

Key Legal Issues & Contract Management in Purchasing & Procurement

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Key Legal Issues & Contract Management in Purchasing & Procurement

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I. **Understanding Legal Framework Governing Purchasing & Procurement**

I. Understanding Legal Framework Governing Purchasing & Procurement

Purchasing and procurement involve a lot of laws including Laws

- Law of contract
- Law on sale of goods
- Law on hire of work
- Product liability law
- Banking law
- Secured transaction law
- Taxation law
- Customs law
- Excise tax law
- Intellectual property law
- Investment promotion law
- Employment law
- Immigration law
- Foreign exchange law
- Civil procedure law
- Arbitration law

I. Understanding Legal Framework Governing Purchasing & Procurement

Purchasing and procurement may include legal agreements:

- Supply agreement
- Purchase Agreement
- Engineering agreement
- Offtake Purchase agreement
- Sub-contract agreement
- Management agreement
- Operation and Maintenance Agreement

I. Understanding Legal Framework Governing Purchasing & Procurement

Purchasing and procurement may include legal agreements:

- Lease agreement
- Licensing agreement
- Technical assistance agreement
- Loan agreement
- ISDA Master Agreement
- Mortgage agreement
- Guarantee agreement
- Assignment agreement



I. Understanding Legal Framework Governing Purchasing & Procurement

Purchasing and Procurement process may involve

- Term of reference (TOR)
- Bidding
- Negotiation with bidders
- Selection of suppliers
- Letter of award
- Signing agreements and legal documentation

II. Identifying Key Contract Terms and Conditions on Purchasing & Procurement

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Terms and Conditions of Supply Agreement may include provisions that:

- The product is supplied by the supplier.
- Purchase of the product is made by the purchaser.
- Delivery of the product shall be timely and duly supplied by the supplier to the purchaser.
- The price validity is for a certain period of time.
- The contract price is fixed or variable.
- The price is inclusive or exclusive of taxes and customs tariffs.

II. Identifying Key Contract Terms and Conditions on Purchasing & Procurement

Terms and Conditions of Supply Agreement may include provisions that:

- Increase or decrease of the total purchased volume of the product depends upon the business fluctuations of the purchaser.
- Requirements for quantity and quality of the product are essential.
- A form of a purchase order may be attached to an agreement.
- A purchase order for the product may be made by the purchaser to the supplier from time to time.
- Payment term sets forth either one lump sum payment or installment payments.

II. Identifying Key Contract Terms and Conditions on Purchasing & Procurement

Terms and Conditions of Supply Agreement may include provisions that:

- Payment for the product by electronic transfer , a letter of credit or bank guarantees.
- Guarantee for payment may be made by a bank.
- Escrow account is created in the case of doubt between the supplier and the purchaser.
- Guarantee for export and import of the product may be made by a financial institution.
- License for manufacture may be granted to the supplier for production of the product.

II. Identifying Key Contract Terms and Conditions on Purchasing & Procurement

Terms and Conditions of Supply Agreement may include provisions that:

- Drawings, specifications , statements of work and other requirement must be clearly set out.
- Warranty of the product is essential for manufacture and delivery of the product.
- Audit of the plant , facilities, equipment and machinery and financial records. May be inserted.
- Tooling to be used for manufacture of the product , service parts and component parts is clearly specified by the purchaser.
- The product, service parts and component parts must be manufactured by the supplier for a certain period of years.
- Quality assurance procedure must be fully and strictly complied with.

II. Identifying Key Contract Terms and Conditions on Purchasing & Procurement

Terms and Conditions of Supply Agreement may include provisions that:

- Sub-contractors cannot be made unless the supplier shall be liable for the works of the sub-contractor and a prior written approval is obtained from the purchaser.
- Defected product must be recalled for repair, replacement or otherwise, compensation for the defected product must be made.
- The supplier is obliged to provide quality assurance in the manufacture , production and distribution of the product.
- Provisions on the minimum volume of the product and the maximum volume of the product may be provided.
- Assignment cannot be made by one party to a third party unless a prior written approval is given by the other party.

II. Identifying Key Contract Terms and Conditions on Purchasing & Procurement

Terms and Conditions of Supply Agreement may include provisions that:

- Intellectual properties are protected.
- Cost and expenses shall be borne by each of the parties.
- Tax and/or customs shall be seriously taken into consideration at the time of preparation of an agreement.
- Setoff of the debts can be made or restricted between the supplier and the purchaser.
- Insurance against loss or damage to the product must be made.
- The supplier is generally liable for losses and damages incurred by the purchaser resulting in failure of delivery of the product or delivery of defect product.
- Indemnification provides for liability for losses, damages , costs and expenses.

II. Identifying Key Contract Terms and Conditions on Purchasing & Procurement

Terms and Conditions of Supply Agreement may include provisions that:

- Events of default include default in delivery of the product, default in payment, insolvency or bankruptcy, change of control, or breach in performance of other obligations under an agreement.
- A cure period may be given in the case of a curable event of default.
- Termination of agreement is made in case of occurrence of any events of default
- Confidentiality, confidential information and trade secrecy are stipulated in an agreement.
- Governing law lays down legal basis under an agreement.
- Litigation or arbitration may be chosen between the parties.

III. Legal Issues and Strategies in Purchasing and Procurement Contract

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A purchase form shall contain the date of the order, the name of the seller, the name of the buyer, the name of the product, specification , quantity, quality of the product , unit price and total price , delivery time, place of delivery and the method of payment.

The quality of the product shall meet the industrial standard.

Bid bonds, advance payment bond and performance bond are required for receipt of payments.

The product shall be of sound material and workmanship.

A change order will cause delay in manufacture and delivery of the product as well as the price of the product.

Increased costs may result from a lot of factors.

III. Legal Issues and Strategies in Purchasing and Procurement Contract

What are losses and damages to be claimed ?

Are liquidated damages, consequential damages or punitive damages provided under a foreign law ?

Are liquidated damage consequential damages or punitive damages be enacted under domestic law ?

Can claim for liquidated damage consequential damages or punitive damages be accepted by court ?

What are force majeure events ?

III. Legal Issues and Strategies in Purchasing and Procurement Contract

Are any unforeseen circumstances regarded as a force majeure ?

A force majeure event may be interpreted differently in the country of the seller and in the country of the buyer ?

Who causes a force majeure event ?

Can unusual circumstances or hardship be regarded as a force majeure event ?

What is discussion in good faith to resolve any dispute ?

IV. Practical Tips for Negotiation of Purchasing and Procurement Contract

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- Looking at bargaining power of the party
- learn weak points of one party
- use knowledge, experience and expertise of the parties
- add some words in Memorandum of understanding
- pay close attention to Term sheet, letter of intent, letter of comfort, letter of award and letter of acceptance
- cautious at validity, legality and enforceability of an agreement
- challenge or accept the so-called market practice
- emphasize on strength of our side
- avoid weaknesses of our side
- listen carefully to the other party
- speak out at important points
- be careful at each of wordings
- check laws and regulations

V. Critical Issues and Pitfalls to Avoid

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- Payment for price of the product and payment of double taxes in the country of seller and the country of purchaser incurred additional costs for the purchaser.
- Title of the product passes from the seller to the purchaser but payment was not received.
- Transfer of title of the product happened at the same time as transfer of risk.
- The price was inclusive of all costs and expenses including packing costs , transportation costs , insurance premiums.
- Increase of price in the world market led to cancellation of the purchase agreement.

V. Critical Issues and Pitfalls to Avoid

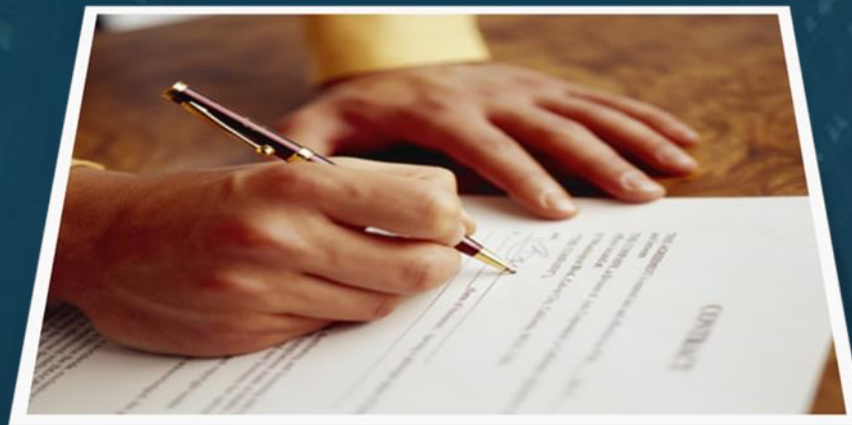
- Change of order by the purchaser had impact on price of the product and time of delivery of the product.
- Defect of any part supplied by any sub-contractor caused problems on the part of the supplier.
- The time of passing of title and the time of passing of risk of the product posed important issues.
- Collateral for payments was impossible to be enforced.
- Lease of real property, not ownership of real property, had legal implications for enforcement of the collateral.

V. Critical Issues and Pitfalls to Avoid

- Verbal communication and instruction was not generally enforceable unless confirmed in writing.
- Any delay in performance of any obligation under an agreement constituted any event of default;
- Any delay in making any of installment payments adversely affected financial position of the supplier.
- An amount of liquidated damages was reduced by a court.
- Taxes were paid out of no necessity.
- Business rehabilitation of the purchaser resulted in no requirement to the foreign supplier even though the supplier obtained an award from the international arbitration but failed to comply with local bankruptcy law.

V. Critical Issues and Pitfalls to Avoid

- Product liability resulted from defect of the product.
- An Insurance company refused to pay compensation to a supplier suffering damage from flooding or fire on ground of a force majeure.
- Unforeseen circumstances and force majeure posed a different result in a lawsuit.
- Local lawyers for litigation assisted the local companies to win cases.



*Thank you very much
for your kind attention*

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