

Defence Contracts and Tenders

Dispute settlement in Defence acquisition contracts

Lt Gen A V Subramanian AVSM, VSM (Retd)

04 Apr 2023

Tuesday

0900 to 1100h

avsmanian2002@gmail.com



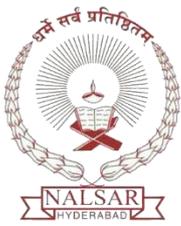
Agenda

- Dispute resolution mechanisms in DAP 2020
- Arbitration Institutions
- Performance of Defence Acquisition Systems: USA and UK
- Arbitration : Foreign Sellers, Indian Sellers
- Post Contract Management
- Issues in Execution of Contract
- Case illustration



Provisions for Arbitration

- Chapter II Acquisition Procedures for Categories Under 'Buy', and 'Buy and Make' Schemes
 - Appendix O to Schedule I to Chapter II
- All disputes or differences arising out of or in connection with the present Contract, including the one connected with the validity of the present Contract or any part thereof, shall be settled by bilateral discussions.



Avenues for Dispute Settlement in DAP 2020

- CHAPTER VI : STANDARD CONTRACT DOCUMENT: ARTICLE 24: ARBITRATION
 - In case dispute or differences are not settled amicably despite best efforts of Seller and Buyer, the provisions and process contained in the concluded contract for arbitration shall be followed.
 - Arbitration
 - For Foreign Sellers
 - For Indian Private Sellers



Arbitration

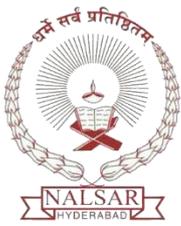
- Arbitration is a creature of a contract and right to arbitrate arises out of contract.
- Parties who enter into an arbitration agreement are only entitled to arbitrate amongst themselves.
- Allow the parties to a contract to choose the institution and the law as per their choice to adjudicate upon the disputes between them.
- Party, not a signatory to the contract containing arbitration clause, may also be subjected to arbitration under certain circumstances. Different arbitrations arising out of different contracts may be consolidated and conducted under a single arbitration depending upon the institution or law under which the arbitrations are being carried out.



Arbitration Institutions of India

- Indian Council of Arbitration (ICA)
- International Centre for Alternative Dispute Resolution (ICADR)
- International and Domestic Arbitration Centre of India
 - Parliament in Dec 2022 passed a bill to rename the New Delhi International Arbitration Centre





International Centre for Alternative Dispute Resolution (ICADR)

- Registered under the Societies Registration Act, 1860 on 31st May, 1995.
- Autonomous organisation working under the aegis of the Ministry of Law and Justice, Government of India, with its Headquarters at New Delhi and Regional Centres at Hyderabad and Bengaluru.
- Rules and Bye-laws framed and adopted by ICADR
 - ICADR Arbitration rules, 1996 (including provisions for Fast Track Arbitration)
 - ICADR Conciliation Rules, 1996
 - ICADR Mini Trial Rules, 1996
 - Rules and Regulations
 - Financial Bye-Laws
 - Service Bye-laws
 - Bye-laws for Regional Offices





Indian Council of Arbitration (ICA)

- Resource Personnel: Judges, Advocates, Engineers, CAs, Executives, Maritime Experts, Businessmen, Foreign Nationals
- International Institution for Alternate Dispute Resolution
- Mediation, Conciliation – pre litigation, Arbitration – Choose your own judge
- Removal of drafting errors: Draft arbitration agreement
- Pre-arbitration litigation



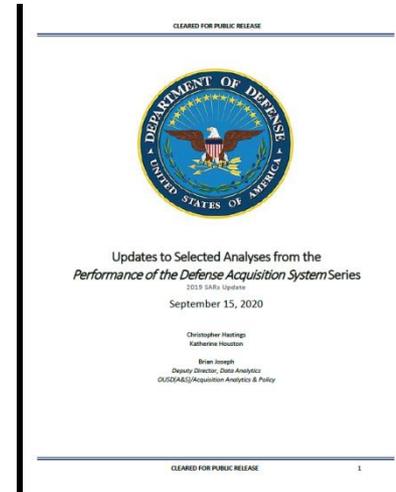
International Arbitration Institutions

- ICC: International Court of Arbitration
- American Arbitration Association
- Chartered Institute of Arbitrators
- London Court of International Arbitration
- Singapore International Arbitration Centre
- International Chamber of Commerce, Paris



Performance of the Defence Acquisition System : USA, UK

- Department of Defence in USA publishes annual report titled **Performance of the Defence Acquisition System** which calculates cost overruns, delays, and the fulfilment of technical objectives and makes it possible to analyze the severity of different challenges in procurement.
- UK, the National Audit Office publishes Major Projects Report that provides information on equipment acquisition. The report discusses cost and time schedules, difference between projected and actual values in these categories and provides explanations for performance.



Report
by the Comptroller
and Auditor General

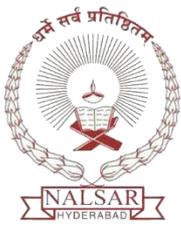
Ministry of Defence

Major Projects Report 2015
and the Equipment Plan
2015 to 2025



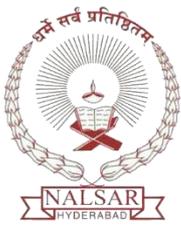
Arbitration : For Foreign Sellers

- Any disputewhich cannot be settled amicably, shall within sixty (60) days or such longer period as may be mutually agreed upon, from the date on which either party informs the other in writing by a notice that such dispute, disagreement or question exists, will be referred to the Arbitration Tribunal consisting of three arbitrators.
- One Arbitrator each by the Buyer and Seller
- The third arbitrator shall be nominated by the two arbitrators within ninety (90) days of the receipt of the notice mentioned above, failing which
 - third arbitrator may be nominated under the provisions of Indian Arbitration and Conciliation Act, 1996 (as amended from time to time)
 - or by dispute resolution institutions like Indian Council of Arbitration (ICA) 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 third arbitrator may be nominated by the President of International Chamber of Commerce, Paris,
 - The arbitrator nominated under this Clause shall not be regarded nor act as an umpire.



Arbitration : For Indian Private Sellers

- Any disputewhich cannot be settled amicably, shall within sixty (60) days or such longer period as may be mutually agreed upon, from the date on which either party informs the other in writing by a notice that such dispute, disagreement or question exists, will be referred to the Arbitration Tribunal consisting of three arbitrators.
- One Arbitrator each by the Buyer and Seller
- The third arbitrator shall be nominated by the two arbitrators within ninety (90) days of the receipt of the notice mentioned above, failing which
 - Third arbitrator, shall be nominated by the parties within ninety (90) days of the receipt of the notice mentioned above, failing which the third arbitrator may be nominated under the provision of Indian Arbitration and Conciliation Act, 1996 (as amended from time to time) or by dispute resolution institutions like Indian Council of Arbitration (ICA) or ICADR, at the request of either party, but the said nomination would be after consultation with both the parties.
 - The arbitrator nominated under this Clause shall not be regarded nor act as an umpire.



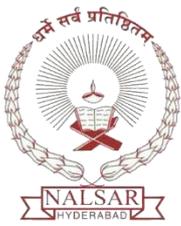
Post Contract Management(PCM)

- Chapter XI of DAP 2020
- ensures compliance with the terms and conditions of contract, managing
 - contractual amendments
 - quality assurance
 - timely payment and deliveries and
 - resolving claims and disputes.
- Letter of Acceptance (LOA) with the US Government and other IGA are also to be treated at par with Contracts for the purpose of execution of Contracts.



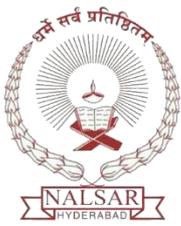
Post Contract Management(PCM)

- Responsibility for contract administration
- SHQ concerned
 - preparation and distribution of contract document as per terms of RFP)
 - management
 - ensuring timely payments and deliveries,
 - management of guarantees,
 - quality assurance,
 - extensions and contract amendments,
 - Contract closure/termination,
 - arbitration and any other issue
 - would be that of the.
- Post-contract monitoring, done by MoD (Acquisition) and
 - SHQ renders quarterly report to DG(Acquisition) of cases with contract management issues.



Normal Issues in Execution of Contract

- First Off Production Model (FoPM)
- Inspection –Pre Dispatch Inspection (PDI)/ Joint Receipt Inspection (JRI)
- Packaging and Dispatch
- Change of Name of Vendor
- Bank Guarantees (BGs) Management:
 - IPBG (Integrity Pact BG),
 - Advance payment,
 - PWBG, and
 - Additional Bank Guarantee for Essential parameters –
 - BGs kept in a sealed envelope under lock and key with the Contract Executing Authority i.e. concerned directorate in the SHQ.
- End Use Certificate (EUC)
- Payments Terms and Conditions
- Non-Availability of Buyer Furnished Equipment (BFE)/Platform/ Infrastructure
- Terms of Delivery
- Failure to Deliver within the Delivery Period (DP)
- Liquidated Damages and Other Post-Contractual Issues
- Alteration/ Obsolescence Management/ Upgradation of the Equipment Post Signing of Contract



Types of risks

- Technological:
 - Rapid rate of innovation and technological change in the face of relatively low technical capabilities and inability to precisely anticipate or comprehend futuristic requirements, engineering, and design issues
- Contractual:
 - Contractual risks involve awarding a contract in a situation of incomplete information and inefficiencies resulting from renegotiation of contracts
- Organisational:
 - organisational structure and management that affect procurement performance



Technological risks: Indian Supplier

- Lack of infrastructure or raw materials
 - Navy's Aircraft carrier could not be produced because of non-availability of Steel
 - Parachutes could not be supplied as Indian substitute for Parachute canopy did not get supplied in time by OF, Kanpur
 - Delays in Ship building: availability of docks, nominated systems, spares, etc
- Changes in design and re-development
 - Arising due to delays in DRDO efforts due to key manpower attrition
- Initial teething problems of an indigenization effort
 - Navy has significant issues because of aggressive indigenisation



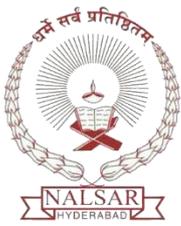
Issues with Foreign Supplier

- Russia
 - Language issues and consequent delays
- France
 - Issues connected with third party supplied items
- Israel
 - Issues due to rapid upgradation of technology
- Lack of experts in MoD to frame contractual amendments and obtain due approval



Termination of Contract

- Standard Contract Document (SCD) under Chapter VI of DPP 2020 provides Termination of Contract.
- Article 22 of SCD states that the contract can be terminated for
 - default in delivery or meeting milestones by the seller or
 - termination of Contract for (Procuring Entity's) Convenience.
- Procedure for Termination.
 - SHQ shall submit the proposal with full justification for obtaining the approval of respective CFA for termination of contract.
 - Termination of CCS/Finance Minister approved cases will be put up for approval of RM.



CAG Observation

- Reasons for poor procurement performance, one of which is the lack of knowledge and experience about contract negotiation in the MoD.
- Disputes arise with
 - Defence Research and Development Organisation (DRDO)
 - government-owned defence companies (defence public sector undertakings or PSUs), privately-owned Indian defence companies (Indian private company), and foreign firms.
 - Of the 72 contracts studied by CAG, where a reason for delay was mentioned, 10 involved DRDO, 35 involved DPSUs, 23 involved foreign firms, and 4 involved Indian private companies.

AW 101 Dispute





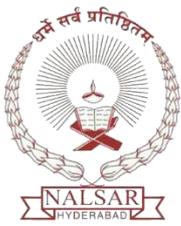
Agusta Westland Chopper Acquisition

- On 5th August, 1999, the Air Force proposed the replacement of MI-8 VIP helicopters and a global RFP was issued to eleven vendors on 20th March, 2002.
- Technical Evaluation Committee shortlisted three vendors viz.,
 - MI- 172,
 - EC-225 and
 - EH-101.
- The flight evaluation of EH-101 could not be done as the helicopter was not certified for an altitude of 6,000 meters. The EH-101 helicopter was later renamed as AW101 of Agusta Westland.
- After flight evaluation, only EC-225 was found suitable for acquisition.
- From 2005 onwards, a series of measures were taken which resulted in eventual acquisition of AW helicopter.



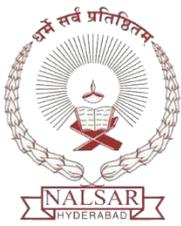
AW Chopper (contd..)

- Cabin height of 1.8 meters was made mandatory in the revised Service Quality Requirements.
- Acceptance of necessity for the procurement of 12 helicopters at Rs.793 crores was accorded by the Defence Acquisition Council on 3rd January, 2006.
- Changes in SQRs eliminated the EC-225 helicopter which had met the Operational Requirements earlier and allowed AW-101 helicopter to enter the fray. In this way, options remained limited to a few range of helicopters.
- While the RFP was issued to M/s AgustaWestland, Italy, the response to RFP was received from M/s AgustaWestland International Ltd., UK, which was not the entity to whom RFP was issued.



AW Chopper (contd...)

- RFP has categorically stated that FET would be carried out in India on 'no cost no commitment' basis. Trial was conducted on representative helicopters as at the time of FET, the Agusta Westland helicopter was in developmental stage.
- Neither S-92 nor AW-101 fully complied with SQR in the FET. However, AW-101 was recommended for induction in spite of emerging as a single vendor by waiving off two parameters, while no such concession was granted to S-92.
- Warranty of 'three years/900 hours whichever is earlier' offered on the whole helicopter by M/s AWIL was accepted instead of RFP stipulation of 'three years/900 hours whichever is later'.
- Augusta Westland gave a yearwise breakup of work from 2011 to 2014 to be executed by IDS Infotech under this offset programme even though the work has been completed well before the conclusion of the contract in 2010.



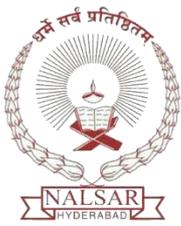
AW Chopper (contd...)

- Chopper Deal was terminated in 2013 and payments withheld
- Agusta Westland appealed for Arbitration
- Arbitration proceedings were terminated as Criminal Conspiracy case was filed in Court



Case Study: Indian Supplier

- “All disputes & differences arising out of or in any way touching or concerning this agreement (except those for which specific provision has been made therein) shall be referred to Sole Arbitrator to be appointed by MoD. The Arbitrator so appointed shall be a Government Servant / Ex Government Servant (with mutual consent) who had not dealt with matters to which this agreement relates and in course of his duties had not expressed views on all or any of the matter in dispute or differences. The Arbitral Award of Sole Arbitrator shall be final and binding on the parties.”
- Due to technology obsolescence, a sub system needed change, which was not accepted by User, and so Bank Guarantee revoked



Clarity on Legal Terms in RFP

- Collaboration:
 - “The act of working together in a joint project”: Black’s Dictionary of Law
 - “The action or process of collaborating or working in combination. *See also ‘FOREIGN COLLABORATION’.”: LexisNexis , P Ramanatha Aiyar’s Advanced Law Lexicon
- Foreign Collaboration: “A business enterprise entering into an agreement with a foreign company for getting assistance to market its products abroad, for some financial assistance or **for acquiring technical know-how.**
- Support:
 - Not only does the word “support” include “bearing weight” but it is also used by the student and understood in common phraseology as covering “to keep from falling” and other kindred Expressions Support generally means articles for ordinary sustenance as food etc., and does not include medicines, unless the context shows such intention The word “support” will have to mean sustenance or maintenance. LexisNexis , P Ramanatha Aiyar’s Advanced Law Lexicon



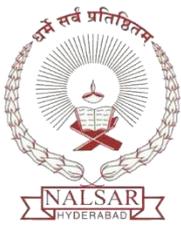
Definitions of Words/ phrases related to IPR

- Build to Print
- Copyright
- Confidential
- Confidential Information
- Confidentiality
- Design
- Intellectual Property
- Intellectual Property Rights
- Patent
- Proprietary Information
- Technical Know-why
- Technology
- Transfer of Technology
- Trademark



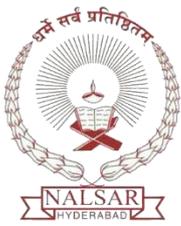
Inferences

- Arbitration as dispute resolution mechanism is incorporated in DAP 2020
- Institutions and infrastructure for administering “Arbitration” are still evolving
- Legal documents incorporated in DAP 2020 need robust support information for clarity
- Acquisition Workforce with MoD need to be endowed with legal capability to predict and prevent delays and resultant arbitrations.



References

- Behera, Laxman K. 2012. 'India's Defense Acquisition System: Need for Further Reforms'. Korean Journal of Defense Analysis
- Cohen, Stephen P., and Sunil Dasgupta. 2013. Arming without Aiming: India's Military Modernization.
- Kundu, O. (2019). Risks in defence procurement: India in the 21st century. Defence and Peace Economics. <https://doi.org/10.1080/10242694.2019.1646443>



Defence Procurement Policies

National and International Perspectives: Defence Acquisition

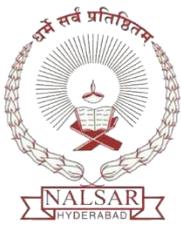
**Lt Gen A V Subramanian AVSM, VSM
(Retd)**

31 Mar 2022

Friday

1400 to 1600h

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Agenda

- Why is there a Defence Acquisition System?
- Defence Acquisition Models, Evolution and Process
 - USA
- Evolution of Indian Defence Acquisition Process
- Inferences

Defence Management and Strategic Studies: Defence Planning and Budgeting

Lt Gen A V Subramanian AVSM, VSM (Retd)

03 Apr 2023

Monday

0900 to 1100 h



Agenda

- Defence Planning Process
- Strategic Gap
- Approaches to Defence Planning
- Indian Approach
- Financing the Plan



Interaction

Defence Contracts and Tenders: Dispute settlement in Defence acquisition contracts

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