquidated damages on delayed supplies to IAF

M/s CAB Ltd., was liable for LD amounting to Rs.460.90 crore due to delayed delivery of aircrafts to defence customer. However, in the absence of enabling provision in the contracts with M/s OTH Ltd., no claim had been preferred on them by DPSU for compensating the loss.

ii. Pre-contract integrity pact not executed with vendor

No Pre-contract Integrity Pact was signed for all the above contracts as per provisions of Defence procurement Manual.

II. DEFICIENCIES IN CONTRACT MANAGEMENT – MONITORING & CONTROLLING PROCESS:

Delay in Transfer of Technology:

- i. There were delays ranging between 24 to 30 months in supplying Technical documentation, tooling's.
- ii. Delay in supply of certain Ukrainian items contracted through the Russian supplier due to ongoing political turmoil.

18.3 LEARNINGS:

- i. Liquidated Damages clause to be included in the contract with the supplier if ultimate Buyers contract contains such provision.
- ii. Risk purchase clause to be included in the contract.
- iii. Suitable clauses may be incorporated in the contracts with foreign vendors to safeguard the interests of Indian counterparts in respect of delay in meeting contractual obligations with regard to transfer of technology, delayed supplies and replacement of damaged articles.
- iv. Integrity pact from vendors may be insisted upon from pre-bid stage in respect of all contracts involving value in excess of the ceiling applicable.
- v. Monitoring of manufacture of the aircraft may be streamlined to strictly comply with PERT charts drawn up for each major activity of the DPR with co-ordinated links.

**19. DEFICIENCIES IN PLANNING, EXECUTION, CO-ORDINATION IN
CONTRACT MANAGEMENT RESULTING ABNORMAL DELAY AND COST
ESCALATION OF THE WHOLE PROJECT.**

19.1 BACKGROUND:

M/S CAB Ltd., Nasik (a DPSU) signed (September 2005) a separate General Contract with M/S OTH Ltd., Russia for repair and overhaul of aircraft and its aggregates as also to prepare and supply technical documents for repair and overhaul and design documentation.

The scope of work of overhaul to be carried out at Nasik Division included repair of airframe and its various Russian aggregates. M/S CAB Ltd. Nasik was allocated Rs.283.35 crore at 2008 level (Rs.311.44 crore at incurrence level) for civil works, factory, plant & machinery, services office, material handling equipment/ assembly aids, runway up-gradation, etc.

19.2 ISSUE:

I. DEFICIENCIES IN CONTRACT MANAGEMENT – CONTRACT PROVISIONS:

a) ABSENCE OF LIQUIDATED DAMAGES CLAUSE:

There was no Liquidated damage Clause in the contract entered with the Russian Supplier to compensate against delay in deliveries of supplies.

b) PRE CONTRACT INTEGRITY PACT NOT EXECUTED WITH VENDOR:

No Pre-contract Integrity Pact was signed for all the above contracts as per provisions of Defence procurement Manual.

c) ABSENCE OF CLARITY REGARDING PRICING OF ITEMS IN THE CONTRACT:

Item wise cost of spares for overhaul of airframe and aggregates of fighter aircraft is not provided by Russian side, which affects the procurement of additional spares for overhaul of airframe and aggregates.

II. DEFICIENCIES IN CONTRACT MANAGEMENT – EXECUTION PROCESS:

a. Delay in deliveries by the supplier:

- i. Non Standard Equipment (NSE)/ tooling for long cycle and critical items like Under Carriage and Ejection seat were received only in May'14 and May'15 respectively. Hence establishment of facilities for these long cycle items got delayed.
- ii. Indigenous development of NSE and Tooling items through vendors got delayed because of late receipt of Design Documentation for Technological Equipping Means (DDTEMs), as the specifications can be finalized only after its receipt.
- iii. Delay in deputation of Russian specialists for commissioning and mastering of aggregates.
- iv. The compositions of group set of spares supplied for aggregates and airframe are not sufficient for overhaul.

b. Delay in establishing infrastructure:

There were in-ordinate delays in completion of civil works, installation and commissioning machinery and equipment's in sites where ROH facilities have been planned to be established.

- c.** Repair/ overhaul facilities which were required to be in readiness by February 2012 were completed in 2016.

19.3 LEARNINGS:

- a. Contract should contain adequate provision to safeguard and compensate the buyer against delay in deliveries. It is essential to organize a joint study of the contractual provisions to appreciate the terms and define the plan of implementation by each stake-holder.
- b. A comprehensive plan should be drawn to co-ordinate different activities envisaged in the contract, to reach the ultimate objectives in time. Progress on implementation of the contractual provisions needs to be monitored by a Committee which could review and suggest remedial measures to remove any obstacles.

- c. Regular interaction and communication **are** required between all stakeholders to identify the shortcoming areas and measures to sort out the bottlenecks.
- d. Effective monitoring mechanism is required to ensure setting up of infrastructure facilities in time.

20. DEFICIENCY IN CONTRACT MANAGEMENT- IMPROPER PLANNING TO AUGMENT INFRASTRUCTURE FACILITIES.

20.1 BACKGROUND:

M/S CAB Ltd., Nasik (a DPSU) signed (September 2005) a separate General Contract with M/S OTH Ltd., Russia on 28th Dec, 2000 for Manufacturing of AL-31FP engine for fighter aircraft.

It was planned to utilise the existing facilities available in the factory as well as to organise additional new facilities for manufacture of 24 nos. AL 31 FP engines per annum.

20.2 ISSUE:

DEFICIENCY IN CONTRACT MANAGEMENT – IMPROPER PLANNING TO AUGMENT INFRASTRUCTURE FACILITIES:

- i. Due to non-inclusion of 713 items of plant and machinery costing Rs.127.15 crore and 372 items of Non-Standard Equipment costing Rs.47.17 crore (2000 PL) in the DPR the envisaged (2000) built up capacity for manufacture of 24 engines per annum could not be achieved.
- ii. It also found that with the prevailing manpower and other factors in the DPSU could build only 12 engines per annum.
- iii. Even the installed capacity also could not be achieved for manufacture due to various factors.
- iv. **Inability to develop outsourcing facilities as assessed in the plan**
Capacity was assessed based upon various factors including possibilities of subcontracting which could not be materialised as per plan

FAULTS IN CONTRACT EXECUTION AS PER PLAN:

- i. **Abnormal delay in receipt of Technical documentation**
 - Technological documents have been received after a delay of 2 & 1/2 years.
- ii. **Delay in receipt of equipment and tooling:**
 - Equipment and Tooling have been received after a delay of 2 years.
 - Large no. changes in drawings during manufacturing and prove out of first engine further delayed the process.

20.3 LEARNINGS:

1. Proper planning, monitoring system for timely execution of the project.
2. Stress on indigenisation to reduce dependence on foreign supplier.
3. Liquidated Damage and periodical project review by both parties must be appropriately incorporated in the contract.

21. IN-ADEQUATE SUPPORT SERVICES FROM THE LICENSOR LEADING TO DIFFICULTIES IN REPAIR AND OVERHAUL PROGRAM OF AIRCRAFT

21.1 BACKGROUND:

M/S CAB Ltd., Nasik (a DPSU) signed (September 2005) a separate General Contract with M/S OTH Ltd., Russia on September 2005 for Repair & Overhaul of AL-31FP engine for Aircraft.

21.2 ISSUES:

- Pre-mature failures were experienced due to failure of bearings that led to requirement of unanticipated spares such as discs, shafts etc during repair of the engines. Issue was discussed with OEM and IAF jointly. The recommendations of the Russian Side are under implementation at the Air bases and DPSU plant.
- In case of ROH of AL-31FP engine, the support of the Licensor was observed to be highly inadequate due to non-submission of offers for group sets of spares, which has serious impact on serviceability of aggregates and ROH activities. This is contrary to the Clause of ROH General Contract which Russian side has taken responsibility for continuous spare support throughout total exploitation life of Aircraft and its systems.

21.3 LEARNINGS:

- Proper planning, monitoring system for timely execution of the project.
- Stress on indigenisation to reduce dependence on foreign supplier.
- Non Inclusion of appropriate clause to cover premature failures.

22. IN-ORDINATE DELAY IN ENGINE DEVELOPMENT PROGRAMME

22.1 BACKGROUND:

Delivery schedule in case of design and development projects was left open-ended in the RFP on the pretext of flexibility. Such an approach leaves a lot of uncertainty, ambiguity and discretion with the development agencies and makes the appraisal and monitoring of the project rather difficult.

22.2 ISSUE:

M/S LMV Ltd. a defence PSU (DPSU) invited global proposals to explore development of a new engine meeting the thrust requirements with adequate growth potential built in for the future.

The RFQ called for unlimited total technical life of engines with "on condition" maintenance and the Technical Evaluation Committee found that both the vendors satisfied this parameter.

After evaluation/selection process and detailed negotiations, AL55I engine from M/s RSI Ltd., Russia was selected (April 2004). Accordingly, a contract was signed (June 2005) with M/s RSI Ltd. for development and supply of AL 55 I engines and an order was placed (July 2005) for five engines (inclusive of two mock up) at a total value of 29.50 million USD (Rs.132.93 crore).

However, contrary to the requirement of unlimited life specified in the RFQ, Company entered into a contract stipulating a limited life of 100 hours each for the three engines for the development phase, which could be extended through complex life extension programme by entering into a separate contract for production phase. The vendor developed two prototype engines. The qualification tests and flight tests at the vendor's premises were completed in December 2006.

After a lapse of 11 months, the Russian supplier made a detailed presentation (October/ November 2007) on the problems encountered during the bench test and life cycle tests of the engine. At this stage the supplier suggested extension of the initial assigned life of engine to 300 hours even for the prototype engines.

After a lapse of another 11 months, in September 2008 M/s LMV Ltd., entered in October 2008 into a supplementary contract with M/s RSI Ltd. and placed an order for carrying out works for establishing an initial assigned life of 300 hours at a cost of 26 million USD (Rs 131 crore). The engines with modified life were received in January 2009.

a. Flaws in the contract with M/S RSI Ltd:

Thus, improper assessment of the required life of the engine and failure to negotiate and include a specific clause in the initial contract entered into (June 2005) with M/s

RSI Ltd. for full life extension without any additional cost resulted in avoidable expenditure of Rs 131 crore and contributed to further delaying the completion of the project.

b. Delay in Engine Development Programme:

The Establishment of 300 hours of initial life to the AL55I engines has been completed only on 23 Dec 2013.

The plan with timelines for further life extension to the specified TBO of 1200 hours had been provided by Russian Side in June 2014, which indicates 141 months (around 12 years) for achieving 1200 hrs life, which was not acceptable as it would affect the scheduled delivery of Trainer Aircraft to end user.

Plan with timelines beyond 1200 hrs to full life of 3600/ 6000 hours, is not provided by Russian side.

c. In-ordinate delay in supply of Design Documentation (DD) and Technological Documentation:

The updated DD and operating manuals for engine with 300 hours of initial life has not been handed over to the Indian Side. Russian Side has informed that Licence Design Documentation for 300 hours engine life shall be supplied to M/s LMV by Dec 2014.

d. Delay in offering of draft supply agreement for supply of Engine Kits:

DSAs (Draft Supplementary Agreement) for 25 Engine kits (18 Ph-0, 2 Ph.-I and 5 Ph-3) are still awaited from Russian side. Russian side to offer DSAs for Engine Kits immediately.

e. Insistence on Amendment to Inter Governmental Agreement (IGA):

Russian Side is insisting on amendment of Technical specification of Engine in the IGA. Russian Side has brought out that the amendment is required to incorporate correction in the General Contract (for license Production) to make it in line with the finalized specifications after the Design & Development work.

f. Liquidated Damages (LD) & Integrity Pact (IP) Issues:

These Clauses were not available in the Series Production contract. Russian Side has not yet resolved the LD issues against D&D contract against delay in supply of LSP engines.

22.3 LEARNINGS FROM THE PROJECT:

- i. Preparation of proper Technical Specification and avoidance of deviations from the specification while awarding the contract
- ii. Adequate provision in the contract to dispense with avoidable expenditure later on.
- iii. Adequate negotiation skill to protect and safeguard the interest of the project while entering into a contract.
- iv. Appropriate Liquidated Damages Clause in the contract to penalise the designing agencies against delays.

23. DELAY IN PROJECT EXECUTION DUE TO NOT RESOLVING THE PRICING ISSUES BETWEEN THE PARTIES

23.1 BACKGROUND:

M/S SEM Ltd. (a DPSU) entered into a contract with M/S CVS, Russia for overhauling RD 33 Engine in their facilities in India. The contract among others includes establishment of infrastructure facilities for making six number uncommon items required for the project with supplies of technical documents i.e. technological Part of the project (TPP) as well as Repair Technological Documents (RTD) by the Russian vendor within 2014.

23.2 ISSUE – DELAY IN PROJECT DUE TO PRICE ESCALATION ISSUES RAISED BY VENDORS:

Russian side has forwarded Draft Supply Agreement (DSA) for incorporation of escalation, which M/s SEM Ltd., is unable to conclude pending approval of escalation protocol from the customer i.e., IAF. It ultimately resulted delay in project implementation.

23.3 CONSEQUENCE:

Price escalation issues for the period 2013 to 2017 agreed by the sides in 2015. The supply of TPP and RTD are awaited from Russian side. Matter is being followed up with customer. Meanwhile M/s SEM Ltd., obtained their Board approval for going ahead for conclusion of supplement.

23.4 LEARNINGS:

Contentious issues like pricing should be settled between the stakeholders before setting up the project plan and completion schedule of the project.

24. DELAY IN PROJECT EXECUTION DUE TO NON- SUBMISSION OF CRITICAL DOCUMENTS, ITEMS BY THE FOREIGN SUPPLIER

24.1 BACKGROUND:

M/S SEM Ltd. (a DPSU) has entered into a contract on December, 2010 with M/S CVS, Russia for design, development and manufacturing Multi Role Fighter Aircraft in India.

24.2 ISSUE – DELAY IN PROJECT EXECUTION DUE TO NON-SUBMISSION OF CRITICAL DOCUMENTS AS WELL AS ITEMS BY THE FOREIGN SUPPLIER:

During Preliminary Design Phase following delays were observed:

- Delay in receipt of Special Software & Training materials from Russian side.
- Delay in signing of Supplementary Agreement (SA) i.e. Contract required to transfer certain limited work share elements to the Russian side .

There was also delay in resolution of Technical issues as per Tactical Technical Assignment (TTA) requirement, Cost finalization, IPR, Joint marketing of PMF to third countries.

24.3 CONSEQUENCE:

All the major technical issues related to deliverables during the R&D stage and in-principle issues governing the Series Production stage have to be resolved during R&D Contract technical meetings between the parties associated with the programme including Licensor & Licensee, Buyer & Seller, etc.

24.4 LEARNINGS:

1. In any technology transfer programme, Licensors/OEMs are not willing to transfer their core technology and keeping core items as proprietary. This indirectly restricts the Indian manufacturer to complete self-reliance and continuous

dependency on Foreign OEMs even after Technology transfer. Hence the Scope of the contract should exclusively include complete Transfer of technology upto components level.

2. The contract should ensure full logistic support by the foreign vendor for supplying required technical documents, training and other requirements within the stipulated time period.

**25. INABILITY TO TERMINATE THE CONTRACT AND RECOVER
ADVANCES GIVEN TO SUPPLIER IN ABSENCE OF TERMINATION
CLAUSES IN THE CONTRACT**

25.1 BACKGROUND:

M/s MDM LTD, an Indian DPSU placed an order on M/s KN Ltd. Germany, for design, manufacture, supply, installation and commissioning of HVAC system on P15A ships in the year 2006 with staggered deliveries for three ship sets from 2007 to 2009.

For that they paid interest bearing advances to the German firm.

25.2 ISSUES:

There was a delay on the part of the firm even for the deliveries of the first ship set and after the delivery of about only 20% of the equipment the firm had gone into liquidation.

PITFALLS IN DRAFTING CONTRACT:

As per the contract terms, there was no specific provision/clause about remedies available in case of bankruptcy or insolvency of the other party which would enable M/s MDM Ltd. to terminate the contract and recover the advances made therein.

The termination clause or the risk purchase clause as it existed in the contract did not have any provision for termination in case of bankruptcy or the firm becoming insolvent.

25.3 CONSEQUENCE

Accordingly there were difficulties in termination of the contract due to the bankruptcy of the German supplier and recover the Advances provided to them with interest.

25.4 LEARNINGS:

1. Contract particularly with foreign parties should have adequate remedies in case of Bankruptcy/Liquidation of the other party.
2. Contract should ensure proper financial coverage against any probable financial risks and loss to the company.
3. Clauses like Force majeure and procedure for dispute resolution between the parties are important constituents of the contract to safeguard against future risks.

26. INABILITY TO EXECUTE THE CONTRACT IN ABSENCE OF CLARITY IN SCOPE OF WORK

26.1 BACKGROUND

M/s MDM LTD, an Indian DPSU had entered into a contract with M/s GSL for carrying out certain jobs on ship that was constructed by them but was required to undergo certain tests and completion of balance works at M/s GSL, Goa.

26.2 ISSUE - LACK OF CLARITY IN THE SCOPE OF WORK:

There was lack of clarity in the scope of work and all-encompassing clauses were not existing in the contract to define the scope of work. Even when certain works are in balance, the vessel was being brought back to M/s MDM due to the rough weather and cyclonic conditions, the vessel was getting drifted away and had to be salvaged.

26.3 CONSEQUENCE - FINANCIAL LOSS TO MDM LTD.

In the process M/s GSL unilaterally stated that the contract stands executed on the above said reasons and they had not made any attempts to recover/salvage the vessel for which M/s MDM had to mobilize the tugs and manpower for the rescue operations.

The non-execution and balance work or repair to the damages that was required to be carried out would fall under the scope of work or not or the contract would stand unilaterally abandoned by M/s GSL or not became a matter of dispute between the parties.

26.4 LEARNINGS:

All-encompassing clauses in the contract to cover "Scope of work" should be defined unambiguously.

27. NON-CONCLUSION OF SUPPLY OF CRITICAL SPARES IN THE CONTRACT LEADING TO ACUTE SHORTAGE OF FITTINGS

27.1 BACKGROUND:

M/S JIT Ltd. (a DPSU and manufacturer of ship) entered into a contract with M/S CST Ltd., Delhi, for Design, manufacture, supply and installation of Sewage Treatment Plant (STP) on board ship.

27.2 ISSUE – SUPPLY OF CRITICAL FITTINGS NOT INCLUDED IN THE CONTRACT:

Design, manufacture, supply and installation of Sewage Treatment Plant (STP) on board ship was in the scope of the contractor. After the delivery of the STP it was noticed that there was acute shortage of fittings for the plant.

27.3 CONSEQUENCE:

Since the list of deliverables are not available at the time of order placement and gets firmed up during the design phase by the firm there was no specific mention about the fittings to be supplied by the firm in the PO, M/s JIT had great difficulty in making the firm understand and supply the balance fittings.

27.4 LEARNINGS:

It is essential to include suitable clauses in the contract for supplying items which although yet to be designed but critical for completeness of stores/system. This necessitated the inclusion of the sentence “the items not specifically listed but required for completeness of stores/system deem to be included”.

28. CASE STUDY ON DETERMINATION OF L-1 IN LARGE DEFENCE CONTRACT

1. Ministry of Defence floated a Request for Proposal (RFP) for 20 Fast Petrol Vessels (FPVs) for the Indian Coast Guard in 2009. The proposals were invited through two bid systems i.e., Technical proposal and Commercial proposal. The Request for Proposal was urgent as there were 26/11 Mumbai Terrorist attack in the year 2008. The Indian Coast Guard(ICG) is responsible for maintaining surveillance along with Coast line of 7516 km and an Exclusive Economic Zone(EEZ) of 2.013 m Sq. Km. To meet the growing maritime challenges, to overcome the gaps in the coastal surveillance and to sanitise the vast sea area, this requirement arose to process on Fast Track Basis.

2. The condition in RFP was to have firm & fixed basic price during the entire period of contract of supplies. However, one of the bidder (A) no doubt given bids in two parts: a technical proposal and the commercial proposal. But, in Technical proposal it desired to avail the Foreign Exchange Rate Variation (FERV) benefit. Thereafter, the Commercial bid was opened. The Commercial bids was opened in the presence of bidders.

3. The bidder (A) was found to be L-1 but non-responsive as their basic price was not firm and fixed in the entire duration of the contract and was subject to escalation through Foreign Exchange Rate variation methodology enumerated in the proposal. While another Defence PSU was found to be lowest bidder L-2.

4. On receipt of Technical and Commercial offers from 5 bidders, a Technical Evaluation Committee was constituted. The estimated cost of the project is more than Rs.300 crores and therefore a Technical Oversight Committee was also constituted by Ministry of Defence to ensure that there was no oversight in the conduct of Technical Evaluation process. A Contract Negotiation Committee (CNC) was constituted in accordance with Defence Procurement Procedure. When the commercial bid was opened, it was observed that the Bidder (A) had a variable Foreign Exchange component because Commercial bid

specified that the Cost of FPV included a maximum foreign exchange content of Rs.432 crores and any revision in the foreign exchange content after the

specified date of 15.10.2009 was to be claimed at actuals. To determine the FE content, the petitioner attached a copy of SBI rate card with the commercial bid which rate card contained various exchange rates of different foreign currencies. Bidder (A) however, did not specify as to which foreign currency was the basis of foreign exchange component in the commercial bid since the commercial offers had to be firmed and fixed and since the petitioner has claimed the Foreign Exchange Rate Variation (FERV) component, CNC concluded that the commercial offer of the petitioner was non-responsive. Bidder (A) on account of its bid being non-responsive subsequent to opening of commercial bid by his letter dated 15.1.2010 withdrew its earlier offer and offered the quoted prices without FERV component. The object of this letter, therefore, was to make non-responsive bid as responsive. The CNC, therefore, consequently declared bid of bidder (A) as non-responsive and permitted consequently the Defence PSU bidder as L-1 bidder on 18.1.2010 and Ministry of Defence was subsequently awarded the contract.

5. All these suggest that the bidder(A) wanted to act smartly by giving SBI rate card along with quotation which has 19 currency and in appreciation in any one of the currency could have also created unimaginable impact on the Ministry of Defence(MoD) as even weight factor of each currency was not provided for in the Commercial bid. Hence, Bidder (A) is clearly non-responsive and is not entitled to the contract. Accordingly, the CNC of MoD has rightly awarded the contract to Defence PSU who has given the basic cost as firm and fixed and specified a particular foreign currency along with the weight factor and SBI rate of the concerned currency of the opening of the bid date as the base rate as the contract for delivery was for a period of more than 5 years.

LEARNINGS:

If request for proposal is properly drafted, it will weed out angle of corruption in MOD and contract so awarded will stand scrutiny of vigilance organisations, CAG & Courts.

(Source: WP(C) No. 3231/2010 in the Hon'ble High Court of Delhi)

(Larsen & Toubro Limited &Anr Vs Union of India &Ors)

29. LESSONS LEARNT FROM FAILURE TO PERFORM AN EXPORT CONTRACT BY A DPSU

A Contract for export of Helicopters was concluded with a Latin American Country by a DPSU. The Contract was signed after successful bidding against global tender issued for purchase of the Helicopters by Latin American country. The Contract stipulated integration of many new systems which were not proven on the Helicopters. At the time of signing of the contract for supply of Helicopters time lines for integration of the new systems were agreed by DPSU.

The selection of these new systems are to be carried out after following the detailed design analysis, commercial procedures for selection of vendor, as well as timelines required for development of the new systems by the vendors and their integration on the Helicopters and flight testing and acceptance by the Customer.

While signing of the Contract the timelines for these activities were estimated optimistically and a period of 12/24 months was agreed with the Customers and entered into a Contract. However, during actual implementation many issues such as single vender situation, (procurement of Defence PSU generally avoids such procurement), refusal of the Vendors to supply the systems due to International Trade Arms Regulation etc. were encountered which has resulted in not able to source the systems within the timelines agreed with the Customers. The delays are further compounded considering the Helicopters under the Contract were not produced as per the time-lines agreed in the contract and the integration of the new systems required the availability of the Helicopters. Further availability of the Helicopters was dependent upon the concurrence from the buyer. Further, while integrating the new systems the buyer wanted changes in the configuration/position on the Helicopters which has further added to the delay in the integration of the systems on the Helicopter.

This delay has accumulated up to approximately 5 years and the systems could not be integrated even after the gap of 7 years from the date of the signing of the Contract. In the meantime, 4 out of the 7 helicopters supplied were met with accidents resulting in huge media attention and adverse publicity in the International Media about the product and DPSU. Due to the huge public attention, the

Government of concerned country ordered a Special Audit of the whole transaction. The Audit based on the findings attributed that the non-integration of the systems has resulted in restricted usage of the helicopter or non-exploitation of the Helicopter to the intended purpose. This has given an arm on hand to the Political Opposition in the Country and voices were raised stating that the product supplied was of inferior quality and allegation of corruption was made against the ruling Government which was incidentally in power while concluding the Contract.

To salvage the political situation in the country, the Government sought a Technical Operative Report from the base Commander of the Air Force and based on the report issued unilateral termination of the Contract.

Certain clauses of the Contract which are having a bearing on the present case are given below:

Payment Terms: the payment as per Contract will be made as follows:

- a. An amount of 66% of the contract value as advance within 45 days of signing of the contract and presentation of the Bank Guarantee for the equivalent amount.
- b. Balance 34% of the Contract value will be paid in 10 equal instalments with applicable interest @ LIBOR + 1% to be re-set at every year.

Unilateral Termination clause:

In conformity with the Art. 104 Codification of the Public Procurement Law of the Buyer Country, the Buyer can terminate the Contract with an early due date, in the following cases:

1. Due to the non-compliance by the Seller of any of the obligations by the present Contract;
2. Due to bankruptcy of the Seller.
3. If the value of the fines exceeds the amount of the Performance bank Guarantee of the Contract;

4. Due to the Seller formalizing contracts against the express prohibition of the Law; and
5. In the rest of the cases established Law on this issue.

To proceed with the unilateral termination of the Contract the norms of the Art.105 of Public Procurement Law of the Buyer Country will be applicable. To invoke this provision the Buyer need to notify at least 15 days in advance to the seller.

The clause on "**Fines due to delay**" read as:

"In case of delay in fulfilment of the Contractual Term, the seller will pay the Buyer the amount equivalent to one by thousands of the amount for the Goods and Services that are delivered late, as a fine, for each day of the delay, up to a maximum of total amount of the Contract, without any damage to the rights that are established in the Unilateral Termination clause of the Contract".

The seller will not be responsible for the delay which is due to unforeseen circumstances or force majeure situation. Further in case the delay is due to reasons arising from the written requests and instructions of the Buyer, the seller shall not be held responsible for the delay.

The clause on **Secrecy**:

The parties are obliged to maintain strictly secret the contents of this contract, the documents, annexures and communication conducted between them, not only during the Contract but also after the execution of the same.

This contract and any information, material and/or technical documentation submitted, must be treated and classified by the parties as "SECRET" material.

The Clause on Dispute:

If there exists difficulties not solved by the execution of this contract, the proceedings will be discussed according to that stated in the Art.109 of the Public Procurement Law of the Buyer Country before the Tribunal of contentious and Administrative Matters with Headquarters in the city of Quito

To start any judicial actions, the parties must obtain the lifting of the secrecy of the documents otherwise they will face legal liability for divulging the contents of Secret Documents.

The unilateral termination was issued invoking two paras viz., (1) and (3) of the contract i.e., due to non-compliance of the contractual obligations by the Company and the fines exceeding the 5% of the value of Contract value and notice served on the company giving 10 days to justify or remedy the breach.

At the time of issuance of the unilateral termination of the contract, the Foreign Customers has paid 6 annual instalments and 4 instalments were due.

The unilateral termination was contested by the company and a detailed written response was submitted within 8 days of the receipt of notice with request for personal hearing. The termination notice was contested based on the technical facts and the knowledge of the Indian Law. The assistance of Indian Embassy was also sought to use their good offices to resolve the issue. Based on the request for personal hearing and intervention of Indian Embassy, the Foreign Government has agreed to accept a delegation from the DPSU.

During the meeting the Defence Minister of the Government addressed the DPSU delegation and stated that the present situation is due to the political situation in their country and they are not in a position to continue to operate the contract. However he has agreed to terminate the contract on mutual agreement basis and suggested to submit a proposal for mutual termination of the contract.

Considering the novice to the foreign law the company took the assistance of the legal firm of the foreign country. The law firm advised that to start with the unilateral termination notice needs to be withdrawn by the Ministry and subsequently the proposal for mutual termination of the contract needs to be submitted.

Accordingly, a detailed techno-legal response was submitted contesting the unilateral termination notice with request for withdrawal of the termination of contract notice which is detailed below:

1. Lack of legitimacy and competence of the Minister of Defence of the Buyer Country to issue the Termination Notice:

The contract was signed by the Honourable Board of National Defence, represented by its Minister of National Defence. This Board was transitioned into Strategic Goods Direction and afterwards, Strategic Goods Co-ordination. The legal, statutory and administrative powers that of the Honourable Board of National Defence were totally assumed by Strategic Goods Co-ordination. Consequently, an administrative procedure for unilateral termination of the contract would have been based on the technical and economic reports of the contract administrator which is Strategic Goods Co-ordination. However, unilateral termination of the contract was issued based on the reports from third parties i.e., Base co-ordinator of the Air Force.

2. Lack of right and competence to initiate an administrative procedure for unilateral termination of the contract:

As per the clause on dispute of the contract, which states "If there were no solved difficulties within the execution procedure of this contract, the procedure will be solved according to Art.109 from the codification of Public Contracts Law, before a Court of Administrative Litigation in Quito...."

In case of controversies where the parties do not agree to use the mediation and arbitration procedures, and they decide to go by judicial way, the procedure will be resolved before the district courts of administrative procedures applying the law of administrative court jurisdiction.

In the instance case without exhausting the options of mutual discussions for finding amicable solutions or option of, mediation and arbitration issuance of a unilateral termination is null and void.

3. Breach of Secret Clause of the Contract:

In order to divulge the decision to start a procedure for unilateral termination of the contract, the secrecy clause and lifting of secrecy of the documents were not adhered to. However, the Ministry has not adhered to above mentioned clauses and by doing this before their countries social communication media, the image and reputation of seller has been evidently affected.

4. The Buyer is in breach of contractual obligations by not making the payments as per the contract, consequently lack of legitimate right to demand the unilateral termination of contract:

As on the date of issuance of Unilateral Termination Notice, the Buyer was in default in making the 7th annual instalment which was overdue by 3 months. Further, the subsequent three instalments were also due as on the date of issuing the unilateral termination. This was contested based on the Art.95 of the Organic Law of Public Contracts National System, which says: “.....The sellers could not say that the contracting entity is in arrears on the compliance of his economic obligations in case the advance payment given under the contract is not totally amortized.....Arrears on the compliance of economic obligations from the Contracting Entity could only be adduced when the advanced payment given to the seller is totally amortized, and the seller maintains economic obligations of payment.....” In this case the advance payment is totally amortized several years ago, and it is evident that there are economic obligations pending for seller.

5. Wrongful calculation of fines:

The Unilateral Termination of Contract is based on the premise that “.... since these non-compliances have generated penalties exceeding the 5% of the value of the contract, which corresponds to a value superior to Performance Bond guarantee of the contract.

The fines were calculated not considering the contractual stipulation of limit of 5% of the contractual values and calculated cumulative fines which represents 8.75% of the Contract value. Further, the fines were unilaterally deducted by the customers which are also not contemplated in the contract. Further, the fines were deducted from the annual instalments due to the company to the extent of 4.75% of the value of the contract. Therefore, it was contested that since as on date of issue of unilateral termination even if the fines calculated by the customer which is 4% of the contract value and does not exceed the performance bond value of the contract. It was also contested that the fines are calculated by the customer without giving cognizance to the items already supplied and could not

be integrated into the Helicopters at the instance of the customer who has ordered that the integration to be done during the servicing of Helicopter.

This unilateral action from the Government of buyer has created a situation beyond seller's control. It is evident that for this situation seller is not in a real position to perform its obligations under the contract, despite its willingness and readiness which has been amply demonstrated by seller. After the unilateral decisions from the Minister of National Defence of buyer, all payments to seller have been stopped, including the 7th instalment which was due on August 2015, even though they are contractually obligated to pay.

6. *Violation of confidentiality:*

The Buyer's Minister of National Defence, has given communication to national media about the unilateral termination and the other deficiencies of the product as well as about the conduct of the seller. This is in violation of the secrecy clause of the contract. Such breach of confidentiality of the contract has created serious and heavy damages to the image of the seller, because by divulging this in public has put the seller goodwill in damaging position due to the violation of secrecy clause and the adverse publicity given in local media criticizing due to total legal and technical ignorance of the performance of the seller's helicopters.

7. *Non- Response to offer of company to recover the Helicopters:*

As on the date of issuance of termination notice, the seller has offered to recover the Helicopters and do the necessary actions required for completion of the contractual obligations.

Therefore, it is concluded that the customer was not correct in issuance of the unilateral termination notice and was requested to withdraw the termination notice and due to the situation created by the actions of the customer by breach of secrecy clause of the contract, by giving negative publicity about the product and the seller and unilateral suspension of flights etc., has left no room for continuation of the contract and therefore it was requested for termination of the contract on mutual agreement basis. The

same was agreed by the customer and advised the seller to submit a proposal for mutual termination of the contract.

Accordingly, a proposal for mutual termination of the contract was submitted with request to settle the dues which includes unpaid instalments, unpaid interests and interest for delayed payments, refund of excess recovery of LD etc., was submitted and negotiated for termination of the contract.

Lessons learnt:

1. Lack of knowledge of international / local laws by the seller

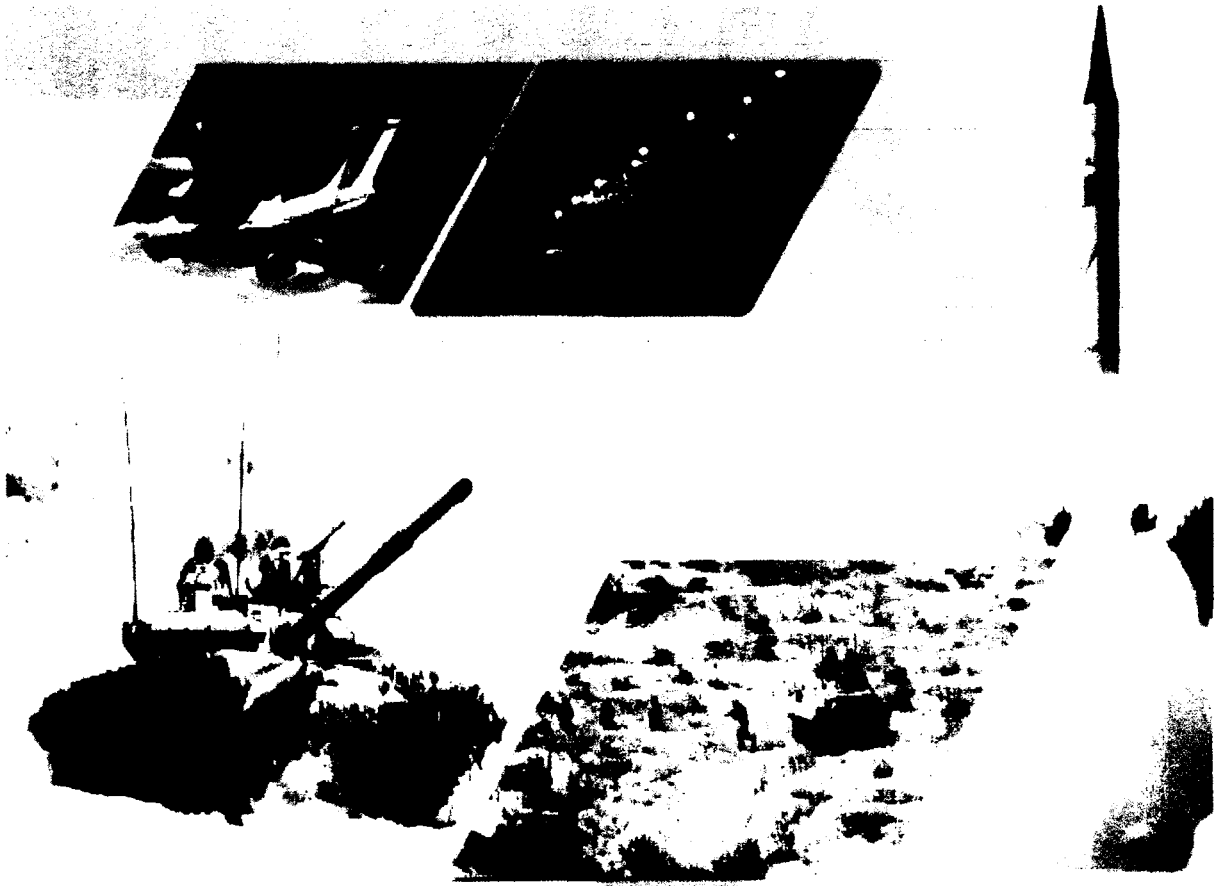
- The contract was subject to laws of buyer country the knowledge of which was not completely available at the time of signing and execution of the contract. The variance of laws between the two countries makes it difficult for interpretation and taking appropriate actions. Therefore, the international contracts should be based on laws of a neutral country to protect the interests of both the parties.
- Further, the contract was subjected to the jurisdiction of courts in the capital of the buyer country. This puts the contracting party at a lot of disadvantageous position. Therefore, it is desirable to have the jurisdiction of the contracts under a neutral venue to be on equal footing.
- The contract does not have a dispute resolution mechanism through Arbitration or mutual conciliation. This has resulted in issuance of unilateral termination without exhausting such dispute resolutions.

2. Compliance to the contractual obligations:

- a) The international contracts have many risks which inter alia include political risk, currency risk, etc., therefore, while executing the international contracts; proper care should be taken so that the contractual obligations are met as per the schedules agreed. Further, the contractual obligations are to be met in letter and spirit and no scope should be given for jeopardising the contract due to political risks.
- b) While offering a product in an international market, it should be ensured that the products is a matured product and meets the expectations of the international customer.

3. *Project Management:*

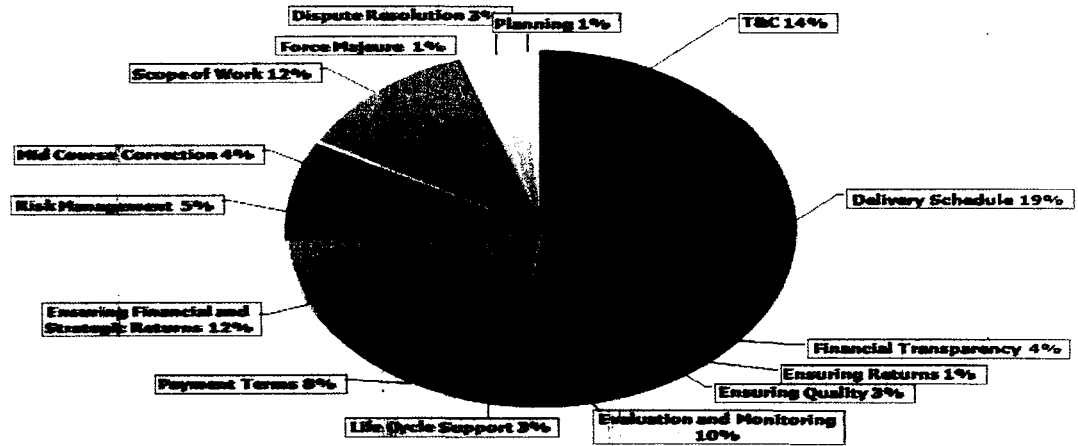
- a) The international projects are to be closely monitored and a Project Manager needs to be assigned to ensure that the contract is executed as planned or scheduled.
- b) The damage to the image and the brand in international contracts are very high, needs to be kept in mind



Contract Management and Practice – A REVIEW

Sl. No.	1(a) In your opinion what is the most important factor with respect to Contract Management & Practice?	Responses	%
1	Delivery Schedule	15	19%
2	T&C	11	14%
3	Ensuring Financial and Strategic Returns	9	12%
4	Scope of Work	9	12%
5	Evaluation and Monitoring	8	10%
6	Payment Terms	6	8%
7	Risk Management	4	5%
8	Financial Transparency	3	4%
9	Mid Course Correction	3	4%
10	Ensuring Quality	2	3%
11	Life Cycle Support	2	3%
12	Dispute Resolution	2	3%
13	Ensuring Returns	1	1%
14	Force Majeure	1	1%
15	Planning	1	1%
	Total	77	100%

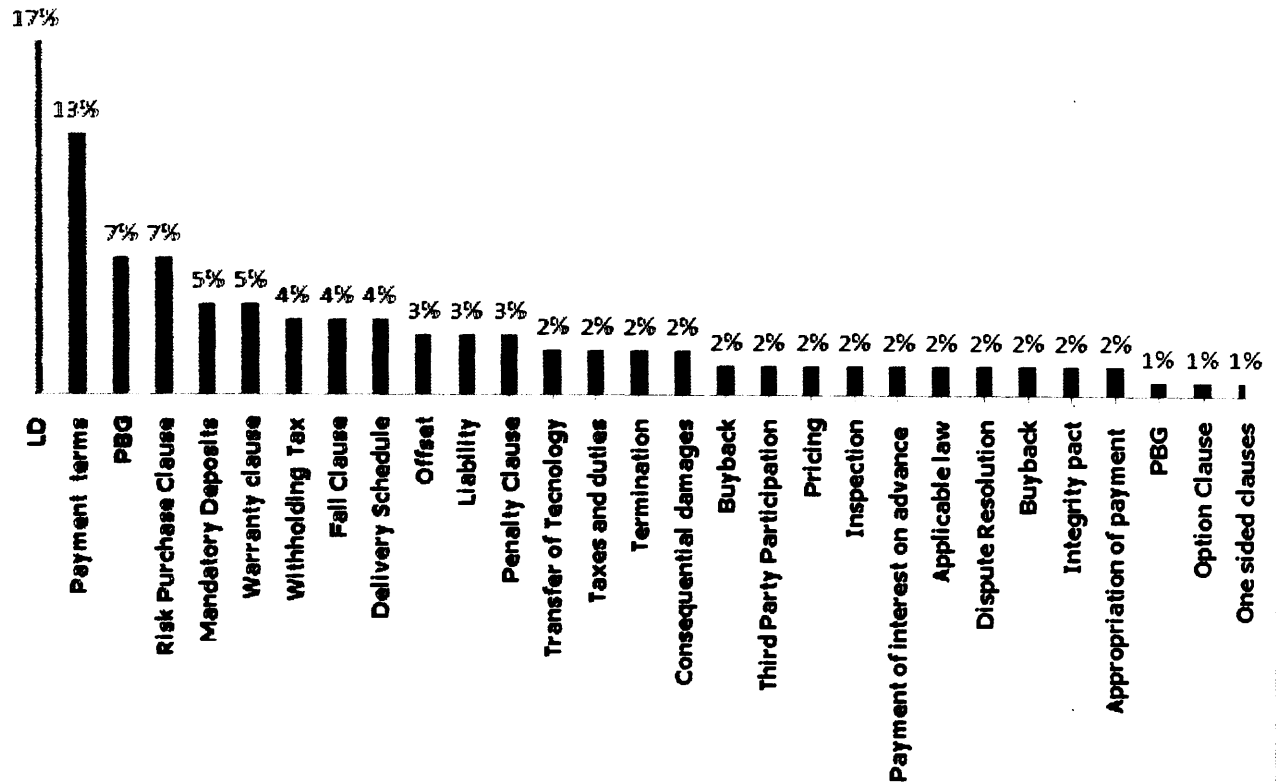
1(a) In your opinion what is the most important factor with respect to Contract Management & Practice?



From the above analysis Delivery schedule & Terms and conditions appears to be most important factors in Contract with 33% response. The other terms such as Financial & Strategic returns & Scope of work are next with 12% response each. The terms such as ensuring returns, Force Majeure & Planning are least important with 1% response each.

Theme	Responses	%
LD	23	17%
Payment terms	17	13%
PBG	9	7%
Risk Purchase Clause	9	7%
Mandatory Deposits	6	5%
Warranty clause	6	5%
Withholding Tax	5	4%
Fall Clause	5	4%
Delivery Schedule	5	4%
Offset	4	3%
Liability	4	3%
Penalty Clause	4	3%
Transfer of Technology	3	2%
Taxes and duties	3	2%
Termination	3	2%
Consequential damages	3	2%
Buyback	2	2%
Third Party Participation	2	2%
Pricing	2	2%
Inspection	2	2%
Payment of interest on advance	2	2%
Applicable law	2	2%
Dispute Resolution	2	2%
Buyback	2	2%
Integrity pact	2	2%
Appropriation of payment	2	2%
PBG	1	1%
Option Clause	1	1%
One sided clauses	1	1%
Total	132	100%

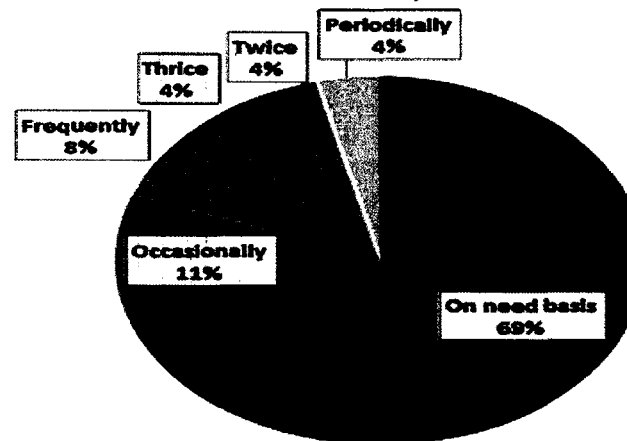
1(b) In your opinion what are the contractual clauses that are normally resisted by vendors/subcontractors?



Response analysis reveals that LD & Payment terms are most resisted by Vendors with around 30% of the respondents reacting followed by PBG & Risk purchase clause with 7% response each. The option clause & one sided clauses are the least important with 1% response each.

SL No	1 (c) During the currency of Contract how frequently the clauses/terms & conditions of the contract are interpreted between the parties?	Responses	%
1	On need basis	18	69%
2	Occasionally	3	12%
3	Frequently	2	8%
4	Thrice	1	4%
5	Twice	1	4%
6	Periodically	1	4%
	TOTAL	26	100%

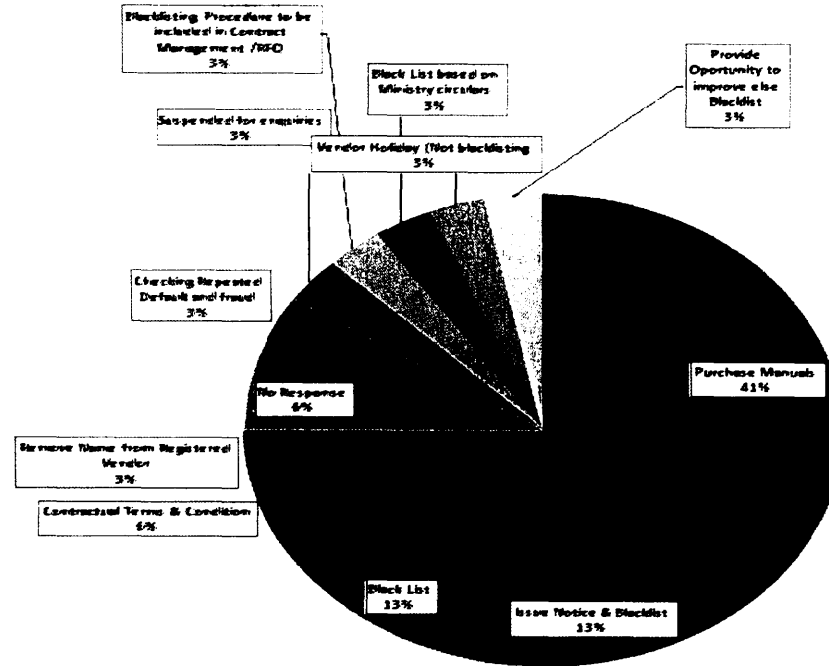
1 (c) During the currency of Contract how frequently the clauses/terms & conditions of the contract are interpreted between the parties?



From the above analysis it is seen that 69% of the respondents that Contract terms & clauses are amended on need basis and could be any number of times. While 11% respondents has indicated that Contract terms & clauses are amended around three times and in case of others it is less than three times.

Sl. No.	1 (d) In case it is decided to Blacklist a Vendor/Subcontractor? What is the procedure followed? What are the available recourse in Contract Management?	Responses	%
1	Purchase Manuals	13	41%
2	Issue Notice & Blacklist	4	13%
3	Black List	4	13%
4	Contractual Terms & Condition	2	6%
5	Remove Name from Registered Vendor	1	3%
6	No Response	2	6%
7	Checking Repeated Default and fraud	1	3%
8	Suspended for enquiries	1	3%
9	Blacklisting Procedure to be included in Contract Management /RFQ	1	3%
10	Black List based on Ministry circulars	1	3%
11	Vendor Holiday (Not blacklisting)	1	3%
12	Provide Opportunity to improve else Blacklist	1	3%
	Total	32	100%

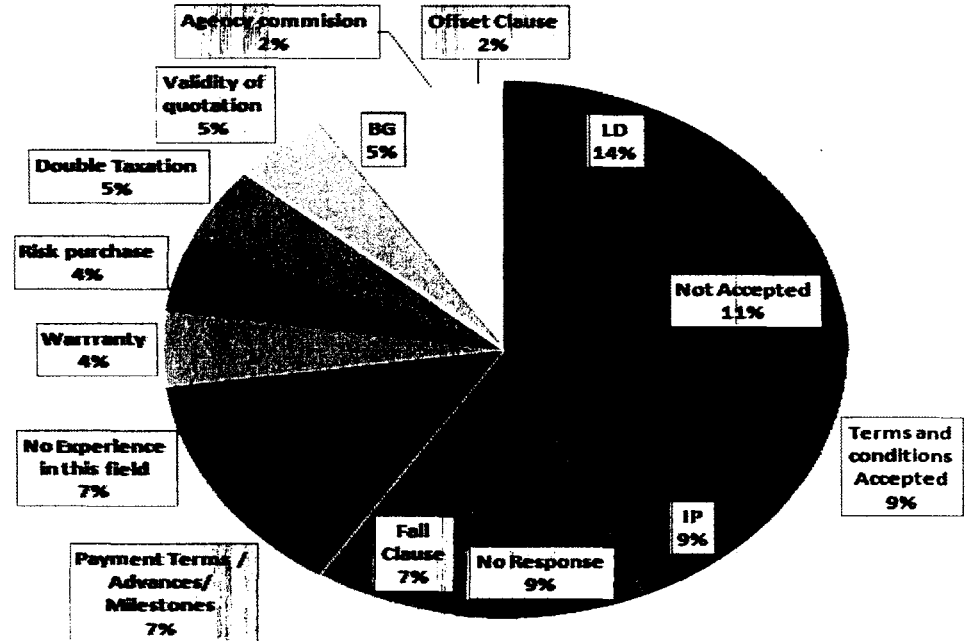
1 (d) In case it is decided to Blacklist a Vendor/Subcontractor? What is the procedure followed? What are the available recourse in Contract Management?



From the above it can be seen that 42% follow Purchase manuals procedure for blacklisting a vendor. While in 13% cases the firm is blacklisted after serving notice to the vendor and an equal percentage respondents say that firms will be directly blacklisted. While 3% response each for other recourses such as checking Repeated Default and fraud, Suspended for enquiries, Vendor holiday & Provide opportunity to improve else blacklist.

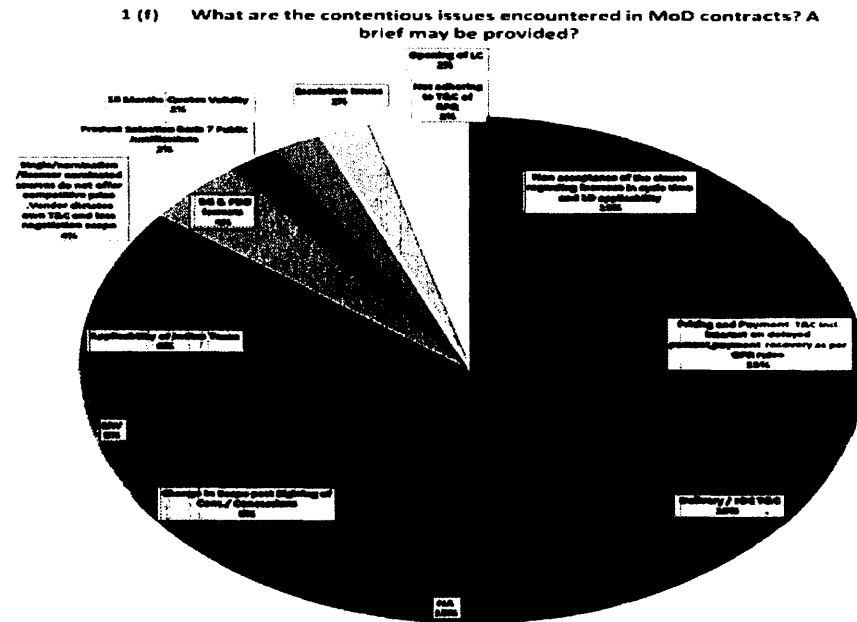
SL no	1 (e) Are overseas Vendors accept for DPP 2013 terms and conditions? If not, what are there deviations?	Responses	%
1	LD	6	14%
2	Not Accepted	5	11%
3	Terms and conditions Accepted	4	9%
4	IP	4	9%
5	No Response	4	9%
6	Fail Clause	3	7%
7	Payment Terms / Advances / Milestones	3	7%
8	No Experience in this field	3	7%
9	Warranty	2	5%
10	Risk purchase	2	5%
11	Double Taxation	2	5%
12	Validity of quotation	2	5%
13	BG	2	5%
14	Agency commission	1	2%
15	Offset Clause	1	2%
	Total	44	100%

1 (e) Are overseas Vendors accept for DPP 2013 terms and conditions? If not, what are there deviations?



The analysis indicates that DPP 2013 is not very well accepted by the foreign Vendors. the analysis further reveals that 14% of the responses object for LD clause. 11% will not accept DRP 2013 terms & conditions while 9% agree for DPP 2013 terms & conditions. While the least important are the clauses such as Agency Commission & Offset clause with 2% response each.

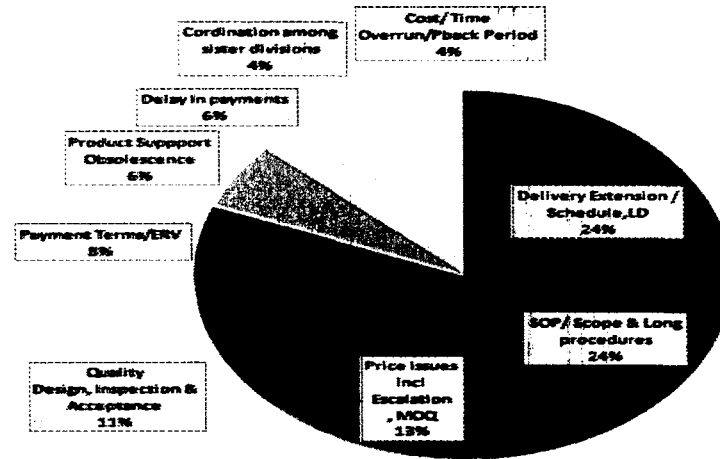
SL No	1 (f) What are the contentious issues encountered in MoD contracts? A brief may be provided?	Responses	%
1	Non acceptance of the clause regarding increase in cycle time and LD applicability	7	15%
2	Pricing and Payment T&C incl. interest on delayed payment, payment recovery as per GFR rules	7	15%
3	Delivery / IOC T&C	7	15%
4	NA	7	15%
5	Change in Scope post Signing of Cont./ Concessions	4	8%
6	ERV	4	8%
7	Applicability of Indian Taxes	3	6%
8	Single nomination /licensor nominated sources do not offer competitive price .Vendor dictates own T&C and less negotiation scope	2	4%
9	BG & PBG formats	2	4%
10	Product Selection Basis 7 Public Justifications	1	2%
11	18 Months Quotes Validity	1	2%
12	Escalation Issues	1	2%
13	Opening of LC	1	2%
14	Not adhering to T&C of RFQ	1	2%
15	Total	48	



Contentious issues as revealed from responses are mainly non-acceptance of increase in cycle-time, pricing and payment including interest on delayed payment, delivery. The lists contentious are opening of LC, validity of quotes, escalation issue, and T & C.

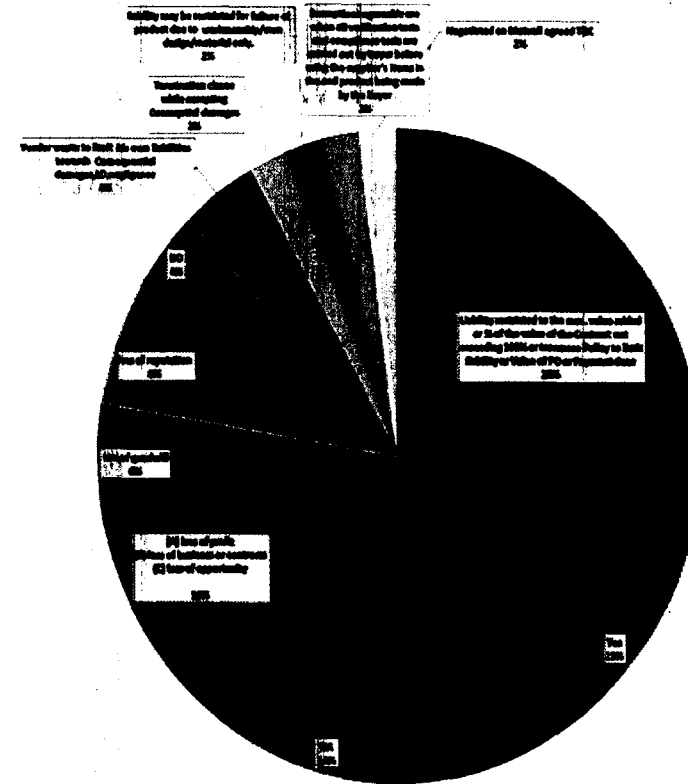
Sl. No	g) List five major issues being faced as a DPSU while executing the MoD contracts?	Response	%
1	Delivery Extension / Reschedule LD	13	25%
2	SCP/ Scope & Long procedures	13	25%
3	Price issues incl Escalation - MOC	7	13%
4	Quality Design, Inspection & Acceptance	6	11%
5	Payment Terms/ERV	4	8%
6	Product Support Obsolescence	3	6%
7	Delay in payments	3	6%
8	Coordination among sister divisions	2	4%
9	Cost/ Time Overrun/Pback Period	2	4%
	Total	63	100%

1 (g) List five major issues being faced as a DPSU while executing the MoD contracts?



SL No	1 (h) Do you agree for Limitation of Liability in your Contract? How do you define Limitation of Liability? What are the exemption's you agree?	Respo nses	%
1	Liability restricted to the max. value added or % of the value of the Contract not exceeding 100% or Insurance Policy to limit liability or Value of PO or Payment done	12	24%
2	Yes	11	22%
3	NA	7	14%
4	(A) loss of profit (B) loss of business or contracts (C) loss of opportunity	5	10%
5	loss of goodwill	3	6%
6	loss of reputation	3	6%
7	NO	2	4%
8	Vendor wants to limit his own liabilities towards Consequential damages, LD, negligence	2	4%
9	Termination clause while accepting Consequat damages	1	2%
10	Liability may be restricted for failure of product due to workmanship/own design/material only.	1	2%
11	Exemptions agreeable are when all verification tests and compliance tests are carried out by buyer before using the supplier's items in the end product being made by the buyer	1	2%
12	Negotiated on Mutual agreed T&C	1	2%
	Total	49	100%

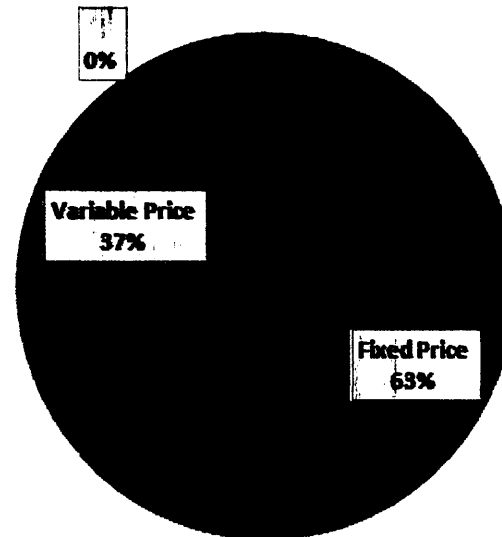
1 (h) Do you agree for Limitation of Liability in your Contract? How do you define Limitation of Liability? What are the exemption's you agree?



22% of the responses agreed with limitation liability clause. Only 4% responded negatively. 24% responses have restricted the liability to maximum value added / contract value.

SL No	2 (a) Are your contracts being finalized on Fixed Price Basis or Variable Price Basis?	Response	%
1	Fixed Price	26	63%
2	Variable Price	15	37%
	Total	41	100%

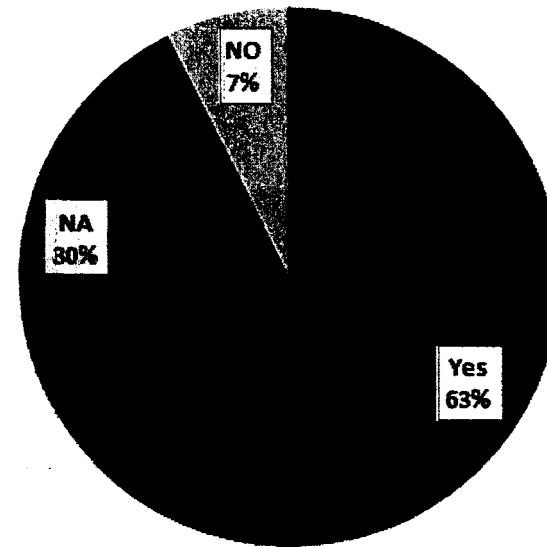
2 (a) Are your contracts being finalized on Fixed Price Basis or Variable Price Basis?



To a question 'Are your contracts being finalized on Fixed Price Basis or Variable Price Basis?' majority of response i.e. 63% have opted for 'Fixed Price' while 37% have opted for 'Variable Price'.

SL No	2 (b) In case of a contract with Variable Price, are the methodology and appropriate indices are properly defined?	Responses	%
1	Yes	17	63%
2	NA	8	30%
3	NO	2	7%
4	Total	27	100%

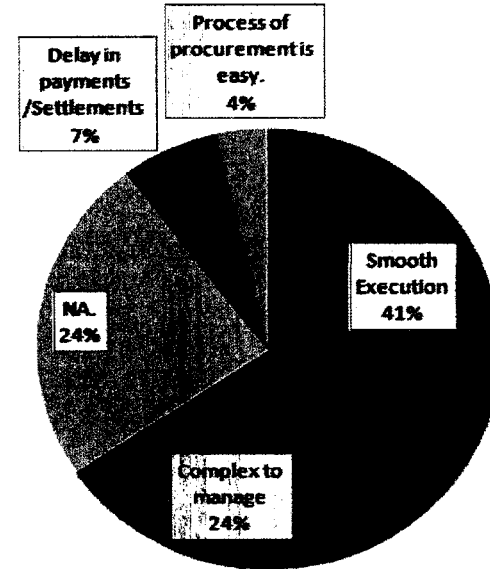
2 (b) In case of a contract with Variable Price, are the methodology and appropriate indices are properly defined?



In response to a question on proper definition of indices and methodology in case of Contract with variable price, majority of response i.e. 63% have replied positively while 7% have replied negatively'.

Sl No	2(c) What has been experience in contract execution,having price on variable basis?	Responses	%
1	Smooth Execution	12	41%
2	Complex to mainage	7	24%
3	NA.	7	24%
4	Delay in payments /Settlements	2	7%
5	Process of procurement is easy.	1	3%
6	Total	29	100%

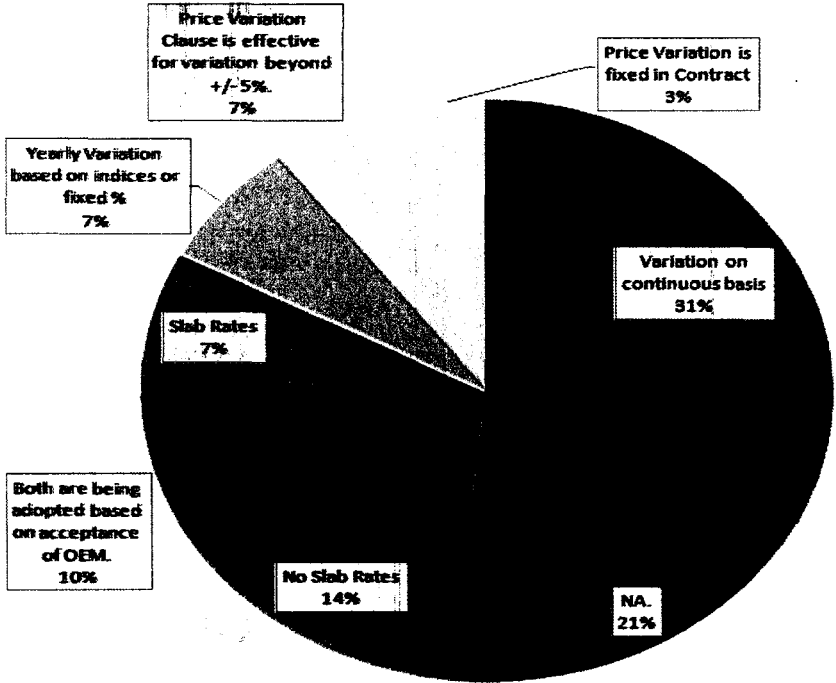
2(c) What has been experience in contract execution,having price on variable basis?



The above analysis shows that 41% of response agreed that execution of Contract will be smooth if the Contracts are on varibale price basis. While 7% have opined that there will be dealy in payments/settlements . For 24% response each it is complex to manage / the clause is not applicable.

Sll No	2 (d) Is there any slab rate for application of price variation clause or it is variation on continuous basis?	Responses	%
1	Variation on continuous basis	9	31%
2	NA.	6	21%
3	No Slab Rates	4	14%
4	Both are being adopted based on acceptance of OEM.	3	10%
5	Slab Rates	2	7%
6	Yearly Variation based on indices or fixed %	2	7%
7	Price Variation Clause is effective for variation beyond +/- 5%	2	7%
8	Price Variation is fixed in Contract	1	3%
	Total	29	100%

2 (d) Is there any slab rate for application of price variation clause or it is variation on continuous basis?

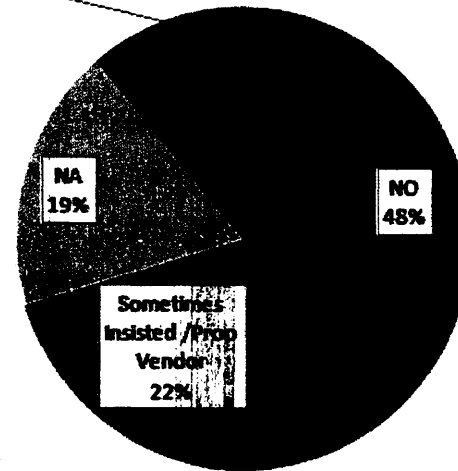


In response to a question 'Is there any slab rate for application of price variation clause or it is variation on continuous basis?' majority of response i.e. 31 % have replied that variation is on continuous basis. The least response of 3% have opined that Price variation is fixed in Contract. 21 % have responded as not applicable.

Sil No	2(e) In case of price variation clause, the escalation has been insisted by the vendors for deliveries beyond actual scheduled delivery period?	Responses	%
1	NO	13	48%
2	Sometimes Insisted / Prop Vendor	6	22%
3	NA	5	19%
4	Yes as per delivery schude	3	11%
5	Total	27	100%

2(e) In case of price variation clause, the escalation has been insisted by the vendors for deliveries beyond actual scheduled delivery period?

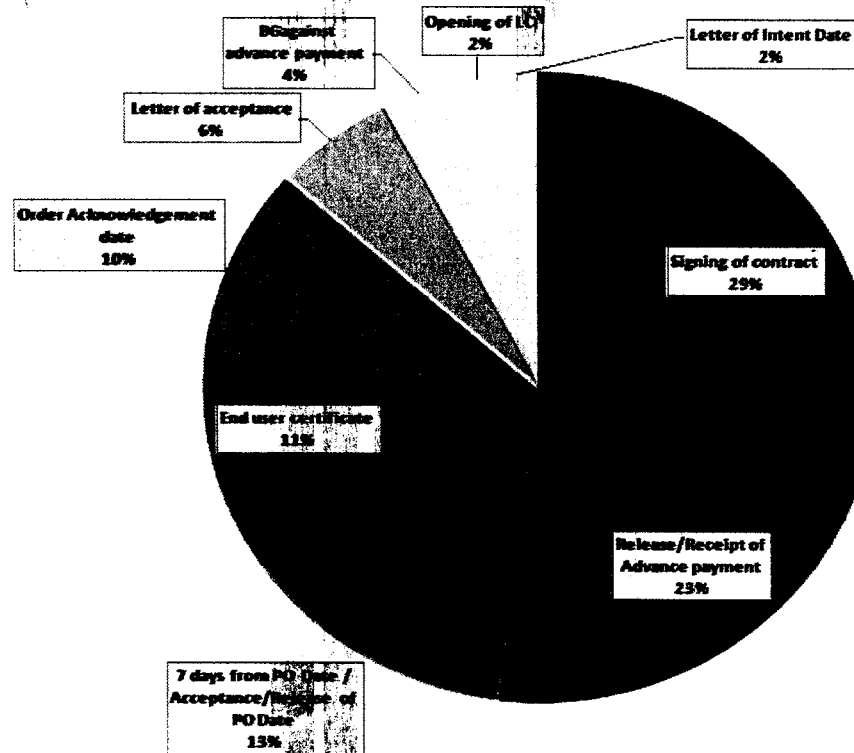
Yes as per delivery schude 11%



The above analysis shows that 48% of resposne said 'no' to applicability of escalation clause for deliveries beyond actual scheduled delivery period. The minimum 11% responded that escalation is as per the delivery schuedule.

Sl. No.	3 (a) How the "Effective Date of Contract" has been defined? Is letter of intent/acceptance taken as "Effective Date of Contract" for commencement of contract?	Responses	%
1	Signing of contract	15	29%
2	Release/Receipt of Advance payment	12	23%
3	7 days from PO Date / Acceptance/Release of PO Date	7	13%
4	End user certificate	6	12%
5	Order Acknowledgement date	5	10%
6	Letter of acceptance	3	6%
7	Back against advance payment	2	4%
8	Opening of LC	1	2%
9	Letter of Intent Date	1	2%
	Total	52	100%

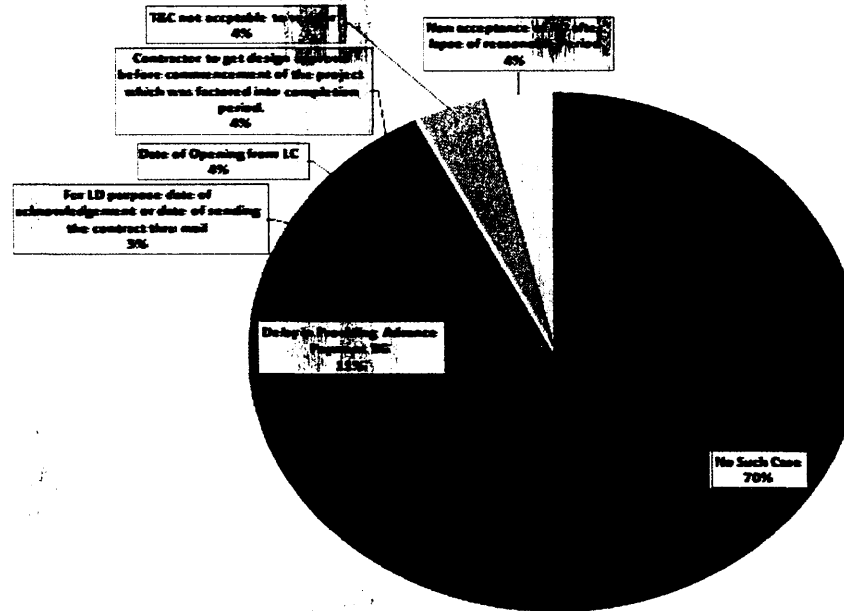
3 (a) How the "Effective Date of Contract" has been defined? Is letter of intent/acceptance taken as "Effective Date of Contract" for commencement of contract?



In response to a question 'How the "Effective Date of Contract" has been defined? Is letter of intent/acceptance taken as "Effective Date of Contract" for commencement of contract?' majority of response i.e.29% have replied that signing of Contract is effective date of Contract. The next highest response 23% have replied that 'Release/Receipt of advance payment' as effective date of Contract. The least response of 2% each is for 'letter of Intent date' & 'opening of LC' as effective date of Contract.

Sl No	3 (b) Has there been case where dispute has arisen with regard to "Effective Date of Contract"? If so, the reasons of dispute may be specified.	Responses	%
1	No Such Case	19	70%
2	Delay in Providing Advance Payment B/C	3	11%
3	For LD purpose date of acknowledgement or date of sending the contract thru mail	1	4%
4	Date of Opening from LC	1	4%
5	Contractor to get design approval before commencement of the project which was factored into completion period	1	4%
6	T&C not acceptable to vendor	1	4%
7	Non acceptance of PO after lapse of reasonable Period	1	4%
	Total	27	100%

Responses 3 (b) Has there been case where dispute has arisen with regard to "Effective Date of Contract"? If so, the reasons of dispute may be specified.

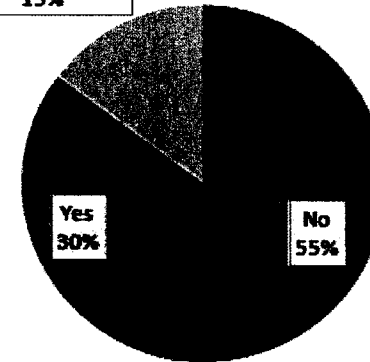


The above analysis shows that 70% of response said 'no such case' to a question 'Has there been case where dispute has arisen with regard to "Effective Date of Contract"? If so, the reasons of dispute may be specified'. The least response of 4% each for a) For LD purpose date of acknowledgement or date of sending the contract through mail, b) Date of LC Opening, c) Contractor to get design approval before commencement of the project which was factored into completion period, e) T&C not acceptable to vendor and f) Non acceptance of PO after lapse of reasonable Period.

Sl. No	3 (c) Have you had any experience while levying Liquidated damage due to improper definition of terms like – incoterms, selection of freight forwarder, carrier etc. ?	Response	%
1	No	15	56%
2	Yes	8	30%
3	No response / Response not related to query	4	15%
	Total	27	100%

3 (c) Have you had any experience while levying Liquidated damage due to improper definition of terms like – incoterms, selection of freight forwarder, carrier etc. ?

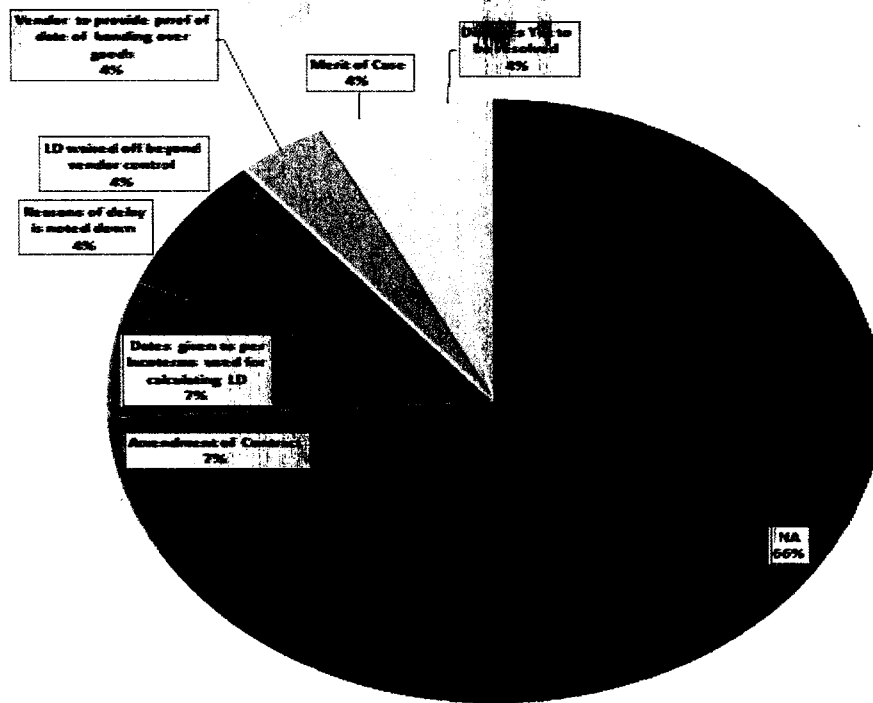
No response /
Response not
related to query
15%



In response to a question 'Have you had any experience while levying Liquidated damage due to improper definition of terms like – incom terms, selection of freight forwarder, carrier etc. ?' majority of response i.e. 55% have said 'No', while 30% have said 'Yes', and there is no response from 15%

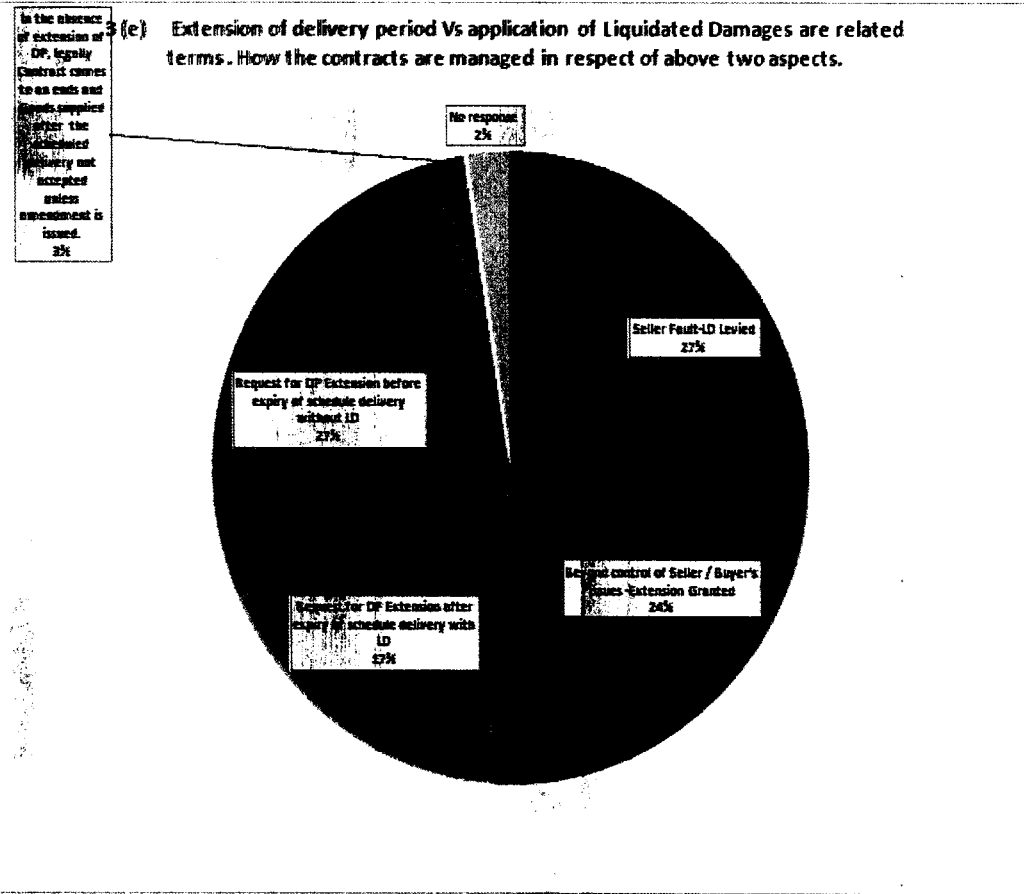
Sl. No.	3 (d) If above is yes, what course of action has been resorted to for resolution?	Responses	%
1	N/A	18	67%
2	Amendment of Contract	2	7%
3	Dates given as per Incoterms used for calculating LD	2	7%
4	Reasons of delay is noted down	1	4%
5	LD waived off beyond vendor control	1	4%
6	Vendor to provide proof of date of handing over goods	1	4%
7	Merit of Case	1	4%
8	Disputes Yet to be resolved	1	4%
9	Total	27	100%

3 (d) If above is yes, what course of action has been resorted to for resolution?



The above analysis shows that 66% of responses said 'not applicable' to a question 'If above is yes, what course of action has been resorted to for resolution?'. The least response of 4% each for a) Reasons for delay is noted down. b) LD waived off beyond vendor control. c) Vendor to provide proof of date of handover of goods. d) merit of case. e) T&C not acceptable to vendor and f) Dispute yet to be solved.

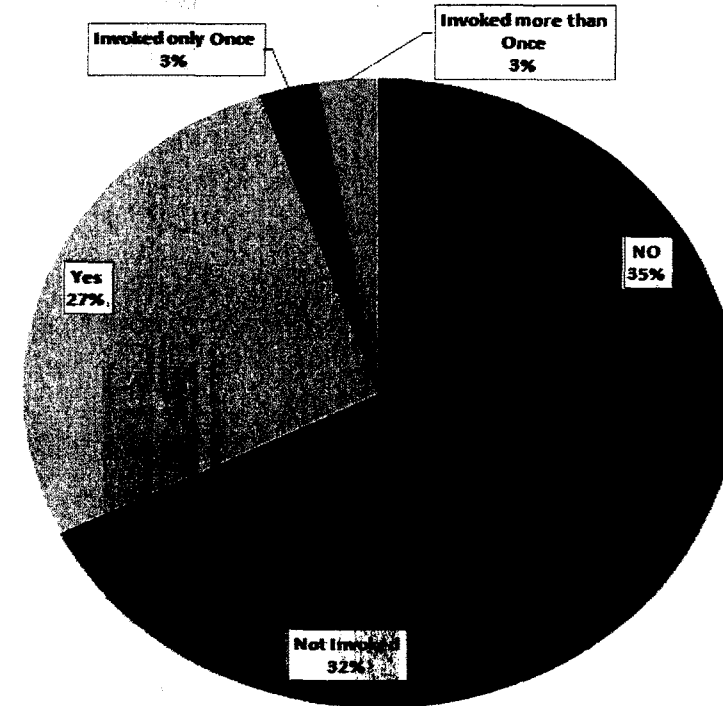
Sl. No	3 (e) Extension of delivery period Vs application of Liquidated Damages are related terms . How the contracts are managed in respect of above two aspects.	Response	%
1	Seller Fault-LD Levied	11	27%
2	Beyond control of Seller / Buyer's issues - Extension Granted	10	24%
3	Request for DP Extension after expiry of schedule delivery with LD	7	17%
4	Request for DP Extension before expiry of schedule delivery without LD	11	27%
5	In the absence of extension of DP, legally Contract comes to an ends and Goods supplied after the scheduled delivery not accepted unless amendment is issued.	1	2%
6	No response	1	2%
	Total	41	100%



In response to a question Extension of delivery period Vs application of Liquidated Damages are related terms . How the contracts are managed in respect of above two aspects. Majority of response i.e.27% have replied that if seller is at fault LD is levied. Equal response of 27% has replied that Request for delivery period extension before expiry of schedule delivery without LD will be made. The 2% replied that In the absence of extension of Delivery period, legally Contract comes to an end and goods supplied after scheduled delivery date is not accepted unless amendment is issued. There is no response from 2%.

SL. No	4 (a) Is the Risk Purchase Clause accepted by major vendors? How many times the Risk Purchase Clause has been invoked during last 3 years?	Responses	%
1	NO	13	35%
2	Not Invoked	12	32%
3	Yes	10	27%
4	Invoked only Once	1	3%
5	Invoked more than Once	1	3%
6	Total	37	

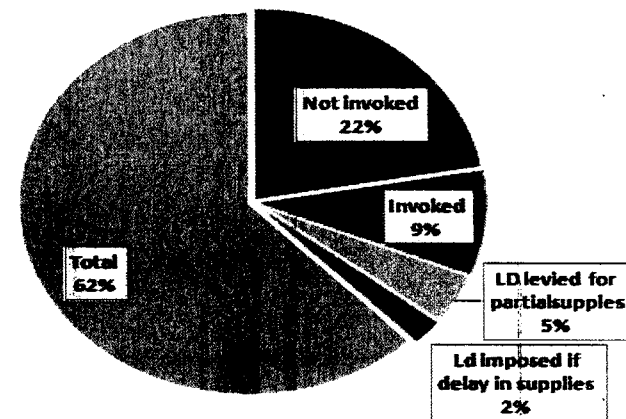
4 (a) Is the Risk Purchase Clause accepted by major vendors? How many times the Risk Purchase Clause has been invoked during last 3 years?



35% of the response opined that Vendor will say 'No' to risk purchase clause, while 27% opined that Vendor has agreed to risk purchase clause. 32% responded that there was no need to invoke risk purchase clause. The least response of 3% each has invoked the same.

SL No	4 (b) In case Risk Purchase Clause is invoked, is Liquidated Damages for delays has been also levied?	Responses	%
1	NA	11	39%
2	Not invoked	10	36%
3	Invoked	4	14%
4	LD levied for partialsupples	2	7%
5	Ld imposed if delay in supplies	1	4%
6	Total	28	100%

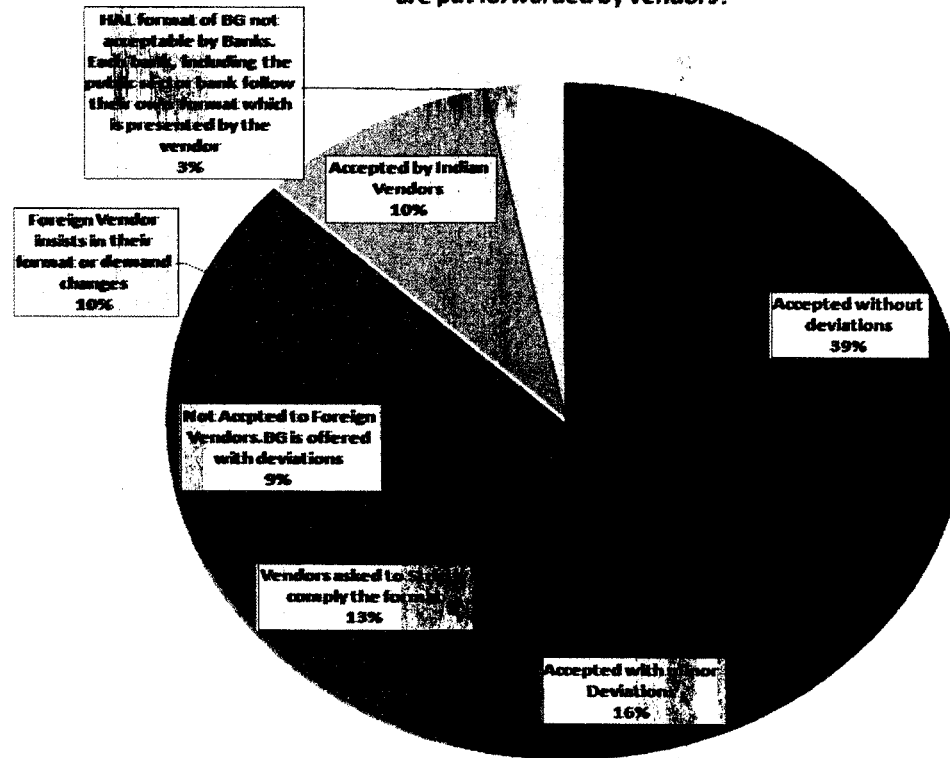
4 (b) In case Risk Purchase Clause is invoked, is Liquidated Damages for delays has been also levied?



Majority of the respondents around 39% has indicated that this is not applicable to them as no such situation has arisen. Further around 36% respondents has stated that they had not invoked the risk purchase clause at all. This in turn means that risk purchase clause is not widely accepted and the Contract do not facilitate invoking the same. Only around 4% has opined that LD is imposed if there is delay in supplies.

Srl No	5 (a) Is Bank Guarantee in the Companies format acceptable or some deviations are put forwarded by vendors?	Responses	%
1	Accepted without deviations	12	39%
2	Accepted with minor Deviations	5	16%
3	Vendors asked to strictly comply the format	4	13%
4	Not Accepted to Foreign Vendors.BG is offered with deviations	3	10%
5	Foreign Vendor insists in their format or demand changes	3	10%
6	Accepted by Indian Vendors	3	10%
7	HAL format of BG not acceptable by Banks. Each bank, including the public sector bank follow their own format which is presented by the vendor	1	3%
Total		31	100%

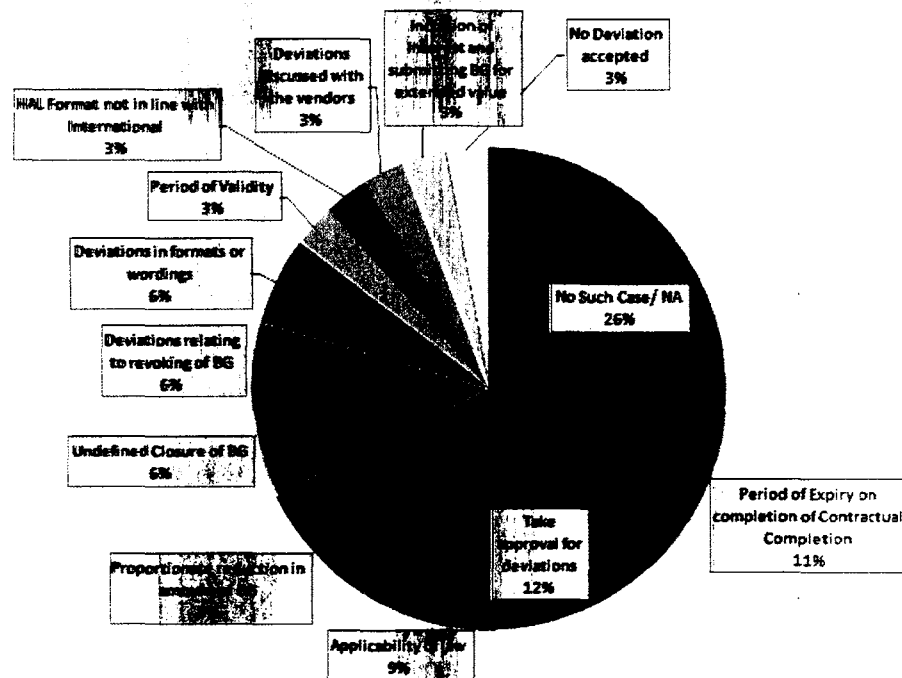
5(a) Is Bank Guarantee in the Companies format acceptable or some deviations are put forwarded by vendors?



Most of the respondents i.e.39% has stated that the vendors has accepted Bank guarantee form in its original form without any deviations. Further 13% indicated that vendors were told to agree the format and accepted the same without any changes. Only 3% responses indicated that the vendor has rejected the Bank format in its original format and has agreed only with deviations.

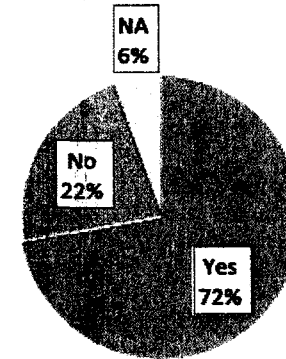
Srl. No	5 (b) What are the deviations and what is the process of resolution of such deviations?	Responses	%
1	No Such Case/ NA	9	26%
2	Period of Expiry on completion of Contractual Completion	4	12%
3	Take approval for deviations.	4	12%
4	Applicability of law	3	9%
5	Proportionate reduction in amount of BG	3	9%
6	Undefined Closure of BG	2	6%
7	Deviations relating to revoking of BG	2	6%
8	Deviations in formats or wordings	2	6%
9	Period of Validity	1	3%
10	HAL Format not in line with International	1	3%
11	Deviations discussed with the vendors.	1	3%
12	Inclusion of interest and submitting BG for extended value	1	3%
13	No Deviation accepted	1	3%
	Total	34	100%

5 (b) Bank Guarantee: What are the deviations and what is the process of resolution of such deviations?



In response to the question what are the deviations in Bank Guarantee format and the process of resolution of the same, most of the response with 26% is for no change in the BG format. 12% have responded for change in period of expiry on completion of contractual completion. The least important clauses with 3% response each is on period of validity, HAL format not inline with international format, inclusion of interest and submitting BG for extended value & no deviation accepted.

5 (c) Is the vendor being informed before invoking the Bank Guarantee?

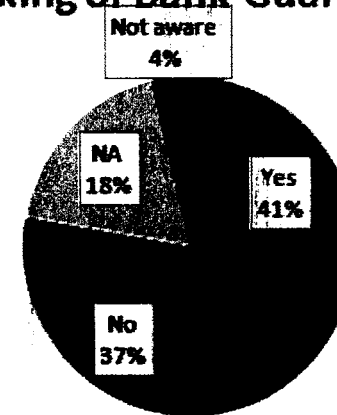


Sl No	5 (c) Is the vendor being informed before invoking the Bank Guarantee?	Response	%
1	Yes	13	72%
2	No	4	22%
3	NA	1	6%
	Total		100%

Most of the respondents i.e.72% have agreed for intimating the vendor before the invoking of Bank Guarantee. 22% of the respondents not agreed for intimation to vendor before the Bank Guarantees invoked while 6% responded as Not applicable.

Sl. No	5(d) Has any dispute arose while invoking of Bank Guarantee.	Response	%
1	Yes	11	41%
2	No	10	37%
3	NA	5	19%
4	Not aware	1	4%
	Total	27	100%

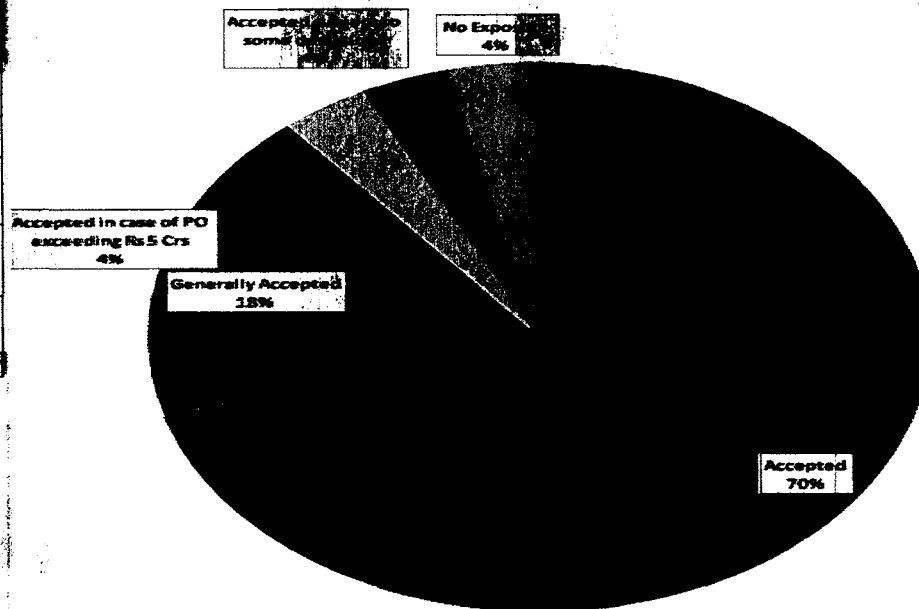
5(d) Has any dispute arose while invoking of Bank Guarantee.



Most of the respondents i.e.41% have informed that they have faced dispute while invoking Bank Guarantee. 37% of the respondents have opined that there is no dispute while invoking the Bank Guarantee. The least 4% respondents are not aware.

Sl. No	6 (a) Is Integrity Pact in the Companies format accepted by vendors?	Response	%
1	Accepted	19	70%
2	Generally Accepted	5	19%
3	Accepted in case of PO exceeding Rs. 5 Crs.	1	4%
4	Accepted subject to some deviations.	1	4%
5	No Exposure	1	4%
6	Total	27	100%

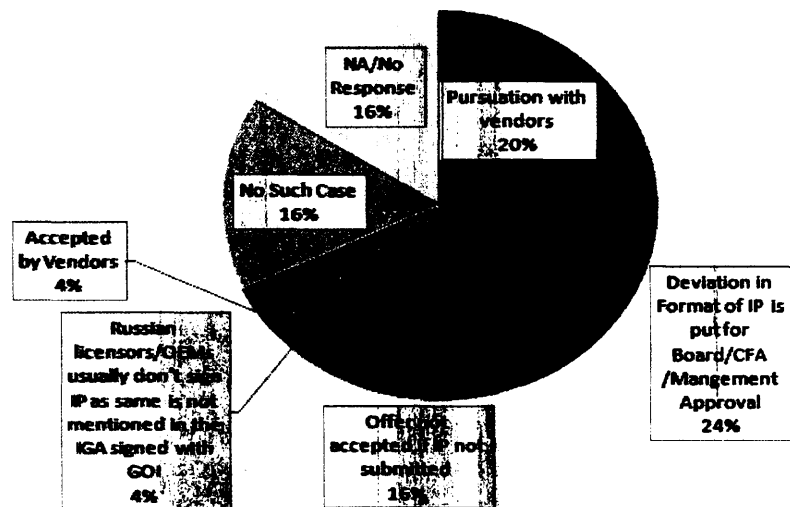
6 (a) Is Integrity Pact in the Companies format accepted by vendors?



Regarding the acceptance of integrity pact in Companies format 70% have opined that the same will be accepted by vendors. 4% each have opined that IP format with deviations is accepted by Vendors and no exposure to IP.

SL. No	6 (b) If Integrity Pact is not accepted by vendor, what resolution measure is being adopted?	Responses	%
1	Pursuation with vendors	5	20%
2	Deviation in Format of IP is put for Board/CFA Management Approval	6	24%
3	Offer not accepted, if IP not submitted	4	16%
4	Russian licensors/OEMs usually don't sign IP as same is not mentioned in the IGA signed with GOI	1	4%
5	Accepted by Vendors	1	4%
6	No Such Case	4	16%
7	NA/No Response	4	16%
	Total	25	100%

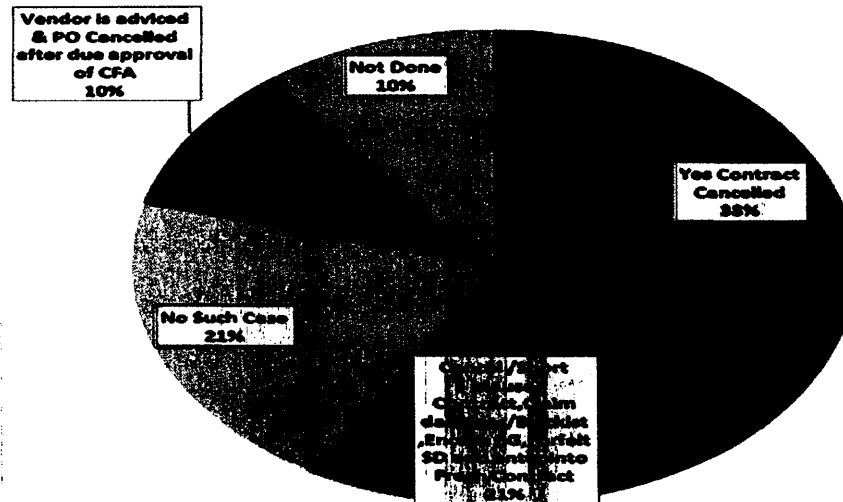
6 (b) If Integrity Pact is not accepted by vendor, what resolution measure is being adopted?



Regarding deviation in integrity pact format 24% have opined that deviation in IP format is accepted with approval of the Board/CFA. 4% each have opined that IP format without changes is accepted by Vendors and Russian vendors usually don't sign IP as same is not mentioned in the IGA

SL No	7. Breach of Contract: In case of Breach of Contract by vendor what course of action is resorted to? Is cancellation of Contract is done or specific performance of contract is insisted upon.	Responses	%
1	Yes Contract Cancelled	11	38%
2	Cancel Short clause Contract Claim damages/Blackist Encash BG Forfeit SD and enter into Fresh Contract	6	21%
3	No Such Case	6	21%
4	Vendor is advised & PO Cancelled after due approval of CFA	3	10%
5	Not Done	3	10%
6	Total	29	100%

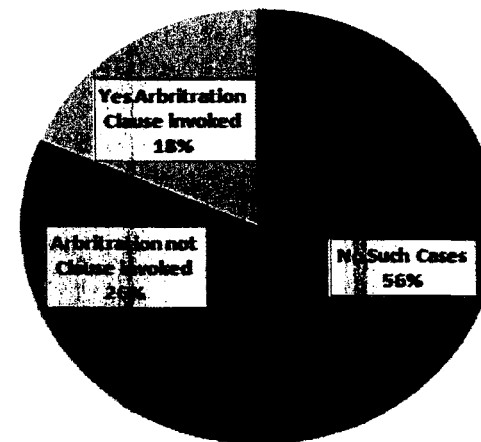
7. Breach of Contract: In case of Breach of Contract by vendor what course of action is resorted to? Is cancellation of Contract is done or specific performance of contract is insisted upon.



The response to the action taken in case of breach of Contract by Vendor 38% have opined that the Contract will be cancelled. 10% each have opined that vendor is informed and Contract is cancelled with due approval of CFA and not done.

Sl. No.	8. Arbitration: In case of Breach of Contract, whether arbitration clause has been invoked by DPSU/ vendors. Details of cases during last three years may be provided with current status?	Responses	%
1	No Such Cases	15	56%
2	Arbitration not Clause invoked	7	26%
3	Yes Arbitration Clause invoked	5	19%
4	Total		100%

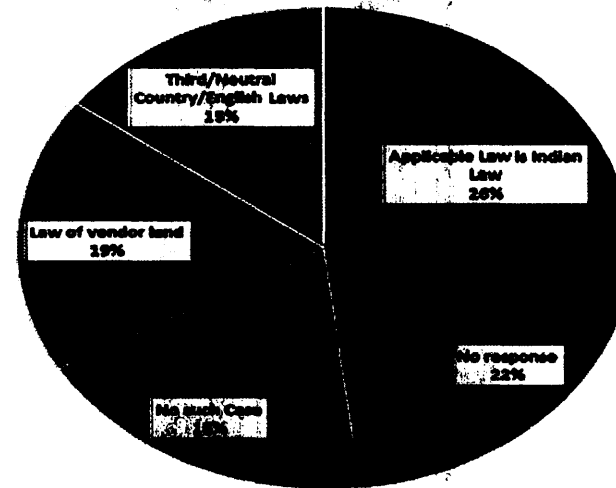
8. Arbitration: In case of Breach of Contract, whether arbitration clause has been invoked by DPSU/ vendors. Details of cases during last three years may be provided with current status?



In response to the question whether arbitration clause is invoked by DPSUs/Vendors most of the respondents i.e 56% have opined that there are no such cases. 19% have opined that arbitration clause is invoked and remedial action will be taken and damages/penalties claimed.

SL No	9. Applicable Law: In case of International Contracts what is the experience of "Applicability of Law" regarding Contract Management including dispute resolution process.	Response	%
1	Applicable Law is Indian Law	7	26%
2	No response	6	22%
3	No such Case	5	19%
4	Law of vendor land	5	19%
5	Third/Neutral Country/English Laws	4	15%
	Total	27	100%

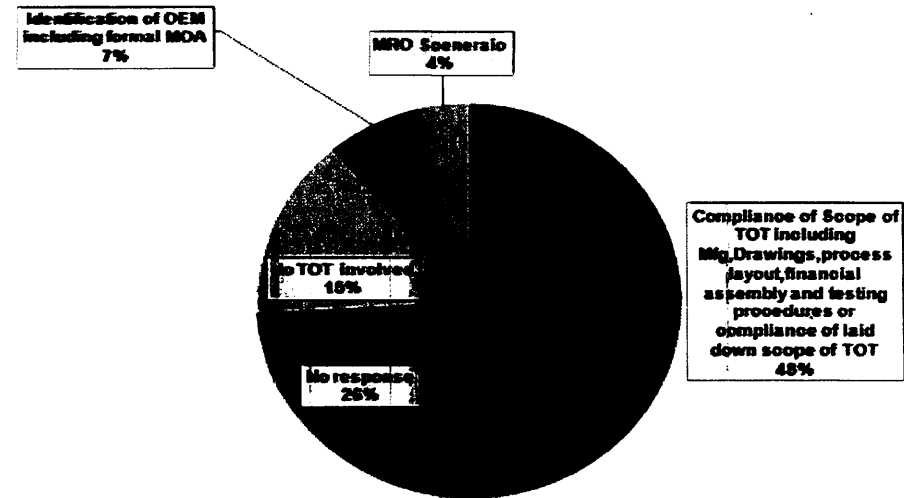
9. Applicable Law: In case of International Contracts what is the experience of "Applicability of Law" regarding Contract Management including dispute resolution process



Regarding the experience of applicability of law in Contract management including dispute resolution process in International Contracts 26% have opined that the applicable law is Indian law. 15% have opined that applicable law is the law of the third/neutral country/English law.

Sl. No	10. Technology transfer is the essence of any defence procurement. In case of Transfer of technology is agreed upon how it is ensured that it is implemented in its original form of usage?	Response	%
1	Compliance of Scope of TOT including Mfg Drawings, process layout, financial assembly and testing procedures or compliance of laid down scope of TOT	13	48%
2	No response	7	26%
3	No TOT involved	4	15%
4	Identification of OEM including formal MOA	2	7%
5	MRO Scenario	1	4%
6	Total	27	100%

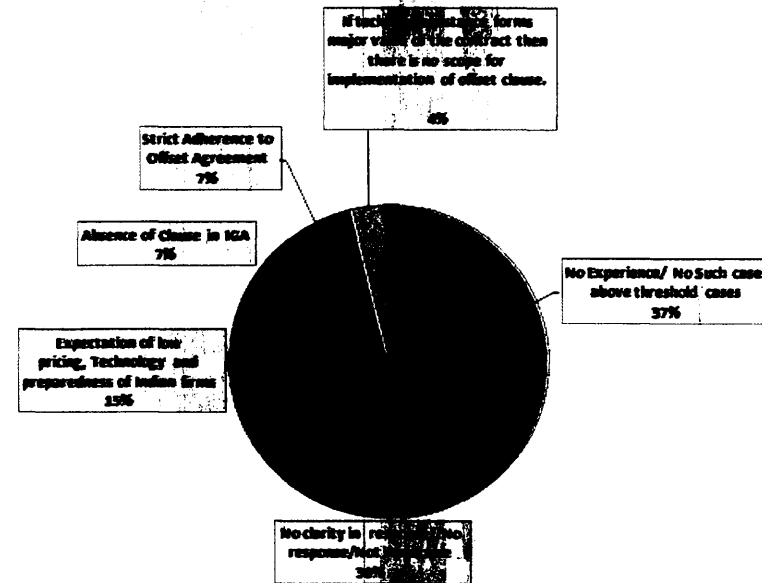
10. Technology transfer is the essence of any defence procurement. In case of Transfer of technology is agreed upon how it is ensured that it is implemented in its original form of usage?



The analysis shows that most of the responses 48% agreed in compliance of technology transfer in Contracts as laid down in scope of TOT through manufacturing drawings, process layouts, financial assembly and testing procedure as laid down in TOT agreement. 26% response opined that in respect of MRO scenario the transfer of technology is not comprehensive.

SRL No.	11. Offset Clause: Offset clause even though invariably is included in majority of defence procurements implementation of the same is far from satisfactory? What has been your experience and how do you ensure its effective implementation?	Responses	
1	No Experience/ No Such cases above threshold cases	10	37%
2	No clarity in response/No response/Not Applicable	3	10%
3	Expectation of low pricing, Technology and preparedness of Indian firms	4	15%
4	Absence of Clause in IGA	2	7%
5	Strict Adherence to Offset Agreement	2	7%
6	If technical assistance forms major value of the contract then there is no scope for implementation of offset clause.	1	4%
7	Total	27	100%

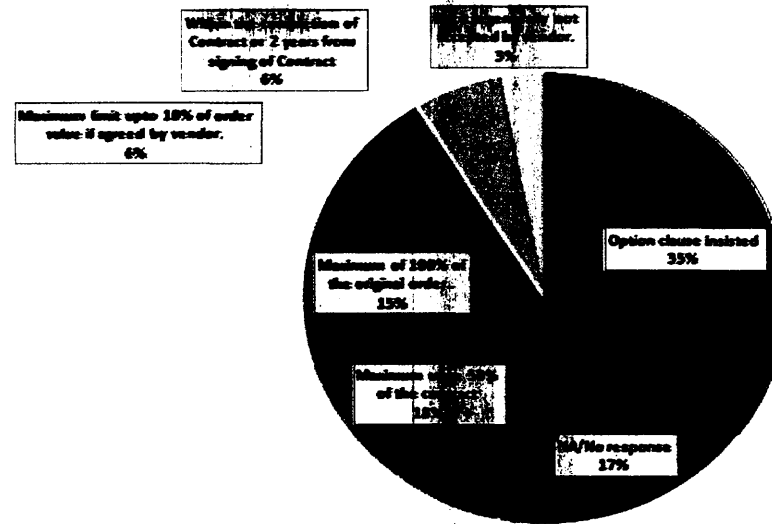
11. Offset Clause: Offset clause even though invariably is included in majority of defence procurements implementation of the same is far from satisfactory? What has been your experience and how do you ensure its effective implementation?



In response to the question of implementation of offset clauses in majority of defence procurement and their poor implementation and steps necessary to ensure its effective implementation - 37% have opined that there are no such cases/ above threshold limits. The least of 4% have opined that there is no scope for offset clause as technical assistance forms major value of the Contracts.

Sl No	12. Option clause: Is option clause insisted upon? If so what is the maximum limit to which it can be exercised?	Responses	
1	Option clause insisted	12	35%
2	N/A/No response	6	18%
3	Maximum upto 50% of the contract	6	18%
4	Maximum of 100% of the original order	5	15%
5	Maximum limit upto 10% of order value if agreed by vendor	2	6%
6	Within the completion of Contract or 2 years from signing of Contract	2	6%
7	But it is generally not accepted by vendor	1	3%
Total		34	100%

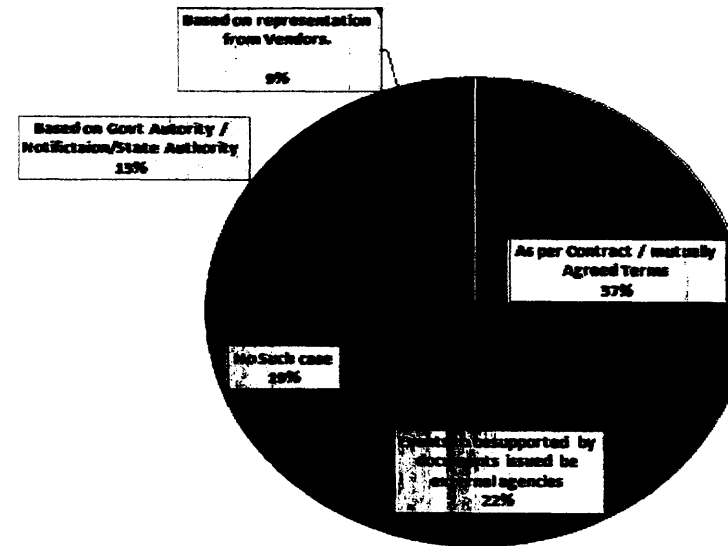
12. Option clause: Is option clause insisted upon? If so what is the maximum limit to which it can be exercised?



Regarding the insisting of option clause in Contracts and maximum cap which can be exercised, most of the respondents i.e 35% have opined that the option clause is insisted in Contracts. Around 33% respondents has stated that the maximum cap ranging from 50% to 100% is stipulated. The least of 3% have opined that option clause is not generally accepted by vendors.

Sl. No	13 (a) In case Force Majeure, How is it decided that the Force Majeure event has occurred? In case of disputes arising there from, what mechanism is used to prove the Force Majeure event/s?	Respon	s
1	As per Contract / mutually Agreed Terms	12	38%
2	Events to be supported by documents issued by external agencies	7	22%
3	No Such case	6	19%
4	Based on Govt Authority / Notification/State Authority	4	13%
5	Based on representation from Vendors.	3	9%
	Total		100%

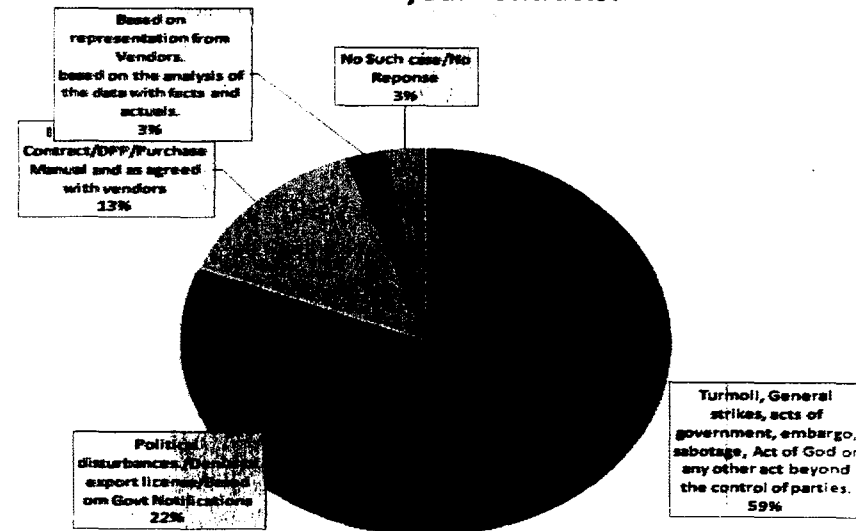
13 (a) In case Force Majeure, How is it decided that the Force Majeure event has occurred? In case of disputes arising there from, what mechanism is used to prove the Force Majeure event/s?



The above analysis shows that most of the respondents i.e. 38% have agreed that the occurrence of Force Majeure is proved as per the contractual terms/mutually agreed terms. However 22% requires proof of Force Majeure from External agencies and 13% requires specific documents from Govt. authority.

Sl. No	13 (b) What major events which constitute Force majeure are specified in the Force Majeure Clause in your Contracts?	Respo nse	%
1	Turmoil, General strikes, acts of government, embargo, sabotage, Act of God or any other act beyond the control of parties.	22	59%
2	Political disturbances, Denial of export license/Based on Govt Notifications.	8	22%
3	Definitions as per Contract/DPP/Purchase Manual and as agreed with vendors.	5	14%
4	Based on representation from Vendors, based on the analysis of the data with facts and actuals.	1	3%
5	No Such case/No Response	1	3%
6	Total	37	

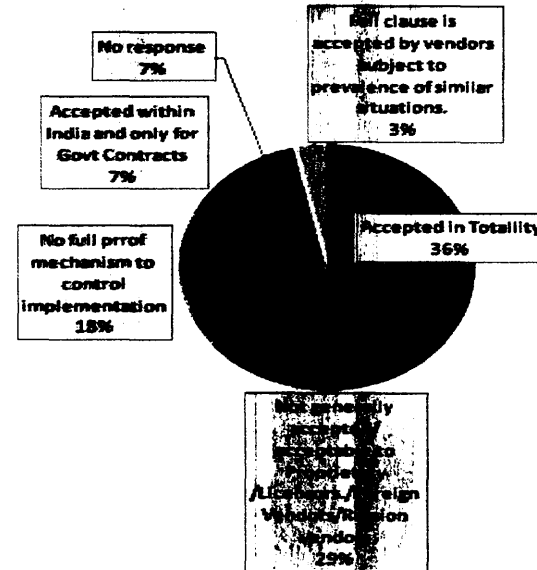
13 (b) What major events which constitute Force majeure are specified in the Force Majeure Clause in your Contracts?



As far as Force majeure situations are concerned the majority of the respondents i.e, 59% have opined that Turmoil, General strikes, acts of government, embargo, sabotage, Act of God or any other act beyond the control of parties. However in around 22% cases it is found that even Denial of Export Licences and Govt. restrictions are considered as Force Majeure situations. Further 14% have opined that based on vendors representation and based on data the occurrence of Force Majeure event is established and 3% have opined that no such case/ no response.

Sl No	14. Fall clause: Is Fall clause acceptable to the vendor? In case it is accepted how do you ensure its enforcement?	Respon tes	%
1	Accepted in Totality	10	36%
2	Not generally accepted/ acceptable to Proprietary /Licensors /Foreign Vendors/Russian vendors.	8	29%
3	No full proof mechanism to control implementation	5	18%
4	Accepted within India and only for Govt Contracts.	2	7%
5	No response	2	7%
6	Fall clause is accepted by vendors. subject to prevalence of similar situations.	1	4%
	Total	28	

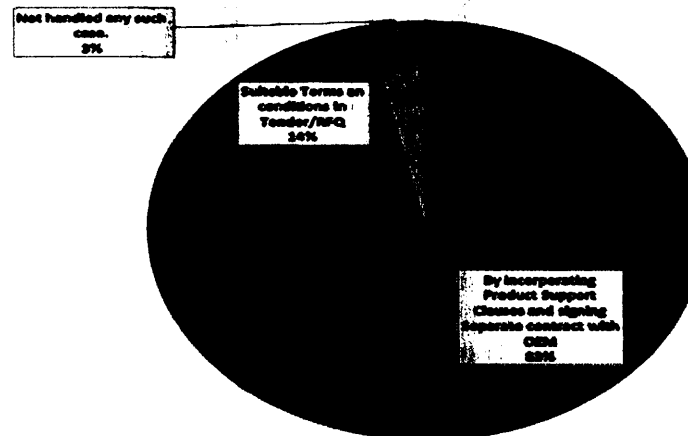
14. Fall clause: Is Fall clause acceptable to the vendor? In case it is accepted how do you ensure its enforcement?



The above analysis shows that most of the respondents i.e.36% have opined that that the 'Fall clause' is accepted in totality . It is surprising that 29% cases the fall clause is not accepted and around 18% with certian restrictions. Hence it needs to be looked into that suitable clauses to care of fall clause to be incorporated in all contracts.

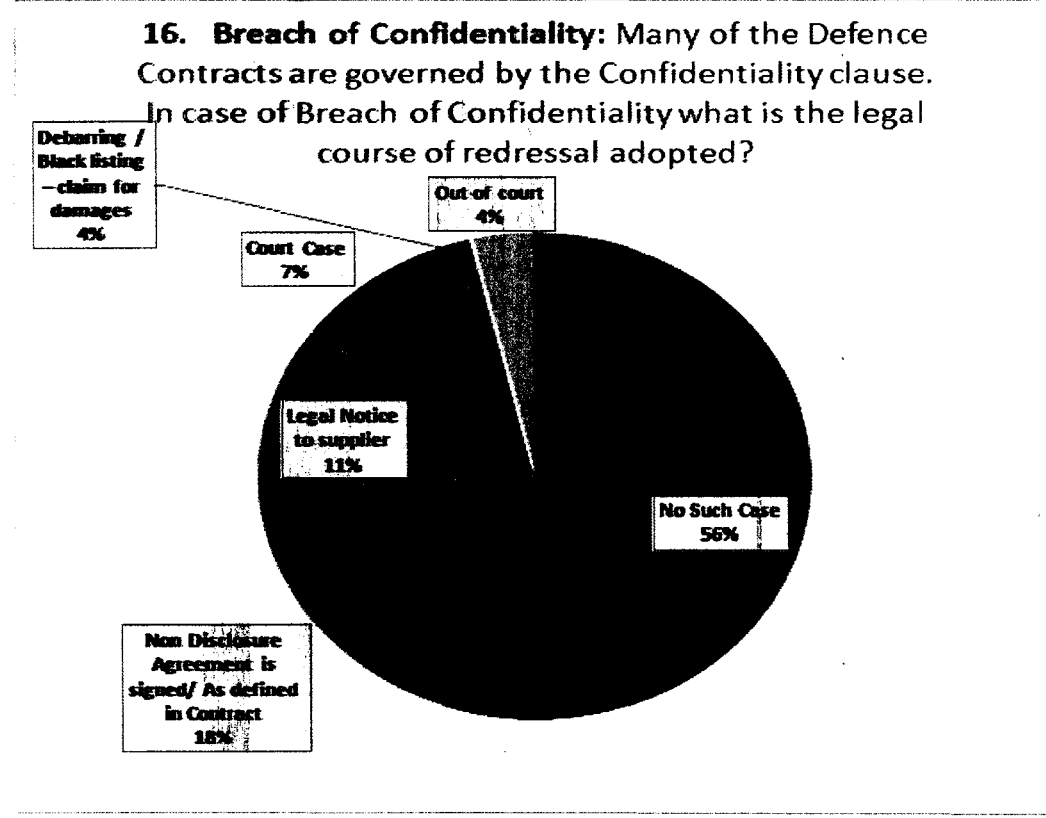
Sl no	15. Support and Services: The longevity of the product requires support from the OEM in the form of supply of Spares and services. How the requirement of Support and services ensured as part of the original Contract?	Responses	%
1	By incorporating Product Support Clauses and signing Separate contract with OEM	24	83%
2	Suitable Terms and conditions in Tender/RFQ	4	14%
3	Not handled any such case.	1	3%
	Total	29	100%

15. Support and Services: The longevity of the product requires support from the OEM in the form of supply of Spares and services. How the requirement of support and services ensured as part of the original contract



The above analysis shows that most of the respondents i.e. 83% have opined that the product support & services from OEM is ensured by incorporating suitable clause in Contract and by entering separate contract with OEM. Only 3% respondents have opined that they have not come across such case.

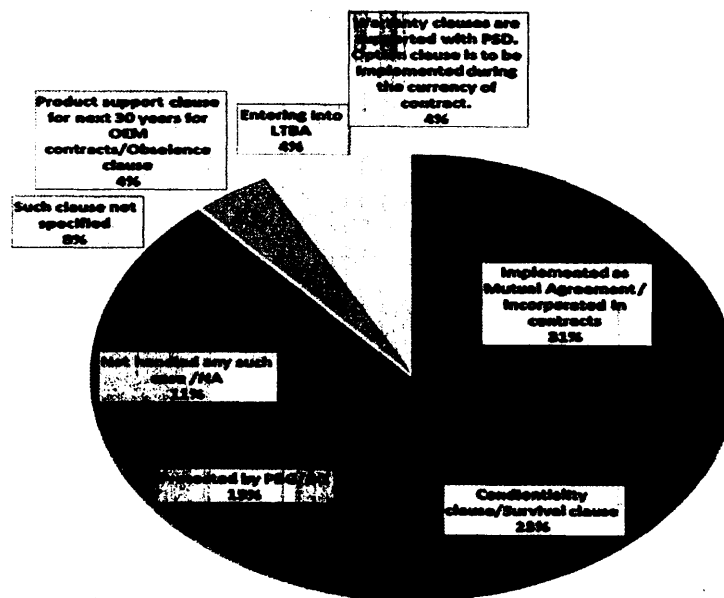
Sl No	16. Breach of Confidentiality: Many of the Defence Contracts are governed by the Confidentiality clause. In case of Breach of Confidentiality what is the legal course of redressal adopted?	Responses	%
1	No Such Case	15	56%
2	Non Disclosure Agreement is signed/ As defined in Contract	5	19%
3	Legal Notice to supplier	3	11%
4	Court Case	2	7%
5	Debarring / Black listing – claim for damages.	1	4%
6	Out of court	1	4%
7	Total	27	100%



Regarding Breach of Confidentiality clause and legal course of redressal adopted most of the respondents i.e 56% have opined that they have not come across such case. Also around 18% has stated that this is protected through Non Disclosure Agreement . However in case of 18% respondents they have taken legal course of action in such cases.

Sl No	17. Survival Clause: Many of the contractual clauses like Warranty clause, Confidentiality clause, Support and services clause, option clause need to continue even after the original contract? If not how the affectivity of the clauses as above are protected?	Responses	
1	Implemented as Mutual Agreement / Incorporated in contracts	8	31%
2	Confidentiality clause/Survival clause	6	23%
3	Protected by PBG/BG	4	15%
4	Not handled any such case :NA	3	12%
5	Such clause not specified	2	8%
6	Product support clause for next 30 years for OEM contracts/Obsolesce clause	1	4%
7	Entering into LTBA	1	4%
8	Warranty clauses are supported with PSD. Option clause is to be implemented during the currency of contract.	1	4%
9	Total	26	100%

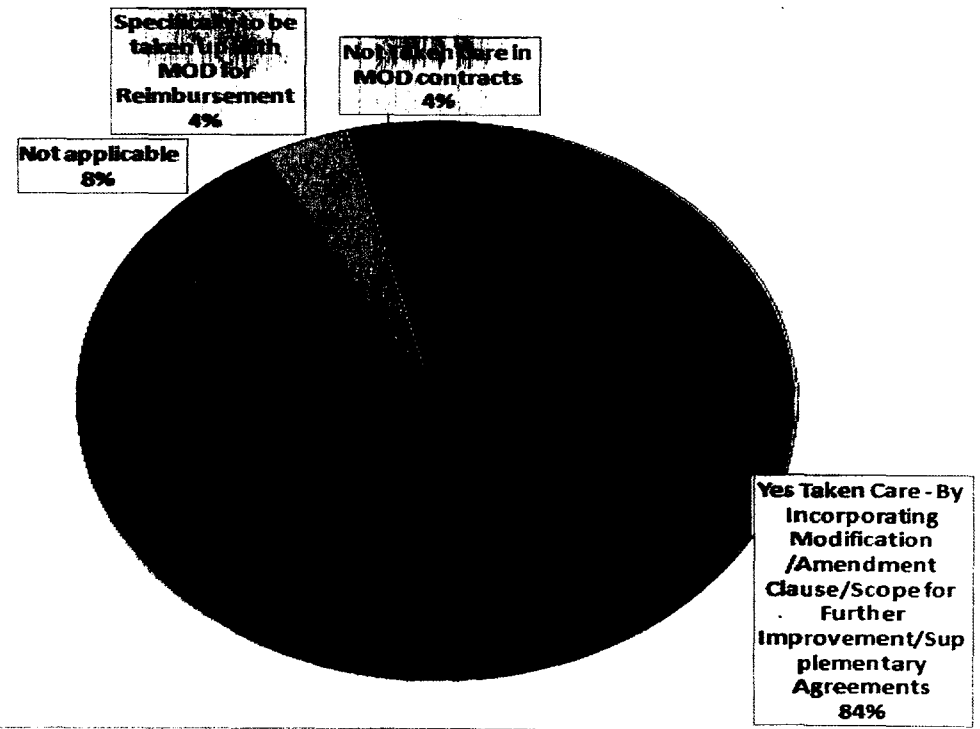
17. **Survival Clause:** Many of the contractual clauses like Warranty clause, Confidentiality clause, Support and services clause, option clause need to continue even after the original contract? If not how the affectivity of the clauses as above are protected?



From the above analysis most of the response i.e.31% have opined that Survival clause is protected by entering mutual agreements and by suitably addressing the issues in the in Contracts. Further 23% has responded that such clauses especially Confidentiality and Survival clause is entered in the contract. Besides 15% of the respondents has stated that there is protective clause in the form of Performance Bank guarantee (PBG)

Sr No	18. In case future amendments to the contracts become necessary due to various subsequent developments, the original contract should provide for such amendments. Is this taken care of as part of the original contract?	Responses	%
1	Yes. Taken Care - By Incorporating Modification /Amendment Clause/Scope for Further Improvement/Supplementary Agreements.	21	84%
2	Not applicable	2	8%
3	Specifically to be taken up with MOD for Reimbursement	1	4%
4	Not Taken Care in MOD contracts.	1	4%
5	Total	25	100%

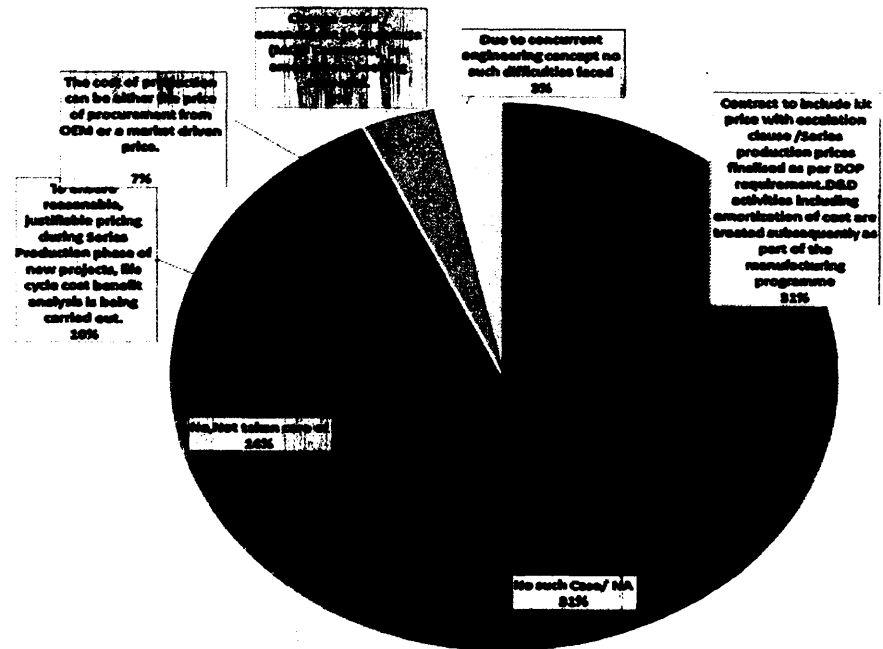
18. In case future amendments to the contracts become necessary due to various subsequent developments, the original contract should provide for such amendments. Is this taken care of as part of the original contract?



In response to the query on whether future amendments to the Contract is possible almost 84 % of the respondents have stated that it is included as part of the contract . This is significant as such eventuality likely to arise in fututre are adequately addressed.

Sl No	19. Design and development and subsequent productionisation is very common in defence procurements. The contractual issues arising there from like production set prices etc. need to be taken care. How is it ensured? Are there difficulties at the production phase in this regard?	Respon ses	%
1	Contract to include kit price with escalation clause /Series production prices finalised as per DOP requirement. D&D activities including amortization of cost are treated subsequently as part of the manufacturing programme	9	31%
2	No such Case/ NA	9	31%
3	No. Not taken care of	4	14%
4	To ensure reasonable, justifiable pricing during Series Production phase of new projects, life cycle cost benefit analysis is being carried out.	3	10%
5	The cost of production can be either the price of procurement from OEM or a market driven price.	2	7%
6	Change order / amendment to contracts (MOD Contracts) for amendment seeking approval.	1	3%
7	Due to concurrent engineering concept no such difficulties faced	1	3%
8	Total	29	100%

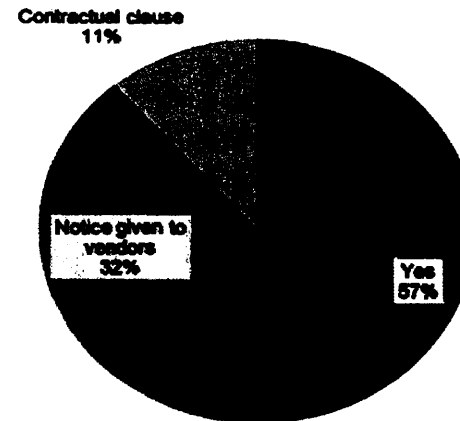
19. Design and development and subsequent productionisation is very common in defence procurements. The contractual issues arising there from like production set prices etc need to be taken care. How is it ensured? Are there difficulties at the production phase in this regard?



From the above analysis most of the response i.e.31% have opined that in respect of D&D contracts with subsequent series production prices are taken care with escalation clause/ Series Production prices finalised as per DDP requirement, D&D activities including amortization of cost are treated subsequently as part of the manufacturing programme. Another 31% have response have opined that they have not come across such cases/NA. Least response of 3% opined that due to concurrent engineering concept no difficulties are faced.

Sl no	20 .Termination Clause: Is the grounds for termination clearly spelt in your contract? Will termination to be preceded by a notice or the party terminating the contract can unilaterally terminate the contract if any of the circumstances mentioned in the contract occurs?	Respo nses	%
1	Yes	25	57%
2	Notice given to vendors	14	32%
3	Contractual clause	5	11%
	Total	44	100%

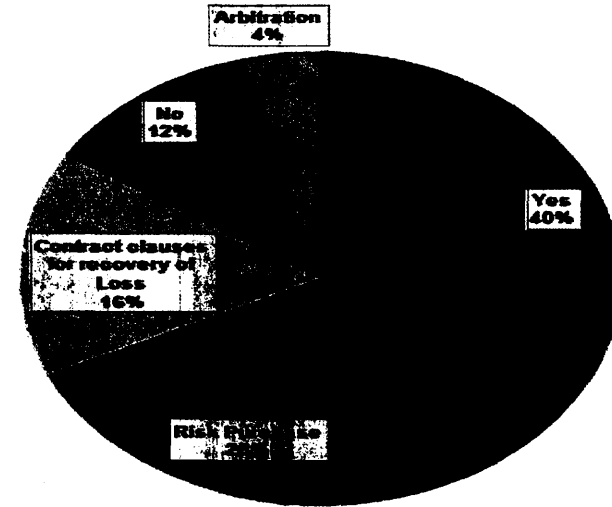
20. Termination Clause: Is the grounds for termination clearly spelt in your contract? Will termination to be preceded by a notice or the party terminating the contract can unilaterally terminate the contract if any of the circumstances mentioned in the contract occurs?



It appears from the survey that 100% of the respondents have stated that there is a termination clause built in all the contracts. Of these around 32 % has stated that notice of termination will be given before termination around 11 % has stated that it will be built as part of the contractual clauses itself.

Sr no	21. Compensation clause: Where there is a need to terminate the contract, due to default on the part of the supplier is there a contractual clause wherein the concept of compensation for the loss suffered is built in the contract?	Response	%
1	Yes	10	40%
2	Risk Purchase	7	28%
3	Contract clauses for recovery of Loss	4	16%
4	No	3	12%
5	Arbitration	1	4%
	Total	25	100%

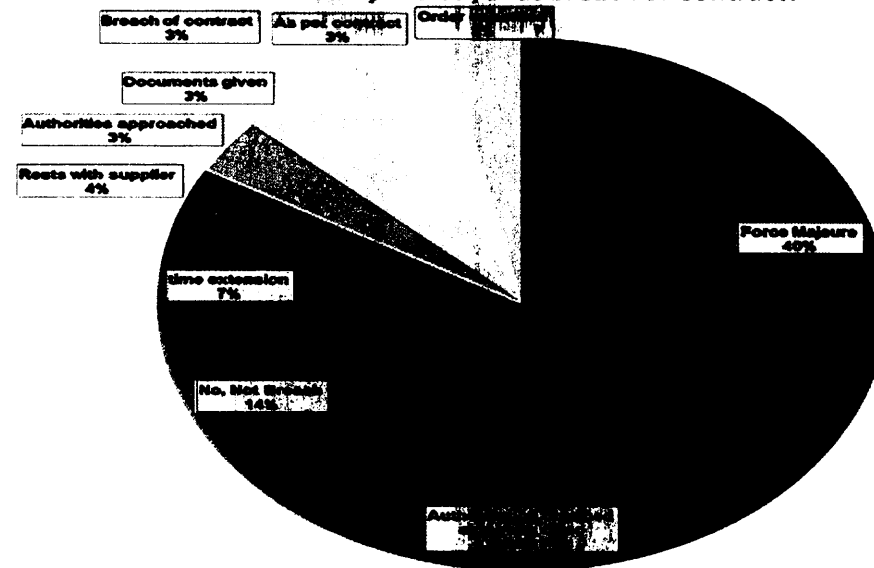
21. Compensation clause: Where there is a need to terminate the contract, due to default on the part of the supplier is there a contractual clause wherein the concept of compensation for the loss suffered is built in the contract?



From the above analysis it is observed that most of the response i.e.56% have opined positively for the question - when the contract is terminated due to default of the vendor, whether compensation clause for the loss suffered is inbuilt in the Contract. Around 28 % has opined that they will resort to risk purchase if such eventuality occurs. Thus there is high level of awareness for protecting the interests of the company when there is a default by the contractor.

SL No	22. Export License: In case of imports from a foreign country the obligation for obtaining an export license rests with Supplier. If the export license is not granted for any reason whatsoever, what is the remedy available to the buyer from the supplier? Is this claimed by the buyer as breach of contract?	Responses	%
1	Force Majeure	12	40%
2	Authorisation obtained along with offer	6	20%
3	No. Not Breach	4	13%
4	time extension	2	7%
5	Rests with supplier	1	3%
6	Authorities approached	1	3%
7	Documents given	1	3%
8	Breach of contract	1	3%
9	As per contract	1	3%
10	Order cancelled	1	3%
	Total	30	100%

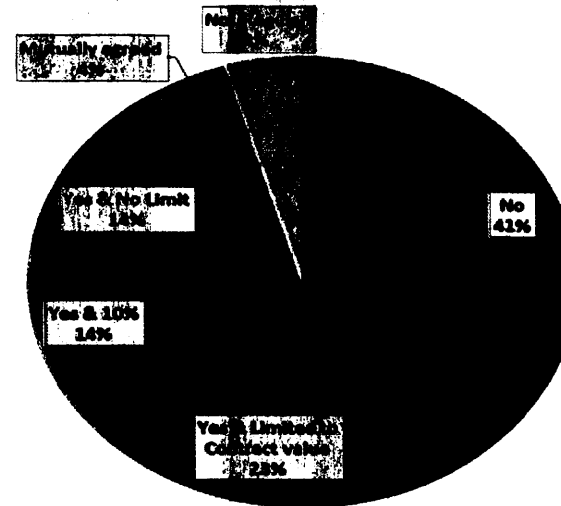
22. Export License: In case of imports from a foreign country the obligation for obtaining an export license rests with Supplier. If the export license is not granted for any reason whatsoever, what is the remedy available to the buyer from the supplier? Is this claimed by the buyer as breach of Contract?



Regarding remedy available to buyer from vendor due non grant of export license - most of the respondents i.e.40% have opined that it will be treated as Force Majeure. Further 20% has stated that they will ensure that sufficient authorization is obtained from the foreign vendor along with the offer to ensure that such situation do not arise.

SL No	23. Consequential Damages: Do your Contracts agree/provide for Consequential Damages arising on account of Breach of Contract? If so, the upper limit is specified as part of the contract or not?	Responses	%
1	No	9	41%
2	Yes & Limited to Contract value	5	23%
3	Yes & 10%	3	14%
4	Yes & No Limit	3	14%
5	Mutually agreed	1	5%
6	Not Regular	1	5%
	Total	22	100%

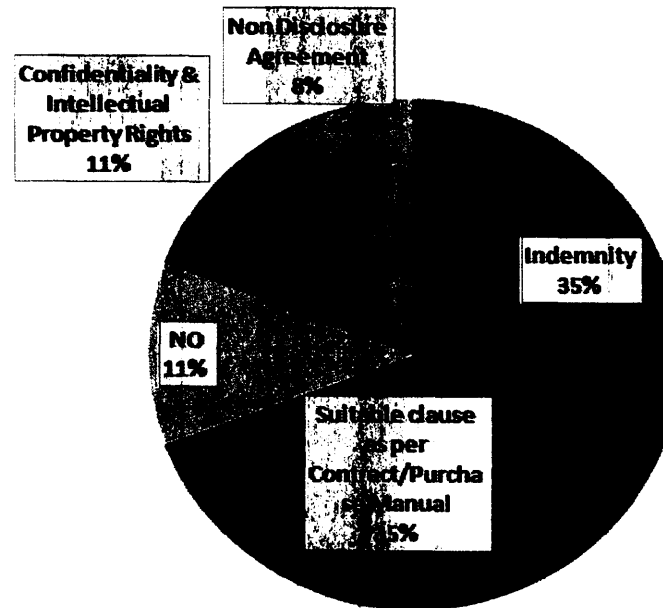
23. Consequential Damages: Do your Contracts agree/provide for Consequential Damages arising on account of Breach of Contract? If so, the upper limit is specified as part of the contract or not?



From the above analysis it is observed that in 51% of the cases Consequential Damages has been provided for. Whereas in 41% cases have opined negatively, i.e. No consequential Damages. Further wherever it is provided it is limited to Contract value in 23 % of the cases and 14% of the cases it is limited to Contract value.

SL. No	24. Intellectual Property rights: How is the buyer protects the IPR from any infringements by the seller? Is any suitable contractual Clause included in the contract?	Responses	%
1	Indemnity	9	35%
2	Suitable clause as per Contract/Purchase Manual	9	35%
3	NO	3	12%
4	Confidentiality & Intellectual Property Rights	3	12%
5	Non Disclosure Agreement	2	8%
	Total	26	100%

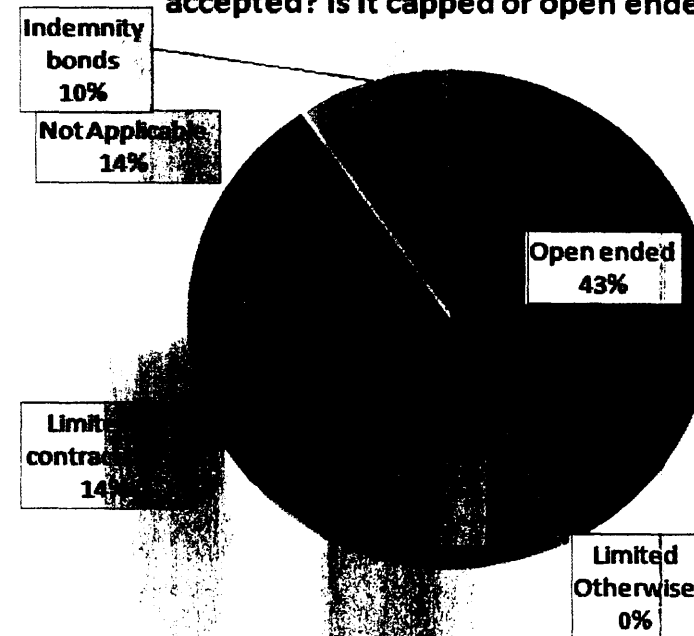
24. Intellectual Property rights: How is the buyer protects the IPR from any infringements by the seller? Is any suitable contractual Clause included in the contract?



Equal number of the respondents i.e. 35% each have opined for indemnity and/or incorporation of suitable clause in Contracts/Purchase manual. Least of 8% responded with other option of NDA.

SL No	25. Indemnity Clause: With regard to indemnity clause, for third party liabilities, what is the liability accepted? Is it capped or open ended?	Responses	%
1	Open ended	9	43%
2	Limited Otherwise	0	0%
3	Insurance Cover	4	19%
4	Limited to contract price	3	14%
5	Not Applicable	3	14%
6	Indemnity bonds	2	10%
	Total	21	100%

25. Indemnity Clause: With regard to indemnity clause, for third party liabilities, what is the liability accepted? Is it capped or open ended?



From the above analysis it is observed that most of the respondents i.e. 43% have opined that there is no limit to the third party liability whereas 19 % takes an insurance cover. Further 14% have told the liability is restricted to Contract price.

6.3 Suggested Contractual Terms and Conditions for DPSU's

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CLAUSE-1	Scope of Supply- Technical Description/Requirement/Quality requirement etc.
CLAUSE-2	Price
CLAUSE-3	Price variation formula
CLAUSE-4	Packing conditions
CLAUSE-5	Inspection and Technical document requirements
CLAUSE-6	Acceptance of goods
CLAUSE-7	Training & Technical Assistance
CLAUSE-8	Payment terms
CLAUSE-9	Warranty
CLAUSE-10	Optional clause (if any) - Repeat Order/ Additional requirements
CLAUSE-11	Product support
CLAUSE-12	Taxes & Duties
CLAUSE-13	Integrity Pact
CLAUSE-14	Liquidated Damages (LD)
CLAUSE-15	Earnest money deposit (EMD)
CLAUSE-16	Security Deposit (SD)
CLAUSE-17	Performance Bank Guarantee (PBG)
CLAUSE-18	Spares management
CLAUSE-19	Obsolescence
CLAUSE-20	Withholding tax
CLAUSE-21	Product Liability
CLAUSE-22	Risk Purchase
CLAUSE-23	Termination clause
CLAUSE-24	Insolvency
CLAUSE-25	Appropriation
CLAUSE-26	Applicable law/ Jurisdiction
CLAUSE-27	Arbitration
CLAUSE-28	Indemnity against Patent rights
CLAUSE-29	Bribes
CLAUSE-30	Sub-contracting/Sub-let
CLAUSE-31	Work & Payment during arbitration
CLAUSE-32	Fall clause
CLAUSE-33	Export license
CLAUSE-34	Immunity to the Government of India
CLAUSE-35	Classified/Confidentiality
CLAUSE-36	Agents / Agency Commission
CLAUSE-37	Intellectual Property Rights
CLAUSE-38	Force Majeure
CLAUSE-39	Amendment & Waiver
CLAUSE-40	Exit criteria
CLAUSE-41	Cartel Formation

**COMMERCIAL CLAUSE IN CONTRACTS/PURCHASE ORDERS
(Generally Applicable)**

Clause No.	Description
CLAUSE-1	Scope of Supply- Technical Description/Requirement/Quality requirement etc.
Suggested Clause	<p>The supply of Stores shall be of the best Quality and Workmanship, be in strict conformity with all the drawings and specifications furnished with the Purchase Orders and shall address the Technical description in all respects. Unlisted items required for completeness of stores / system deemed to be included. Without exception, all supplies should be accompanied by Sellers works inspections/test certificates duly certifying, the Stores are in strict conformity with the drawings/specifications. The ultimate acceptance will be subject to inspection and approval at Buyer's premises. If the materials are rejected and communicated to the Seller, no request shall be entertained for re-inspection or acceptance of the stores. In any case, Buyer reserves the right to re-inspect the stores and consider acceptance at his discretion.</p>
CLAUSE-2	Price
Suggested Clause	<p>Price shall be 'Firm & Fixed' till the execution of the total quantity on the order. Increase shall not be permissible on any account after Contracts signing & in any case till delivery of total quantity of the order as per tender. The quoted Price be on F.O.R. Destination basis, for delivery at Buyer premises inclusive of all charges including transit insurance. As far as Sellers from foreign countries are concerned, Seller shall quote the prices on the FOB/FCA Port of despatch basis, as applicable (INCOTERMS 2010).</p> <p>If imported item is quoted by Indian Seller: the prices quoted should be in the currency of the country of supply. Although Buyer reserves the right to avail Custom duty exemption on imported item; In order to avail the exemption, Buyer will provide Custom duty exemption</p>

	<p>certificate (if applicable) to the Seller. Seller shall submit the invoice of foreign supplier prior to release of custom duty exemption certificate by Buyer. However Seller is advised to quote both the rates (with custom duty exemption and without custom duty exemption). However Buyer reserves the right to select any of the option for commercial evaluation and ordering.</p> <p>In any case once contract is signed, no amendment in price will be entertained by the buyer.</p>
	*Note: Goods and Services are included in Stores
CLAUSE-3	Price variation formula
Suggested Clause	<p>Price variation clause: Purchase orders shall always be placed on a firm price basis. However as an exceptional case, where the firm insists on escalation or on price ruling at the time of dispatch, the purchase order should contain a clause to this effect for admissibility. In any case the formula for determining the quantum of escalation admissible with reference to a fixed base period and prices ruling at that period taken as a base for deciding the escalations. Necessary documentary evidence, for base period & price be agreed and further claims shall be supported by necessary documentary evidence, as compared to the base prices for admitting the escalation claims. Escalation method will be based either on year to year basis or point to point basis.</p> <p>(Specifically be mentioned).</p> <p>Price Variation formula will vary from Contract to Contract. However, a suggested price variation formula could be as follows:</p> $P = P_o \{ (A + B(L/L_o) + C (M/M_o)) \}$ <p>P = Final price payable in the year of delivery</p> <p>P_o = The base price at _ (year) economic conditions</p>

	<p>Lo = Average Labour Index of the base _ (year)</p> <p>Mo = Average Material Index of the base _ (year)</p> <p>L = Average Labour Index Months prior to date of delivery (as applicable at Seller's country).</p> <p>M = Average Material Index Months prior to date of delivery (as applicable at Seller's country).</p> <p>A, B & C = Percentages corresponding to fixed elements, labour and material respectively.</p> <p>Escalation cap (+/-) applicable (percentage) with the above price variation formula to be indicated.</p> <p>The indices incorporated in the escalation formula should be Govt. Published/ in public domain and capable of being verified.</p> <p>Escalation/Revision in price shall not be admitted for the delayed supplies.</p>
CLAUSE-4	Packing conditions
Suggested Clause	<p>The items should be properly packed and should cover for tropical storage and for transport by rail, road, sea or air so as to ensure and to protect them against loss, damage, corrosion in transit on arrival at their destination. Cost of packing and marking of packages is to borne by seller/buyer to be as per negotiation /agreed understanding. All individual package shall contain a Packing Note quoting Purchase Order number and date showing its contents in detail and shall be properly marked with Consignee's name & address, gross weight, package-handling instructions etc. It shall have adequate provision for handling during transit and at destination.</p> <p>Conditions of Packing & Delivery must comply with the prevailing legislation and regulations concerning safety, the environment and working conditions. Imported, items packed with raw/ solid wood packing material should be accompanied by phytosanitary/Fumigation certificate. It shall allow for easy removal and checking of goods on</p>

	<p>receipt and comply with carrier's conditions of packing or established trade practices. If it needs special handling instruction, the same shall be clearly marked with standard symbols / instructions. All Hazardous material should be notified as such and their packing, transportation and other protection must conform to relevant regulations.</p>
CLAUSE-5	Inspection and Technical document requirements
Suggested Clause	<p>All supplies made against respective orders will be subject to Buyer inspection at his premises & the Seller responsibility for items supplied will be until the same have been inspected and accepted by Buyer.</p> <p>The Seller will be informed of these rejections. Whether the goods & services are rejected at the time of inspection at buyers place or during further processing at buyers place responsibilities of the Seller will be to immediately arrange to collect the rejected items at his cost and risk and arrange for the replacement of goods within the shortest possible time. The Seller shall not compel the Buyer to rework the rejected goods. Under any circumstances else on mutual terms & conditions, while rejected material will lie in Buyer factory premises at the risk and cost of the Seller, pending receipt of disposal instruction from seller. And if desired by the Seller, the rejected materials, for which no payment made by Buyer may be packed and returned to the Seller for arranging replacement/rectification on 'freight to pay' basis at his cost and risk and the despatch documents will be forwarded to the Seller directly by Buyer to enable him to arrange insurance and take delivery of the same. In case of payment already made by Buyer to the Seller, the rejected material will be returned to the Seller against refund of the amount already paid by Buyer / submission of BG for the value of rejected goods. Replacement of returned materials shall be borne by the Seller irrespective of the terms in the purchase order, since such charges were already incurred and borne by Buyer on the original consignment, which got rejected and returned to the Seller. Buyer reserves the right to dispose the rejected</p>

	stores, in the manner Buyer deems fit, in case of non-receipt of instruction or non-receipt of refund of due amount from seller within 90 days from the date of intimation by Buyer. Buyer will be free to adjust due cost of Disposal of rejected material along with advance paid for those material or milestone payments made to seller from any dues of seller.
CLAUSE-6	Acceptance of goods
Suggested Clause	At Buyer's premises material will be inspected by QA/ inspection department as per appropriate Quality Assurance plan and their decision in the matter will be final. All supporting documents including test certificate should be sent along with the consignment.
CLAUSE-7	Training & Technical Assistance
Suggested Clause	<p>The seller shall arrange for the training of a reasonable number of the Buyer's technical personnel in shops manufacturing the equipment and in plants where equipment similar to those covered in SOP are in operation. Training period & number of officials to be trained will be mutually agreed upon. All other expenditure other than providing training will be borne by buyer. The assistance clause may cover including followings:</p> <ul style="list-style-type: none"> i. Manufacturing processes as well as quality assurance procedures, programming, operation, mechanical maintenance and electronic / electric maintenance at seller's work and also during commissioning. ii. Duration of training, iii. No. of personnel to be trained. iv. Place of training. v. Charge applicable / or FOC vi. Documentation / training material. vii. Boarding, lodging & travelling charges etc. viii. Free Man-days / Extra Man-days for service engineering.

	ix. Any other aspect related to training & technical assistance.
CLAUSE-8	Payment terms (Normally To be as per tender Condition)
Suggested Clause	<p>100% payment will be made by Buyer to seller through NEFT/RTGS only for accepted material within 30 days of receipt of material.</p> <p>If any advance payment is agreed the same will be released on receipt of bank guarantee of a commercial bank of the value of 110% of advance payment amount.</p>
CLAUSE-9	Warranty
Suggested Clause	<p>Warranty of supplied stores will cover any defect in material, Workmanship, defective design, materials and non-conformance to intended performance, manufacturing defects, or dimension etc., for a period of _____ calendar months from the date they are actually put to use or _____ calendar months from the date of receipt and acceptance of supply in Buyer's place / buyer's designated place, whichever is earlier and the seller shall remedy such defects at his/her own cost or replace free of charge such stores when called upon to do so.</p> <p>If defective materials etc. to be re-exported for repairs to the manufacturer's works, To & Fro freight, insurance charges & custom duty for replacement have to be borne by the seller.</p> <p>Any equipment or component thereof supplied by the seller, during intervening period of warranty suffers due to defective material and /or due to improper design and or due to defective drawing/or due to faulty workmanship the seller will assume full responsibility of rectification of such defective equipment or component thereof including direct expenses related to removal and re-positioning of the replacement/repaired equipment or component thereof and subsequent test & trial, incurred thereon without any financial implication to Buyer.</p> <p>In case of non-removal of intimated defect during warranty</p>

	period within a reasonable time, the buyer can get the same rectified at sellers cost which will be without prejudice to the other rights of the buyer.
CLAUSE-10	Repeat Order and Optional clause / Additional requirements
Suggested Clause	Additional requirement by way repeat order/ optional guaranty requirement can be placed within a period of one year from the date of receipts of last supply at the same rate & terms & conditions restricting the value of supplies - --% of contract value or ----- quantity of contracted supply of Equipment's.
CLAUSE-11	Product support
Suggested Clause	<p>The successful Seller should agree to provide product support for the equipment supplied, assemblies/ sub-assemblies, fitment items and consumables, Special Maintenance Tools (SMT) / Special Test Equipment's (STE) subcontracted from other agencies / manufacturer by the Seller, by making available spare parts, components & tools etc., accessories of equipment and services for a minimum period of ____ years from the date of supply.</p> <p>Seller should supply recommended spares for operator level servicing and should carry out necessary product support activities. Seller should also recommend a list of test equipment/ fixtures and special tools required for servicing at ____/ its customer bases. Seller will extend need based technical assistance to the BUYER for maintenance of the product/ System during the warranty period. Seller shall provide an effective Product Support and maintenance services on demand from the BUYER and at mutually agreed financial consideration, for mutually agreed period from the date of supply of the product/ System. Product Support covers the following areas</p> <ul style="list-style-type: none"> - Spares Support - Field Support

- Maintenance Support

SPARES SUPPORT:

1. SELLER shall advice on the requirement of spares and stock to be maintained as and when required by the BUYER.
2. Supply spares on demand.
3. Should any of the spares or equipment be earmarked for discontinuance of production, give notification to BUYER one year before the production is discontinued, to allow for a life time purchase. SELLER shall assist the BUYER in establishing alternate source of supplies.

FIELD SUPPORT:

On the request of the BUYER, SELLER shall resolve all technical queries and problems on product/ System in service and provide the services of its service engineers at base of the BUYER on mutually agreed terms and conditions as and when required to facilitate repair of the product/ System or to carry out modifications within the framework of system safety and for other field services.

MAINTENANCE SUPPORT:

SELLER shall carry out scheduled, periodic and unscheduled maintenance and snag rectification and for this purpose maintenance personnel will be deputed at mutually agreed terms and conditions.

In case of prices for long-term supplies of spare parts or price catalogue are not available/ applicable, provision for entering into long term business agreements on supply, servicing and repairs like LTSA / LTRA should be provided by Seller in the scope of the contract till establishment of Repair Overhaul Facility at _____ or in India. Seller should indicate lead time for supply of spares and should authorize _____ for direct purchase from OEMs/Primary vendors.

All upgrades, modification, design changes etc. will be provided free of cost as per clause in the RFQ/Tender

	during the product life at OEM's place. As soon as obsolescence is likely to emerge the Buyer & Seller will mutually agree for a solution which may include onetime buy as per Buyers requirement based on agreed escalation formulae or for an alternate solution.
CLAUSE-12	Taxes & Duties
Suggested Clause	<p>Product/services price will be inclusive of GST or any other duties as may be applicable as per RFQ/Tender condition. If not indicated specifically in response to tender in the commercial offer used for ascertaining and comparing competitor's price for determination of L1 then also it will be assumed that prices are inclusive of taxes & Duties.</p> <p>Seller is not entitled to any increase in taxes if there is delay in supplies on his part beyond original Delivery Period. However, if there is decrease in Taxes, the same must be passed on to the Buyer. In case of changes in statutory levies like taxes etc. after the placement of orders the payment will be made as per the terms and conditions in the Purchase Order regarding these changes in statutory levies. Necessary statutory forms shall be issued for availment of concessional rate of taxes.</p>
CLAUSE-13	Integrity Pact
Suggested Clause	Seller shall submit duly signed Integrity Pact in original, strictly as per the format (without any deviation) enclosed with the RFP.
CLAUSE-14	Liquidated Damages (LD)
Suggested Clause	LD will be applicable, in case seller fail to deliver fully or partly the material or services within the stipulated period at designated place (Date, time, & Place). The rate of LD deduction will be 0.5% per week, subject to a cap of 5 % for the undelivered material or services. This LD will not be treated as penalty and also if delay in delivery of material or services by seller is as per requirement of deferring such material or services for a reason in writing provider by Buyer to seller, no LD will be deducted. LD,

	however, will not affect buyer's right to compensation, performance and termination of the Agreement.
CLAUSE-15	Earnest money deposit (EMD)
Suggested Clause	EMD should be submitted by way of bank guarantee /DD in the prescribed format by a National Bank/international bank of repute. The value of EMD will be Rs...../.....US\$ and be valid for a period ofdays beyond the validity of tender/RFQ. Such EMD will not carry any interest for the period retained by Buyer.
CLAUSE-16	Security Deposit (SD)
Suggested Clause	The Seller shall deposit ____% of the total value of this order as an Interest free Security Deposit which amounts to Rs...../.....us\$ by way of DD /Banker's Cheque/Pay Order/ wire transfer / payment gateway / Bank Guarantee (BG) (In prescribed format) from any Scheduled Bank in India / Bank of International repute (for Foreign Sellers). This amount/BG will be returned only after the successful completion of the contract. This amount is likely to be forfeited/BG encashed, in the event of failure to execute the contract as per laid down terms and conditions. SD shall be submitted in favour of _____. SD may be maintained in reducing balance based on proportionate completion of contract, where in the total duration of contract is more than ____ years. Proportionate reduction of SD may be considered in case of long term contracts (more than 3 years)
CLAUSE-17	Performance Bank Guarantee (PBG)
Suggested Clause	Seller shall furnish a Performance Bank Guarantee in the prescribed format (enclosed) for..... % of order value valid till end of the warranty period from a scheduled bank in India / Bank of international repute (for foreign Sellers) from the date of acceptance. In the event of non-performance of the item, the Performance Bank guarantee will be encashed, if seller fail to attend the defects within a stipulated period of time where time is prescribed in tender/RFQ otherwise within a reasonable period of time. Decision of Buyer shall be final and

	binding. The Validity of performance bank guarantee shall be 5 weeks beyond expiry period.
CLAUSE-18	Spares management
Suggested Clause	<p>Seller should provide Product Support for full lifetime of the product. SELLER:</p> <p>a) Shall advice on the requirement of spares and stock to be maintained as and when required by the BUYER.</p> <p>b) Supply spares on demand. Should any of the spares or equipment be earmarked for discontinuance of production, give notification to BUYER one year before the production is discontinued, to allow for a life time purchase.</p> <p>c) Shall assist the BUYER in establishing alternate source of supplies</p> <p>d) In case of Shipyards, the following is applicable.</p> <p>ON BOARD SPARES (OBS):</p> <p>One ship set of on-board spares, special tools and special test equipment to be supplied along with the main equipment. The OBS are to cater for Ship's staff on board maintenance routines and possible repair requirements. The OBS shall include all spares required for exploitation up to 2 years and one set of general - purpose maintenance tools. List of OBS and its detail should be in format as specified.</p> <p>BASE & DEPOT SPARES (B&D):</p> <p>Supplier to forward a list of Base & Depot spares indicating Makes, Part Number and cost of each item for 5 years including two refits. The quotation for B&D spares should specify a clear validity of 90 days. List of Base & Depot spares should be in format as specified.</p> <p>INSTALLATION & COMMISSIONING MATERIALS:</p> <p>All installation and commissioning materials required to complete the installation & Commissioning of system on board ship are to be supplied free of cost with main</p>

	equipment's.
CLAUSE-19	Obsolescence
Suggested Clause	The Seller shall continue to support the equipment for a minimum period of 15-20 years from the date of supply by making available spare parts and assemblies of the equipment supplied. For any reason Seller wishes / decides to close / discontinue the line for manufacture of the products or procurement of certain components, sub-components, Seller undertakes to notify such a decision to Buyer by means of a prior years notice (before closure of the said production line) in writing so as to enable Buyer to place buy order / a life time buy of all spares before closure of said production line. Seller will transfer tools, drawings etc. to Buyer after such notice period. Seller to indicate the source from where Buyer can procure these items. The said aspect would also form an integral part of the contract.
CLAUSE-20	Withholding tax
Suggested Clause	<p>i. Applicable Income Tax as per Government of India Rules applicable at the time of making payments in respect of services rendered in India will be deducted at source from remittance of payment to seller & relevant certificate will be provided to seller. (Generally on the amounts towards services like training, technical assistance offered by the Seller and license fees).</p> <p>ii. Seller should bear the applicable withholding income tax in India. Tax would be deducted at source by Buyer as per DTAA. And certificate will be provided to seller to claim a income Tax relief in his country.</p> <p>iii. Seller is required to indicate the PAN No. issued by Indian Income Tax Authorities and Permanent Establishment Certificate, If Applicable.</p>
CLAUSE-21	Product Liability (optional)
Suggested Clause	The Product Civil Liability on the product, for any loss arising in course of its utilization, for which Buyer may be held legally responsible, is the responsibility of Seller.

	Seller will carry out Product Liability Insurance to the extent set for herein in an amount not less than Rs. ___/___ US\$. Buyer will not be responsible for the payment of any premium for this policy.
CLAUSE-22	Risk Purchase
Suggested Clause	If the seller fails to deliver the items either in part or in full and buyer has to resort to order other suppliers for the requirement at a rate higher than the rate at which the seller was supposed to deliver, then the difference of value will be deducted from seller's due invoice or will become recoverable from seller, as cost of risk purchase. Also this liability will be in addition to LD and any other related compensation.
CLAUSE-23	Termination clause
Suggested Clause	Buyer reserves the right to cancel the order with 15 days' notice in case of emergence of any of the following situations without any financial liability: <ul style="list-style-type: none"> a) When the item offered by the Seller repeatedly fails in the inspection and seller is unable to either rectify the defects or offer items conforming to the contracted quality standards. b) When the Seller fails to honour any part of the contract including failure to deliver the contracted stores/render services in time. c) Adulterated supplies as determined according to Prevention of Food Adulteration Act, 1954 and Rules, 1955 as amended from time to time. d) Supplies inferior to the specified quality. e) Wrong /risky supplies against branded items in the Purchase order. f) Time expired supplies. g) When the Seller is found to have made any false or fraudulent declaration or statement to get the contract or he is found to be indulging in unethical or unfair trade

	<p>practices.</p> <p>h) Based on the decision of Arbitration Tribunal.</p> <p>i) The seller is declared bankrupt or become insolvent.</p>
CLAUSE-24	Insolvency
Suggested Clause	If seller has to resort Insolvency as per Insolvency & Bankruptcy code 2016 it shall immediately inform the Buyer and the Buyer will have the authority to annual or cancel unexecuted part of order as also to lodge a claim for refund of advance with the Insolvency Resolution professional appointed for the seller company.
CLAUSE-25	Appropriation
Suggested Clause	If buyer has a due claim accepted by seller, then it will be entitled to recover the same from any of payable amount to the seller from any of its Division/unit/offices/partner organisation like any DPSU/MOD and for balance amount, if any, the seller shall pay on Demand the remaining balance. The remaining balance due, if any, will be recovered through due process of law in case seller becomes defaulter.
CLAUSE-26	Applicable law/ Jurisdiction
Suggested Clause	The applicable Law/Jurisdiction will be the court at ----- and the law of republic of India will be Applicable.
CLAUSE-27	Arbitration
Suggested Clause	<p>All disputes or differences between the parties will be attempted to be sorted by bilateral discussions, if required, by head of both organisations but if it is not settled within 90 days or such further extended period, then the same shall be settled by Arbitration.</p> <p>The Arbitration Proceedings shall be conducted in India under the Indian Arbitration and Conciliation Act, 1996 and the award of such Arbitration shall be enforceable in Indian Courts only. The law applicable to an arbitration shall be Indian law. In case of Foreign Seller, Indian law or Foreign law to be decided by contracting parties in</p>

advance.

For Indigenous Seller: The arbitration tribunal shall be consisting of sole arbitrator. The sole arbitrator shall be nominated by the parties within ninety (90) days of the receipt of the notice mentioned above through mutual discussions, failing which the arbitrator shall be nominated under the provision of Indian Arbitration and Conciliation Act 1996 at the request of either party or by dispute resolution institutions like Indian Council of Arbitration or ICADR, but said nomination would be after consultation with both the parties. The award of the arbitration shall be final and binding on the parties to this contract.

For Foreign Seller: The arbitration tribunal shall be consisting of sole arbitrator. The arbitrator (other than a citizen or domicile of the country of either of the parties or of any other country unacceptable to any of the parties) shall be nominated by the parties within sixty (60) days of the receipt of the notice mentioned above, failing which the arbitrator may be nominated under the provisions of Indian Arbitration and Conciliation Act, 1996 or by dispute resolution institutions like Indian Council of Arbitration and ICADR. In case, nomination of third arbitrator under Indian Arbitration and Conciliation Act, 1996 or by dispute resolution institutions like ICA and ICADR are not acceptable to the SELLER, then the sole arbitrator will be nominated by the International Chamber of Commerce, Paris through its President in consultation with the parties.

Seat of Arbitration Tribunal shall be in India or any suitable place in India as may be decided by the arbitrator.

The cost of preparing & presenting will be borne by each party on its own. The arbitration cost including the fees and expenses of the arbitrator shall be shared equally by the SELLER and the BUYER, unless otherwise awarded by the Arbitration Tribunal.

In the event of a vacancy caused in the office of the arbitrator, the parties which nominated such arbitrator shall be entitled to nominate another in his place and the

	arbitration proceedings shall continue from the stage they were left by the retiring arbitrator.
CLAUSE-28	Indemnity against Patent rights
Suggested Clause	The Seller shall at all times protect, indemnify and save/keep harmless the Buyer, its successors, assigns, any claim made by a third party against all liability, including costs, expenses, claims, suits or proceedings at law, in equity or violation of any license with respect of the stores covered by the order.
CLAUSE-29	Bribes
Suggested Clause	The seller shall ensure that no gift, commission, etc. has been paid or committed to pay to any of the officials of buyer or their representative. If at any time it is firmed up that seller has attracted the provision of prevention of corruption Act 1988 or any other enacted for the prevention of corruption or chapter IX of the Indian Penal code 1860, then the Buyer shall be at liberty to cancel the contract and all or any other contract of the seller and recover all due payments or losses arising from such cancellation. The decision of the buyer based on firming up of corruption acts of seller shall be final and binding on the seller.
CLAUSE-30	Sub-contracting/Sub-letting with the permission of the Buyer
Suggested Clause	Seller shall not be entitled without buyer's prior written consent to Subcontract the Contract (even by way of change of ownership or control), except as permitted under the Contract.
CLAUSE-31	Work & Payment during arbitration
Suggested Clause	Work under the Contract shall be continued by the Seller during the arbitration proceeding, unless the matter is such that the work cannot possibly be continued until the decision of the arbitrators is obtained. The buyer also shall not withheld any payment on account of such arbitration proceedings, unless it is the subject matter or

	one of the subject matters thereof.
CLAUSE-32	Fall clause
Suggested Clause	Unless the contract is based on competitive bidding L1 price based, the seller shall ensure that buyer is not charged a higher price for the same product or services, which the seller has supplied or committed to supply to MOD or any other DPSU during the same applicable period of this stipulated contract. Supplies or services with due allowance for quantities. If it happens then the seller shall be entitled to get payment at the reduced rate for the supplies made or services rendered and if already paid for then the seller will ensure refund of amount within a period of 90 days from the date of Agreement is reached or violation is proved by Buyer.
CLAUSE-33	Export license
Suggested Clause	Foreign Seller making proposals should ensure availability of export license as per their Govt. regulations for export to India. End User Certificate will be issued by the Buyer. Seller is only required to obtain export licenses from its country.
CLAUSE-34	Immunity to the Government of India
Suggested Clause	Government of India is fully provided immunity under this contract. Seller shall have no claim against government of India under this contract.
CLAUSE-35	Classified/Confidentiality
Suggested Clause	<p>1. This Contract and its Annexures shall be treated as confidential by the Parties and their officers and employees.</p> <p>2. Unless otherwise specified herein, neither Party or any of their affiliated companies shall make any news release, public announcement, advertisement, denial or confirmation, disclose of some or any part of this Contract or transactions contemplated under this Agreement to any third party without the prior written consent of the other Party</p>

3. The Party Disclosing information is termed as Disclosing Party and the Party receiving information is termed as Receiving Party.

Each party undertakes:

i. to keep the other Party's Confidential Information confidential using the same degree of care against public disclosure but in no case any less degree than reasonable care; and

ii. not to make any copies of the other Party's Confidential Information or translation or transfer of the same to other documents or media nor to disseminate the same within its own organisation save as is strictly necessary for the purpose; and

iii. Not to assign the rights and obligations of the Parties without their prior written consent thereto.

4. Provided, however, that the foregoing restrictions and obligations shall not apply to any information which it can be shown:

i. Is already or hereafter becomes published otherwise than through the fault or negligence of the receiving Party; or

ii. Is lawfully obtained by the recipient from a third party having rights to disclose to the receiving Party, without restrictions as to use or disclosure.

5. The technical information provided by SELLER under this Contract shall be treated as confidential by the BUYER and shall be used by BUYER only for purpose intended and shall not be disclosed to any third party.

6. The provisions of this clause shall survive and remain in force notwithstanding the termination or expiry of this Contract.

7. The BUYER shall limit access of technical documentation being provided under this Contract only to such of its employees involved in relevant operations concerning the equipment on a need to know basis.

	8. Non-adherence to this Clause by the Seller shall be treated, amongst others, as a material breach of this Contract.
CLAUSE-36	Agents/Agency clause
Suggested Clause	The buyer being the DPSU is not entitled to work through Agent/Agency clause. Hence seller shall ensure non-involvement of agent/agency clause and will comply with integrity pact in Toto. If any agent involvement emerges at a later stage the seller shall be liable for prosecution as per applicable Indian laws & will have to refund to buyer full amount of Agency commission so paid with a penal interest liber plus 4% in case of foreign seller (and SBI Base rate plus 4% in case of Indian seller) within 90 days of firming up of the issue by Indian Investigating Agency.
CLAUSE-37	Intellectual Property Rights
Suggested Clause	The buyer will be indemnified by the seller against any established claim by third parties including derived cost of any damages suffered by buyer for any infringement of intellectual property rights including related to patents, design, trademark & copyright.
CLAUSE-38	Force Majeure
Suggested Clause	Force Majeure:- (I) During execution of Purchase order, placed by the buyer the performance in whole or in part by either Buyer or/ and by the Seller(s) is / are delayed by any reason of force majeure situations such as acts of civil war, civil commotion, sabotage, hostilities, war, fires, explosions, epidemics, natural calamities like floods, earthquakes, volcanoes, storms, acts of God & laws of respective governments or any other causes beyond the control of either parties, hereinafter referred to as "events", provided notice of the occurrence of such event/s is / are communicated by either party, to the other party within 21 days from the date of occurrence thereof, neither party shall by reason of such events be entitled to terminate the contract. Occurrence of the events to be certified by Chamber of Commerce / Indian High Commission or

	<p>Embassies / Government in that Country.</p> <p>II) The performance in whole or in part under the captioned tender / contract is prevented or delayed by reason of any such event for a period exceeding sixty days either party may at its option terminate the contract / further processing of the tender. The relative obligations of both the parties remain suspended during the actual period of force majeure.</p> <p>III) The Buyer may extend the delivery schedule as mutually agreed, on receipt of written communication from the Seller. If situation of Force majeure continues beyond the reasonable period to be mutually decided, Buyer shall be entitled to cancel the order without incurring any liability on its part.</p>
CLAUSE-39	Amendment & Waiver
Suggested Clause	All amendments & waiver to be backed by signature of both buyer & Sellers/ Authorised Representative; otherwise it will have no validity.
CLAUSE-40	Exit criteria
Suggested Clause	<p>Exit criteria through Termination of contract will happen in any of the following situations:</p> <ul style="list-style-type: none"> ● If the seller is found to be engaged in unethical practices. ● If the information provided by seller is untrue. ● If the requirement of buyer changes but in such case liability will be mutually determined by buyer & seller together. ● If the seller is declared bankrupt or insolvent. ● If the delivery of material is delayed more than a year. ● If it is based on the decision of Arbitration Tribunal.
CLAUSE-41	Cartel Formation
Suggested Clause	Cartel Formation: Cartel formation or quoting of pool rates or quoting in collusion is against the basic principle of competitive bidding and shall attract penal and punitive measures; including blacklisting of such

	Bidders either permanently or for a specified period, apart from reporting to the Competition Commission of India, other Regulatory Authorities, Chambers/Associations of Commerce, etc.
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Chapter - 7

FINDINGS AND RECOMMENDATIONS

From a detailed study of large defence contract involving crores of rupees of a particular defence programme from inception (tender document and pre-tender preparation) till the final stage of termination of contract covering both DPSU contract with foreigners / indigenous vendors as also with defence customers, participation in high value contract negotiations, discussion with various stakeholders, input available in public cloud and hybrid cloud, input available on management strategies, legal and policy analysis, analysis of the various Case Studies and replies to the Questionnaire, various findings which are critical to the execution of the contract have been identified and the recommendations based on the findings are listed out in the subsequent paragraphs.

This chapter focuses and highlights the problems that are encountered in Defence Contracts execution and the lessons learnt thereby. It is clearly evident that the Defence Contracts involve multi-system requirements of all stakeholders and the need to evolve a Comprehensive Contract with critical clauses to take care of the interest of both the Buyer and the seller. In a Defence environment scenario any contract for procurement would involve the complete system for Manufacturing and Supply of Aircraft, naval ships , armaments and related systems, Supply of spares for support and Repair and Overhaul of LRU, Rotables and Aircraft /ships . This multi-system requirement needs unique interface of all Vendors' supplies/services and drafting and contract Terms and Conditions without any ambiguity.

Further, the learning from the Case studies and the replies to the Questionnaire is documented to provide an insight into the various critical clauses and the need to include the same as part of the well drafted Contract. It is observed that in majority of the contracts many of the Contractual clauses are not only ambiguous, but also contradicts between various subsequent clauses leading to litigation and non-performance by either party. This research paper has attempted to identify and include all such clauses and provide as a reference for future drafting of contract by various stakeholders.

The findings from the case studies, analysis of various inputs obtained from secondary sources including study of major defence contracts of DPSU

with foreign / indigenous vendor including defence services, input from primary source gathered during large defence contract negotiations, related legal and management protocols with respect to large defence contract are consolidated under Part – I. Similarly inputs obtained through deep analysis of questionnaires are at Part – II. Final Recommendations are listed out at Part – III.

Part I

Main Findings

Main Findings from Case Studies and others:

While the research study has thrown out the various inconsistencies and incongruence in the various Contractual clauses some of the main findings of the case studies and questionnaire survey are illustrated below:

- While drafting contracts legally incorrect, vague and ambiguous clauses are included in various parts of the contracts. Major areas include Technology transfer, Offset clauses, option clause, support and services, Arbitration, Penalty for delayed deliveries to name a few.
- Every contract entered with each vendor is specific and exclusive. Normally each contract has special and general conditions. They need to be complimentary to each other. However it is observed since enough care is not exercised in the drafting of the contract many of the contract specific terms contradict with similar terms in General conditions. This situation gives rise to various legal complications at a later date.
- Many of the terms and conditions in the contract are loosely worded resulting in difficulties during the implementation phase. For instance, Effective date of Contract is indicated both from the date of signing of the contract as well as the date of the payment of advance which may give rise to a dispute at a later date.
- The purpose of this chapter is to implement in the contract, all the recourses that have taken in course of overcoming the issue/problem and to follow the same as a standard in the forthcoming contracts by every DPSU.
- Selection of vendor particularly on the basis of single acceptable offer with abundant care and caution to avoid subsequent pressures by the vendor.
- Scrutiny of Background and Performance of the vendor thoroughly before final selection.
- Regular updating of the vendor directory and development of vendor base to invite competitive tendering and selection of reliable vendor.
- Proper Strategic decisions and drafting of the right RFQ/contract to avoid change in financial parameters after finalization of contract.
- The Payment Terms/phasing of expenditure should be worked out, inter-alia, duly linked with defined milestones and tangible deliverables, in consonance with the anticipated physical progress of the project, so that the proposal does not appear to be expenditure

driven and the release of payments is not tantamount to parking of funds with the vendor concerned.

- To ensure that the contract terms are clear and unambiguous, thereby ensuring both the parties work with mutual trust and with a common objective of completing the Contractual requirements.
- Avoidance of changes in contract terms subsequent to issue of purchase order, particularly a contract finalised with open tendering.
- Force Majeure clauses should be clearly defined in the contract. Documents required declaring / accepting any event as Force Majeure should be mentioned in the contract within the stipulated time period. Contract should also mention the name of independent agency like Embassy of India, Government of India sources etc. to authenticate the happening of the Force majeure event. The force majeure is decided based on the representation of vendors and based on the analysis of the data with facts and actuals.
- DPSUs are engaged into entering into contract with foreign Defence companies for exporting their products outside India. It was observed that in number of cases the contracts suffer from unilaterally biased towards the foreign buyer, Cost and Risk analysis not properly made and other shortcomings. Ultimately it boils down to the substantial financial burden to the Indian exporter.
- Agreement with the contract terms: Contract terms offered by the supplier should be properly analysed in detail with respect to the legal implications, anticipated responsibilities & rights of buyers and sellers.
- Adequate Cost and risk analysis: Terms of the contracts should be properly evaluated in terms of Costs vis-à-vis risks involved. It is necessary to ensure adherence to broader finance and risk requirements and to assess economic impact of terms and conditions before entering into a contract.
- Avoidance of terms which are one-sided and adversely tilted to one party: In order to avoid adversarial Contract Management, drafting of Contractual terms and conditions shouldn't favour one party. Clauses of a contract which are one-sided, benefitting one party at the expense of the other party should be avoided.
- Negotiation with parties before finalizing the contract: Adequate negotiations should be effected between the contracting parties to mitigate the avoidable risks and removing un-favourable clauses.
- Agreement for participation in a project by a vendor jointly with any other party/parties must contain clauses to adequately safeguard the interest of the exporter in case of sudden withdrawal by the other party from the project.
- The contract should have adequate provision to compensate exporter if there is any cancellation of order by the other party.

- For contract envisaging investments in Export Oriented Project, there should be firm commitment of Export Orders from the other participating party so that the investment could be recovered.
- Contract should ensure commitment for investments in fixed Assets by both the parties so that other party have stake in the project.
- There should not be any clause of withdrawal from the project by the other party unilaterally.
- Not to quote below the prime cost.
- Prices should not be Firm and Fixed throughout the period of contract. To have appropriate Escalation clause in the contract to cover increase in cost, when the contract is for a long period.
- Contract should have minimum and maximum rate of delivery specified therein.
- Duration of the program should be definite and not to be decided by the purchaser alone.
- Purchaser should not have irrevocable option, exercisable at its discretion at any time to issue purchase orders for Production Ship sets and spare parts.
- Contracts should as far as possible not be loaded for or against one party and should result in a win-win situation of both the parties.
- During contract negotiations, it may be required to become flexible to some of the terms and conditions though not entirely favourable. It is essential to analyse the effect of not conceding to such terms and trade off against the similar counter terms to ensure that net impact is acceptable to the company.
- The terms of contract should be precise, definite and practicable.
- Contracts should as far as possible not be loaded for or against one party and should result in a win-win situation.
- Contractual incompleteness: Based on individual DPSU's experience gained from its completed contracts, concerned DPSU's team must deliberate and then cover all eventualities in the new contract which can crop up at a later date. Accordingly the contract shouldn't be silent with respect to what should happen given this event or contingency. The literal completeness can be achieved by adding suitable clause in the contract.
- DPSU's to avoid as far as practicable any post contract modifications / amendments unless it is absolutely necessary and after considering financial implications.
- There should be proper monitoring mechanism for ensuring performance of the contract as per terms and strict adherence of delivery schedule.
- The Buyer should have appropriate and effective mechanisms at sufficiently high levels for monitoring of physical and financial progress

of the project at regular intervals, with a view to anticipating slippages, forecasting and minimizing likely time and cost over-runs.

- The delivery schedule/milestones envisaged for the project should factor in the production capacity and limitations, if any, of the vendor concerned in meeting the commitments.
- Contract should have suitable penalty clause to make good the buyer against un-reasonable delay in executing the contract terms by the supplier.
- Proper remedies should be available in the contract to cover against financial loss to the Indian manufacturer due to delay in fulfilling contractual requirements by the foreign supplier within the time frame of the contract.
- Contract should define the scope of work in clear terms, freezing technical specifications.
- Contractors responsibilities as well time schedule for execution should be clearly specified in the contract defining milestone based deliverables,
- Proper remedies should be available in the contract to cover against financial loss to the Indian manufacturer due to delay in fulfilling contractual requirements by the foreign supplier within the time frame of the contract.
- Liquidated Damages clause to be included in the contract.
- Risk purchase clause to be included in the contract.
- Penalties for non-fulfilment of other important clauses of contract (other than delivery schedule) should also be defined in the contract.
- Terms of Deputation of foreign experts and Training of DPSU's personnel should be defined for full project life cycle.
- Technological changes should be clearly specified through a well-defined procedure & updated Material list, if any, should be simultaneously forwarded.
- Price Escalation should be defined for full contract period.
- Once Price escalation is defined in General contract, signing of supplementary contracts / placement of PO's should be on fast track basis without obtaining fresh offer from OEM.
- Increase the Indigenization efforts and the steps to be taken for increasing Indigenous Content in Defence supplies. The issues identified as constraints for indigenization and the Road map for overcoming the same.
- Analysis of Project time and Cost overrun encountered if any. Detailed review and analysis of the same. Reasons to be identified and corrective measures to be suggested.
- Suitable clauses may be incorporated in the contracts with foreign vendors to safeguard the interests of Indian counterparts in respect of

delay in meeting contractual obligations with regard to transfer of technology, delayed supplies and replacement of damaged articles.

- Integrity pact from vendors may be insisted upon from pre-bid stage in respect of all contracts involving value in excess of the ceiling applicable.
- Monitoring of manufacture of the aircraft may be streamlined to strictly comply with PERT charts drawn up for each major activity of the DPR with coordinated links to meet contracted schedule of defence services.
- Contract should contain adequate provision to safeguard and compensate the buyer against delay in deliveries. It is essential to organize a joint study of the contractual provisions to appreciate the terms and define the plan of implementation by each stakeholder.
- A comprehensive plan should be drawn to co-ordinate different activities envisaged in the contract, to reach the ultimate objectives in time. Progress on implementation of the contractual provisions needs to be monitored by a Committee which could review and suggest remedial measures to remove any obstacles.
- Regular interaction and communication are required between all stake-holders to identify the shortcoming areas and measures to sort out the bottlenecks.
- Effective monitoring mechanism is required to ensure setting up of infrastructure facilities in time.
- Proper planning, monitoring system for timely execution of the project.
- Stress on indigenization to reduce dependence on foreign supplier.
- Preparation of proper Technical Specification and avoidance of deviations from the specification while awarding the contract.
- Adequate negotiation skill to protect and safeguard the interest of the project while entering into a contract.
- Contentious issues like pricing should be settled between the stakeholders before setting up the project plan and completion schedule of the project.
- In any technology transfer programme, Licensors/OEMs are not willing to transfer their core technology and keeping core items as proprietary. This indirectly restricts the Indian manufacturer to complete self-reliance and continuous dependency on Foreign OEMs even after Technology transfer. Hence the Scope of the contract should exclusively include complete transfer of technology upto components level.
- The contract should ensure full logistic support by the foreign vendor for supplying required technical documents, training and other requirements within the stipulated time period.
- Contract particularly with foreign parties should have adequate remedies in case of Bankruptcy/Liquidation of the other party.

- Contract should ensure proper financial coverage against any probable financial risks and loss to the company.
- Clauses like Force majeure and procedure for dispute resolution between the parties are important constituents of the contract to safeguard against future risks.
- All-encompassing clauses in the contract to cover "Scope of work" should be defined unambiguously.
- It is essential to include suitable clauses in the contract for supplying items which although yet to be designed but critical for completeness of stores/system. This necessitated the inclusion of the sentence "the items not specifically listed but required for completeness of stores/system deem to be included".

Part II

Main findings from the analysis of Questionnaire

1. General:

- a) In your opinion what is the most important factor with respect to Contract Management & Practice?

DPSU's Reply:

- **Payment terms**
- **Delivery**

- b) In your opinion what are the contractual clauses that are normally resisted by vendors/subcontractors?

DPSU's Reply:

- **Payment of interest on Advances**
- **Liquidated Damages**

- c) During the currency of Contract how frequently the clauses/terms & conditions of the contract are interpreted between the parties?

DPSU's Reply:

- **During extension of Contract Period**
- **In case of any difference or dispute**

- d) In case it is decided to Blacklist a Vendor/Subcontractor? What is the procedure followed? What are the available recourse in Contract Management?

DPSU's Reply:

- **All the DPSUs follow as per their own internal Manual (Purchase/IMM)**
- **Notice is served on the vendor before blacklisting**

- e) Are overseas Vendors accept for DPP 2013 terms and conditions? If not, what are their deviations?

DPSU's Reply:

- **All DPSUs follows their own internal Manual (Purchase/IMM), some Manuals are in line with DPP provisions**
- **EMD and BG (Format) issues**
- **Integrity Pact (IP)**

- f) What are the contentious issues encountered in MoD contracts? A brief may be provided?

DPSU's Reply:

- **Delivery issues**
- **Payment of statutory levies**

g) List five major issues being faced as a DPSU while executing the MoD contracts?

DPSU's Reply:

- **Delayed payment**
- **Escalation of Prices**
- **Performance delay**
- **Monopoly of MoD approved source (Vendor or Supplier)**

h) Do you agree for Limitation of Liability in your Contract? How do you define Limitation of Liability? What are the exemption's you agree?

DPSU's Reply:

- **Limitation of liability clause is included in contract with 100% of contract price**
- **Exceptions in case of criminal negligence or willful misconduct**

2. Prices:

a) Are your contracts being finalized on Fixed Price Basis or Variable Price Basis?

DPSU's Reply:

- **Price Variation (PV) formula, Price indices (such as base price, cost index, Foreign Exchange are defined)**
- **Mostly Fixed Prices**

b) In case of a contract with Variable Price, are the methodology and appropriate indices are properly defined?

DPSU's Reply:

- **Yes**

c) What has been experience in contract execution, having price on variable basis?

DPSU's Reply:

- **Contracts are performed smoothly**

d) Is there any slab rate for application of price variation clause or it is variation on continuous basis?

DPSU's Reply:

- (PV) Price variation clause differs from case to case. Some are slab bases & some are continuous bases

e) In case of price variation clause, the escalation has been insisted by the vendors for deliveries beyond actual scheduled delivery period?

DPSU's Reply:

- No

3. Delivery:

a) How the "Effective Date of Contract" has been defined? Is letter of intent /acceptance taken as "Effective Date of Contract" for commencement of contract?

DPSU's Reply:

- Date of Signing of Contract
- On payment of Advance.

b) Has there been case where dispute has arisen with regard to "Effective Date of Contract"? If so, the reasons of dispute may be specified.

DPSU's Reply:

- No (rare cases dispute arise)

c) Have you had any experience while levying Liquidated damage due to improper definition of terms like – incoterms, selection of freight forwarder, carrier etc. ?

DPSU's Reply:

- No (rare cases issue arise)

d) If above is yes, what course of action has been resorted to for resolution?

DPSU's Reply:

- No

DPSU's Reply:

- **In some cases 'No' & in some cases it is 'Yes'.**

6. Integrity Pact:

a) Is Integrity Pact in the Companies format accepted by vendors?

DPSU's Reply:

- **Yes**

b) If Integrity Pact is not accepted by vendor, what resolution measure is being adopted?

DPSU's Reply:

- **Offer is rejected (in rare cases Management approval taken)**

7. **Breach of Contract:** In case of Breach of Contract by vendor what course of action is resorted to? Is cancellation of Contract is done or specific performance of contract is insisted upon.

DPSU's Reply:

- **In most cases Contract is cancelled (in rare cases it is requested to perform the Contract)**

8. **Arbitration:** In case of Breach of Contract, whether arbitration clause has been invoked by DPSU/ vendors. Details of cases during last three years may be provided with current status?

DPSU's Reply:

- **In DPSUs Arbitrations are rarely invoked**

9. **Applicable Law:** In case of International Contracts what is the experience of "Applicability of Law" regarding Contract Management including dispute resolution process.

DPSU's Reply:

- **In DPSUs it is insisted for Indian Law**

10. **Technology transfer** is the essence of any defence procurement. In case of Transfer of technology is agreed upon how it is ensured that it is implemented in its original form of usage?

DPSU's Reply:

- **Suitable OEM is identified and formal MoU is entered with clear timelines**

- **Latest version of configuration, control document with all technical specifications and complete breakdown of product structure (lower level/ sub systems/ sub-assemblies/ modules)**
- **ToT Agreement should be in line with contract signed with MoD**

11. Offset Clause: Offset clause even though invariably is included in majority of defence procurements implementation of the same is far from satisfactory? What has been your experience and how do you ensure its effective implementation?

DPSU's Reply:

- **Rarely DPSUs meet the threshold (Rs 2000 Crores) for Offset provisions**

12. Option clause: Is option clause insisted upon? If so what is the maximum limit to which it can be exercised?

DPSU's Reply:

- **Specified upto maximum of 100% original contract (rarely 50% of Quantity of the contract)**

13. Force Majeure:

- a) In case Force Majeure, How is it decided that the Force Majeure event has occurred? In case of disputes arising there from, what mechanism is used to prove the Force Majeure event/s?

DPSU's Reply:

- **Notice is issued & proof of occurrence is requested**

b) What major events which constitute Force majeure are specified in the Force Majeure Clause in your Contracts?

DPSU's Reply:

- **Act of God, fire, flood, earthquake, other natural catastrophes, any law and order, regulation, direction, action of any civil or military authority, national emergencies, insurrections, riots, wars (whether declared or not), hostility, acts of the public or enemy, civil commotion, sabotage, explosion, epidemic, quarantine restrictions, strike and lock-outs, work stoppage or other labour difficulties are the major constituents of Force Majeure clause.**

14. Fall clause: Is Fall clause acceptable to the vendor? In case it is accepted how do you ensure its enforcement?

DPSU's Reply:

- Yes as it forms part of Contract

15. Support and Services: The longevity of the product requires support from the OEM in the form of supply of Spares and services. How the requirement of Support and services ensured as part of the original Contract?

DPSU's Reply:

Some of the DPSU implement the below:

- a) In respect of major equipment, spare parts for two years normal operation are procured along with the machine. Further, the contract also contains a clause that the vendor should ensure supply of spare parts during the life of the equipment. Further, the details of the manufacturers of the spare parts are also taken so that we can procure them directly from the manufacturers.
- b) Generally in the Tender document in case of major equipment's it is asked as to how vendor will support for after sale service and supply of spares. They are asked to supply the list of spares for continuous operations. They are also asked to supply two years spares along with supply of the equipment. The contractor shall submit with the tender an itemized list showing the unit cost and recommended number of spare parts for the first two years of operation along with drawings. The contractor shall also undertake that supplies of necessary spare parts will be made available at any time later at least during the life of the plant, machinery and equipment at reasonable price. Spare parts not manufactured directly by the Contractor shall be properly identified and description/catalogues, etc. given in sufficient detail to enable the Purchaser to procure these directly from the manufacturers, if the company so desires.

16. Breach of Confidentiality: Many of the Defence Contracts are governed by the Confidentiality clause. In case of Breach of Confidentiality what is the legal course of redressal adopted?

DPSU's Reply:

- No such experience with DPSUs

17. Survival Clause: Many of the contractual clauses like Warranty clause, Confidentiality clause, Support and services clause, option clause need to continue even after the original contract? If not how the affectivity of the clauses as above are protected?

DPSU's Reply:

- **Most of the DPSUs are dealt case to case**

18. In case future amendments to the contracts become necessary due to various subsequent developments, the original contract should provide for such amendments. Is this taken care of as part of the original contract?

DPSU's Reply:

- **Yes**

19. Design and development and subsequent productionisation is very common in defence procurements. The contractual arising therefrom like production set prices etc. need to be taken care. How is it ensured? Are there difficulties at the production phase in this regard?

DPSU's Reply:

Some of the DPSU implement the below:

- a) On successful development of a product either through design or through transfer of technology and its subsequent acceptance by the inspection agency i.e. CQA, series production is taken up. The cost of series production is always compared with a bench mark price which can be either the price of procurement from OEM or a market driven price.

The purchase of items from the developed sources is always covered with a clause to increase the quantity on successful development and the source will have to maintain the agreed price for certain defined period / quantity. If there is a breach of contract then there are certain clauses such as Risk Purchase clause where the additional cost incurred will be recovered from the defaulting source. Non-disclosure agreement is also applicable. Blacklisting the firm is also an option.

20. Termination Clause: Is the grounds for termination clearly spelt in your contract? Will termination to be preceded by a notice or the party terminating the contract can unilaterally terminate the contract if any of the circumstances mentioned in the contract occurs?

DPSU's Reply:

- **DPSUs follow as per Contract clause for Termination**

21. Compensation clause: Where there is a need to terminate the contract, due to default on the part of the supplier is there a contractual clause wherein the concept of compensation for the loss suffered is built in the contract?

DPSU's Reply:

- **Most of the DPSUs it is 'No'.**

22. Export License: In case of imports from a foreign country the obligation for obtaining an export license rests with Supplier. If the export license is not granted for any reason whatsoever, what is the remedy available to the buyer from the supplier? Is this claimed by the buyer as breach of contract?

DPSU's Reply:

- **Supplier is responsible for Export License**
- **Some DPSUs treat it as Force Majeure and some treat it as Breach of Contract**

23. Consequential Damages: Do your Contracts agree/provide for Consequential Damages arising on account of Breach of Contract? If so, the upper limit is specified as part of the contract or not?

DPSU's Reply:

- **DPSUs contracts do not provide for Consequential Damages**

24. Intellectual Property rights: How is the buyer protects the IPR from any infringements by the seller? Is any suitable contractual Clause included in the contract?

DPSU's Reply:

- **Yes, Patent Indemnity clause included in Contract**

25. Indemnity Clause: With regard to indemnity clause, for third party liabilities, what is the liability accepted? Is it capped or open ended?

DPSU's Reply:

- Contractor assumes responsibility for, and shall at all times indemnify and save harmless to the organisation and its staff from all losses, liability, claims, costs, expenses, taxes and assessments, including penalties, punitive damages, etc. for which the Contractor has assumed responsibility under this Contract. The Contractor has to obtain third party liability insurance which will cover third party liability.

Part III

Recommendations:

- Primarily my recommendation is based on studies of Defence Contract with values involving over thousand of crores rupees and covers both DPSU contract with foreign / indigenous vendors as also with Defence Customers ; participating in high value contract negotiations, discussion with various Stakeholders , reading of secondary data both available on public cloud & hybrid cloud , response of questionnaire received from various defence organisations , dispute resolutions involving crores of rupees etc.
- After going through full drill of the Research Project, it is understood that Contract Management in a defence contract is not limited to contract per se but it involves part of project management also.
- Take the citation of a fighter aircraft programme which emerged out of Inter Government Agreement. While it provided capability of 4.5 generation fighter aircraft to Defence Services made indigenously under TOT (Transfer of Technology) but learning from failures are much more. Learning commenced from poor programme management capability, poor negotiation skill, poor drafter of contract, working under pressures, feeling of failures on all front of production & supply, technical absorption, loss of money to DPSU on account of LD deduction by Defence Customers – although DPSU not solely responsible, delayed establishment of Maintenance facility and so on so forth.
- The other similar case is with a Trainer Aircraft development programme of defence services by a DPSU. Failure of engine development in time & of capability by reputed foreign Engine Developer & Supplier emerging out of global competitive bidding and go on paying through Nose by DPSU to arrest further delay in Trainer Aircraft Development Programme. Even foreign consultancy firm of world repute unable to solve technicalities of the programme and continue to draw money under pressure from DPSU in order to arrest further delay of programme by repetitive amendment of contract on account of multiple reasons entered into on a single vendor nomination basis.
DPSU has been put to brink of failures as Defence Customers will recover full money involved in thousands of Rs crores so paid as Advance payment and milestone payments. Although its own failures may be minimal but the basically defective contract followed by DPSU has laid to such situation.

- In a similar situation, an indigenous fighter aircraft programme has put the image of a DPSU goodwill to a loss in its national government eyes; while the delayed design by Design Agency followed by Development contract with vendors has mainly created the situation. Finally the established DPSU of 1940 having at its credit design, development & manufacture of over 11 aircraft programmes has largely been made responsible by its defence customers.
- Take another citation of failure of DPSU on accepting an export order of Helicopters with one sided clause favourable to Buyer (a foreign government) at a loss just to show the world as our country is among few countries in world having capability to design, develop & manufacture helicopter, when the Helicopter programme itself was under development mission with few systems still to be tested. The contract clauses were not appropriately covered including SOP (standard of preparation), Design & Development time frame, Training Schedules, Maintenance Philosophy, Payment Terms Vis a Vis cash flow considerations etc. Prior to entering into contract, 'preamble ' to the contract be specific & cover appropriate philosophy of design , development , manufacture, maintenance & spare supplies including product support. Rushing for export orders by DPSU based on pressure from defence customers / Government Agencies / short sighted Management for the development of his own image has laid the DPSU to suffer over crores of rupees. All this has resulted due to non-understanding of contract formulation with appropriate coverage of concept like Force Management, SOP drafting for marketability, Product Liability, cost management culture, EASA certification/ quality certification & other such clauses including clause on Arbitration and Applicable Law.
- It should be ensured that the proposed technology is a state-of-the-art and does not require any reassessment due to obsolescence. The level of technology should meet the requirement of concerned services (i.e. Army, Indian Air Force and Navy).
- In case of TOT (Transfer of Technology) the depth and scope of TOT including value addition and indigenization should be indicated in financial terms to confirm the economic viability of the purchase through the TOT route. The extent of continued dependence on foreign vender during and after the completion of TOT be clarified in the contract and rescue majors to mitigate the situation in case of emergency be provided. If the acquisition or development of a subsystems or weapons system is involved the compatibility and complexities envisaged in integration with the main platform may require comprehensive assistance from the original equipment manufacturer with associated financial or contractual implications, need to be adequately addressed.

- In case of design and development projects, the system realization, its viability as well as confidence level of the developing agency, with regard to project outcomes and outputs, need to be deliberated in consultation with all stakeholders including the ultimate user and to be appropriately worded in contract. If the project envisages association of a foreign vendor, there should be an appropriate provision in the contract agreement or in the Memorandum of Understanding (MoU) for sharing of the possible 'sunk costs', so that they also have adequate financial stake in the success of the project.
 - In case of manufacturing projects, the reasonableness should, inter-alia, be confirmed vis-à-vis the cost of prototypes under the design and development phase. In respect of development-cum-production projects and projects involving transfer of technology being funded by the Government, there should be a pre-determined arrangement with the implementing agency to share with the Government financial benefits, if any, in the future, as a result of commercial exploitation of the facilities/assets/technology to be acquired by the implementing agency during execution of the project.
 - The Payment Terms/phasing of expenditure should be worked out, inter-alia, duly linked with defined milestones and tangible deliverables, in consonance with the anticipated physical progress of the project, and factoring in the spending capacity of the vendor, so that the proposal does not appear to be expenditure driven and the release of payments is not tantamount to parking of funds with the vendor concerned, or merely to meet the expenditure targets.
 - The delivery schedule/project milestones should be worked out in a realistic manner so as to avoid frequent revisions at a subsequent stage.
 - The contract should explicitly be divided into convenient monitoring phases, which would have the associated benefit of concurrent review of technology, if necessary, before undertaking the subsequent phases. Inordinately long implementation period for the project/phase may not turn out to be technologically prudent and financially wise in certain types of projects, e.g. for communication or information technology related projects, where the technology becomes obsolete and prices crash considerably at very short intervals.
- **Knowledge obtained by systematic study on the subject enumerated hereunder :**
 - Personnel engaged in contract drafting for defence industry be with a techno-legal-commercial background.
 - Agent/Agency Commission – may be allowed for supply of spares and maintenance support to ease availability of items for defence



the way implementation likely to happen, it is suggested not to implement such concept.

- Clarity on Escalation formulae – year to year basis or point to point basis with capex on yearly escalation needs to be considered.
- Defence Customer be a part & parcel of all negotiations of DPSU's / Strategic partner procurement so that there will be full clarity on technical & commercial issues including formulation of Preamble and SOP.
- Inter government agreement be made not only in import of equipment /TOT but on Export front also.
- IN all big defence deals involving DPSU's /Strategic Partner Indian reputed law schools & Economic Schools with standing be made a part & parcel of Negotiation Team for guiding team on drafting / modifying clauses.
- Government Sponsored Team /Reputed National law school teams on a continuous basis be asked to study large defence contract and go on suggesting modifications in standard contract document based on experience gained.
- Since lack of awareness of different legal setups at different countries bring legal uncertainty, leading to increase in cost of transaction or become deterrent to transaction, it would be prudent for India when it want to be on global map for trade including want to go for defence export through SME / MSME / Strategic partner, it is right time to adopt CISG (United Nations Convention on Contracts for the international sale of goods) to have better international legal co-operation on international commercial legal code. CISG have already been adopted by 85 countries as of February 2017 which includes China, Singapore, Japan, USA, Canada, Russian Federation, Ukraine, Germany, Israel, France etc.
- Raising of Offset limit of Rs 2000cr from Rs 300cr as at present by DPP 2016 needs much downward review to strengthen MSME in defence sector. This is based on proposition "Failure to Plan" is a mistake but "Planning to fail "is suicidal.
- Let DPSU to forget about Export unless it matures in respective product line. NO Government target be levied on DPSU for achieving exports in new defence products.
- Outsourcing policy of DPSU be reviewed for involvement of MSME (Micro Small and Medium Enterprises) at component, sub-system,

system, LRU, design, development, maintenance level. DPSU's / Strategic Partners be made Aggregators /Assemblers only.

- DPSU's having vertically integrated plants needs review to sell/ opt for joint venture some non-critical plants to generate resources for investments in new platforms /future generation equipments in collaboration with reputed IIT /NIT/ PRIVATE ENGINEERING colleges.
- Since Indian defence sector continuously requires innovation as seems from the study, DPSU's in collaboration with state governments /central government with its CSR funds exclusively to sponsor programmes to students of intermediate plus for generating new ideas for innovation which is lacking since 1970's in this field.
- All DPSU to constitute cross functional team to study systems & procedures of Indian Space Organisation and implement the same in respective organisation in the area of contract management.
- Smiling with a vendor should not be construed as corrupt practice but they are to be treated as partners for the respective programmes without in anyway compromising on contractual terms.
- Learning for contract management can be provided by reputed law schools & their chair be established in all DPSU's.
- National law schools can think of incorporating a small module on 'contract management' in its under graduate level syllabus as this is going to be sold like a hot cake in years to come as also a national requirement as current leadership wishes India to become a Global Power.

SCOPE FOR FURTHER RESEARCH

- Every effort has been made to make the study a comprehensive analysis and to draw definite conclusions thereon.
- The research study has developed the framework for the integration of various Contractual clauses in the Defence Contracts to bring in more clarity and ease of implementation including legal perspective.
- The present research has identified areas in the contract including standard clauses for all DPSU'S /OFB for various types of defence projects which leads to interpretation issues and ultimately not realising the stated objective.
- However in the reality there could be still be undefined areas which are the bone of contention in various future Defence contracts. These areas need to be identified and should be open for further Research to plug in further ambiguities, if any.
- The chosen subject represent the continuous phenomenon for improvement to realise better values not only in terms of money but more importantly for the availability of State of the art technology in the procurement/ design & development/ maintenance management of the Defence equipments.
- Thus for an effective and more realistic representations of the Defence Contracts the research suggests further improvising the generic framework of Defence Contracts to handle both critical and Controversial clauses in the Defence contracts, once the Defence sector embraces the large private sector corporations/ strategic partners in the field after tentatively 5 years.
- While every effort has been made for a comprehensive study of the Defence Contracts with specific reference to Defence Public sector Undertakings, there can always be a different dimension to the study, since it is a very wide and complex field.
- Government of India has largely opened up Indian Industries in Defence sector either by way of enhancing FDI (Foreign Direct

Investment) or liberalisation of its procurement process by involving Indian Private Sector or under "Make in India" campaign.

Hence it would be very interesting to conduct another study within the same area of research with incorporation of Strategic Partners and Partnership, private Industry and FDI also apart from Indian Defence PSU's after a few years when such other Defence Industry gets stabilised to render better utility to various stakeholder

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