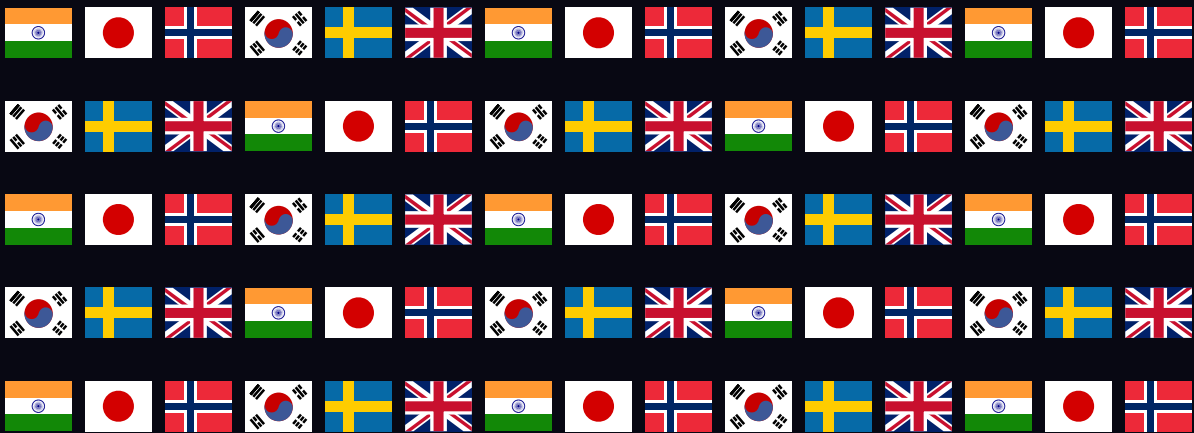


DEFENCE & SECURITY PROCUREMENT

India



Defence & Security Procurement

Consulting editors

Elizabeth Reid

Bird & Bird LLP

Quick reference guide enabling side-by-side comparison of local insights, including into legal frameworks; dispute resolution and risk allocation; defence procurement fundamentals (such as mandatory clauses, IP ownership and supply chain management issues); trade rules; ethics and anti-corruption issues; aviation sector considerations; employment, personal information, licensing and environmental issues; and recent trends.

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UPDATE AND TRENDS

Key developments of the past year

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India



Kabir Bogra
Khaitan & Co



LEGAL FRAMEWORK

Relevant legislation

What statutes or regulations govern procurement of defence and security articles?

India has no overarching statute governing procurement of defence and security articles. Procurements by the government and its agencies are broadly governed by the General Financial Rules 2017 (GFR), which provides the framework under which all government procurements are undertaken.

The Defence Acquisition Procedure (DAP) and the Defence Procurement Manual (DPM) are the principal regulations for defence and security procurements undertaken by the Ministry of Defence (MoD). The DAP and DPM are based on government procurement principles contained in the GFR, but hold the bidders and vendors to a higher standard of compliance and administrative scrutiny.

Introduced in 2020, the DAP governs the procurement of long-term strategic assets (classified as capital procurements) and is indicative of the country's defence production policy. It also serves as an important tool to understand the manner in which defence procurement contracts are likely to be interpreted by the MoD in the event of an ambiguity. The DPM governs the procurement of non-strategic and bulk procurements of goods such as uniforms, non-military stores, etc (classified as revenue procurements).

Apart from the DAP and DPM, government procurements are also subject to the policies and directives issued by the Central Vigilance Corruption (CVC), the chief anti-corruption monitoring institution in India. The CVC periodically issues binding instructions required to be followed across ministries for procurements.

Law stated - 22 November 2021

Identification

How are defence and security procurements identified as such and are they treated differently from civil procurements?

Both defence and civil procurements are conducted under the principles provided in the GFR. A few noticeable differences in procedure between defence and civil procurements are as under:

- the defence establishment (army, navy and air force) seeking to procure articles is required to present a detailed report justifying the procurement, which is required to be approved by a committee. The approval is called the Acceptance of Necessity (AoN), which is the point of initiation of the procurement process;
- procurements of defence and security articles follow a defined categorisation process based on the domestic availability of the articles and the capability of Indian industry to manufacture the same. Each category has a separate procedure for the procurement process; and
- participation by foreign vendors in procurement contracts, for defence and security articles under the DAP exceeding 20 billion rupees in value, necessarily require offset obligations to be undertaken and discharged by the foreign bidder. The range of offset varies between 30 per cent to 50 per cent of the contract value.

Law stated - 22 November 2021

Conduct

How are defence and security procurements typically conducted?

Defence procurements are usually conducted through an open tender system consisting of a two-stage bid process. The process sequence is as follows:

- the requirements are published as a Request for Information, soliciting interest from manufacturers;
- based on the information received from the manufacturers, the technical requirements are formulated and approved by a committee constituted for this purpose. The committee provides its approval through an AoN;
- a Request For Proposal (RFP) is issued within six months of the AoN. The issuance of the RFP implies the formal initiation of the bid process;
- the bidders are invited to participate in a pre-bid meeting to seek clarifications on any technical, commercial or interpretative aspect of the RFP;
- subsequently, the bidders are required to submit separate commercial and technical bids. The DAP also provides for the establishment of several technical committees to evaluate each aspect of the bid;
- the technical bid is evaluated first and bidders that meet the technical requirements are invited to undertake field trials;
- post completion of the field trials, the commercial bids are opened, and preference is typically given to the bidder that quotes the lowest price. However, in certain circumstances, a vendor with a superior technical product at a higher price may be chosen; and
- after the selection of the vendor, contract negotiations are initiated to finalise the contract.

The procurement frameworks also envisage exceptional situations where an open tender system may not be feasible, such as:

- procurements below a de minimis value undertaken through direct orders placed on known vendors;
- procurements in emergencies or crises undertaken through a fast track procedure;
- procurements for sensitive equipment and systems undertaken directly at intergovernmental levels; and
- procurements for products for which only a sole vendor is available.

For the above situations, the procurement process is curtailed, involves fewer procedural steps and is executed faster.

Law stated - 22 November 2021

Proposed changes

Are there significant proposals pending to change the defence and security procurement process?

The last significant amendment to the procurement process was undertaken in September 2020, with the issuance of the new DAP, which supersedes the 2016 iteration. As the amendments to the public procurement regime are recent, there are no significant proposals pending to change or overhaul the procurement process. Incremental amendments and revisions are frequently undertaken to facilitate the procurement process and provide operational guidance to bidders and contractors.

Law stated - 22 November 2021

Information technology

Are there different or additional procurement rules for information technology versus non-IT goods and services?

The procurement process under the GFR and the DPM does not distinguish between IT and non-IT products and services, therefore, the process and rules remain identical for procurement. However, the latest version of the DAP, issued in September 2020, introduced a separate procedural framework for the procurement of information technology products (including software and hardware elements). This procedural framework is broadly similar to others under the DAP, but is customised to meet the characteristics of information technology contracts.

Law stated - 22 November 2021

Relevant treaties

Are most defence and security procurements conducted in accordance with the GPA or other treaty-based procurement rules, or does this jurisdiction commonly use the national security exemption to procure them?

India is not a signatory to the Agreement on Government Procurement (GPA) of the World Trade Organization nor the model procurement law issued by the United Nations Commission on International Trade Law (UNCITRAL). Consequently, the Indian procurement laws are not modelled on either the GPA or the UNCITRAL Model Law.

The Law Commission of India has recommended the adoption of principles and concepts from the GPA and UNCITRAL model law. Based on the recommendation, the Public Procurement Bill, 2012 has been tabled before the parliament. However, the bill has been pending before the legislature for several years and is not expected to be enacted into legislation in the foreseeable future.

Law stated - 22 November 2021

DISPUTES AND RISK ALLOCATION

Dispute resolution

How are disputes between the government and defence contractor resolved?

Arbitration is the preferred mode of dispute resolution in government procurements, including those for defence and security articles. Certain frameworks, such as the General Financial Rules 2017, may also permit dispute resolution through civil remedies through the courts of India.

Procurement contracts under the Defence Acquisition Procedure (DAP) and the Defence Procurement Manual mandate arbitration to be governed by the laws of India and the seat of arbitration to be India. Subject to the nature, value and strategic importance of the procurement, the power to appoint arbitrators may vest solely with the buyer, with both parties or with an independent body such as the International Chamber of Commerce or its Indian counterpart. The burden of the cost of arbitration may also be defined in the contract, which may be shared between the parties or left to the arbitrator or arbitral tribunal to decide.

Law stated - 22 November 2021

To what extent is alternative dispute resolution used to resolve conflicts? What is typical for this jurisdiction?

Alternative dispute resolution through arbitration is the preferred and de facto mode of resolving conflicts between the government and contractors, and between the contractors and subcontractors.

Law stated - 22 November 2021

Indemnification

What limits exist on the government's ability to indemnify the contractor in this jurisdiction and must the contractor indemnify the government in a defence procurement?

The government typically does not provide any indemnities under defence and security procurement contracts. However, with the evolution of the DAP and the introduction of new procurement avenues, such as leasing of equipment, limited indemnities may be negotiated with the government depending on the nature of the transaction. The standard contract requires the contractor to indemnify the government against infringement of third-party intellectual property rights in the goods or services purchased from the contractor.

Defence procurement contracts also require the contractor to execute bank guarantees for performance parameters and anti-corruption compliances. It is not uncommon for these instruments to be invoked in defence procurement contracts for failure to adhere to certain aspects of the contract, such as indigenous content requirements, delivery schedule, quality parameters, bribery and use of undue influence, etc.

Law stated - 22 November 2021

Limits on liability

Can the government agree to limit the contractor's liability under the contract? Are there limits to the contractor's potential recovery against the government for breach?

The standard contract document under the DAP does not contain any clauses limiting the contractor's liability, however, contractors may negotiate for the inclusion of limitations on their liability. Regardless of whether the government agrees to limit the contractor's liability, the provisions of the Indian Contract Act 1872 permit an aggrieved party to seek compensation only to the extent of loss or damage that may naturally arise from a breach that could reasonably have been foreseen at the time of execution of the contract. The courts in India consider damages to be restitutive and not punitive in nature, hence are reluctant to award punitive damages. Therefore, the liability of both the contractor and the Ministry of Defence (MoD) would be limited to direct losses, in the absence of any express clauses to the contrary.

There are no statutory or regulatory restrictions on any claim of damages sought against the government. The Indian courts do not accord any special privileges to the government with respect to contractual disputes.

Law stated - 22 November 2021

Risk of non-payment

Is there risk of non-payment when the government enters into a contract but does not ensure there are adequate funds to meet the contractual obligations?

Defence and security acquisitions are undertaken based on firm budgetary allocations. Therefore, the likelihood of a shortfall of funds in a defence procurement is extremely unlikely. Defence budgets are occasionally revised mid-year by allocating unspent funds by other ministries to meet the requirement of unforeseen procurements.

Law stated - 22 November 2021

Parent guarantee

Under what circumstances must a contractor provide a parent guarantee?

In circumstances where the prime bidder or contractor is unable to tender the bank guarantee mandated to be submitted as part of the bid, the MoD will require the parent to submit such guarantee on behalf of the bidder or contractor. It is standard practice by the MoD to require bidders to submit bank guarantees against all payment streams that the MoD is required to make.

Law stated - 22 November 2021

DEFENCE PROCUREMENT LAW FUNDAMENTALS

Mandatory procurement clauses

Are there mandatory procurement clauses that must be included in a defence procurement contract or that will be read into the contract regardless of their actual inclusion?

India is a common law jurisdiction and upholds the sanctity of contracts and the intention of the parties as reflected in the contractual terms. Therefore, while the procurement process is governed by the relevant framework such as the Defence Acquisition Procedure (DAP) or the General Financial Rules 2017 (GFR), the contract between the buyer and the vendor is the principal document governing the transaction.

Procurement frameworks such as the DAP and the GFR mandate certain clauses to be included in the contract executed between the buyer and seller. For example, the DAP mandates that standard clauses relating to the use of agents, the penalty for use of undue influence, access to books of accounts, arbitration and clauses related to governing law must be accepted by the seller.

Apart from the above, general principles of law may be read into the contract under the laws of India. For example, the Indian Contract Act 1872 mandates that a party to a contract must act in good faith. Therefore, even in the absence of an express clause in the contract, the courts may interpret the buyer to have a right to terminate the contract for mala fide acts undertaken by the vendor, such as misrepresentation of facts.

Law stated - 22 November 2021

Cost allocation

How are costs allocated between the contractor and government within a contract?

Contracts involving the outright purchase of goods and materials from the vendor typically do not demarcate costs between the contractor and the government. The vendor is responsible for all costs incurred up to the delivery of the goods, including the cost of conducting field trials. In certain procurements of high volume but low-value products, the government may reimburse the cost of goods used in trials.

The DAP provides for cost-sharing for specific types of procurements in relation to products identified by the Ministry of Defence (MoD) for long-term indigenous development and production. For such procurements, the MoD bears up to 100 per cent of the cost of development of the prototype and provides facilities, items and consumables for field trials and testing of the prototypes.

Law stated - 22 November 2021

Disclosures

What disclosures must the contractor make regarding its cost and pricing?

Cost and pricing disclosures depend on the applicable procurement framework and categorisation of the procurement. For certain types of procurements under the GFR or the Defence Procurement Manual on fixed-rate bases, the bidders are not required to provide costing information and must only submit their price bid for the procurement.

For procurements under the DAP, the bidders are required to make the following disclosures with respect to price:

- the cost of basic equipment;
- the cost of technology transferred (if applicable);
- the cost of recommended manufacturer spare parts;
- the cost of maintenance tools and test equipment;
- the cost of operating manual and technical literature for equipment and spare parts;
- the cost of training aids such as simulators, films, charts, etc;
- the cost of the recommended training period;
- the cost of freight and transit insurance;
- the cost of annual maintenance; and
- the cost escalations due to inflation.

In addition to the above, it is standard practice for bidders to specify the validity period of the prices quoted in the tender submissions and to state that the cost and prices quoted apply only to the configuration offered for the procurement.

Law stated - 22 November 2021

Audits

How are audits of defence and security procurements conducted in this jurisdiction?

The Comptroller and Auditor General of India (CAG) is the chief constitutional authority that undertakes the audit of all government departments and procurements undertaken by them. The CAG conducts performance and compliance audits of all government procurements and issues a report containing its observations with respect to compliance with legal frameworks and the achievement of defined objectives. CAG reports are submitted to Parliament and are publicly accessible.

Internal audits of vendors and procurements may also be undertaken by an individual ministry. For example, the DAP empowers the MoD to conduct audits to ascertain compliance with indigenous content requirements, discharge of offset and costing claims under a procurement category. The MoD (as a customer) is also contractually permitted to access records maintained by the vendor and visit the manufacturing location to verify the authenticity of claims made by the vendor or its suppliers.

Law stated - 22 November 2021

IP rights

Who gets the ownership rights to intellectual property created during performance of the contract? What licences are typically given and how?

Defence procurements, under most categories of the DAP, entail outright purchases with minimal design and development requirements. Therefore, the creation of intellectual property during the performance of a contract is not common.

If the government funds the design and development of prototypes, it may retain a non-exclusive licence with government purpose rights in the technical data, software and technology created in the programme. It is pertinent to mention that the funding and development of prototypes are limited to a specific procurement category, namely the 'Make' category, in which participation is restricted to only Indian-owned and controlled entities.

Law stated - 22 November 2021

Economic zones

Are there economic zones or other special programmes in this jurisdiction commonly utilised by foreign defence and security contractors for financial or other procurement related benefits?

The government is in the process of establishing defence manufacturing corridors in the states of Tamil Nadu and Uttar Pradesh in India. Apart from these two industrial corridors, several states have identified and allocated land for defence manufacturing. Establishing an industrial unit in these designated corridors does not provide any specific tax incentives but significantly reduces the administrative cost and effort to establish a business.

Industrial units established for export purposes are permitted a host of exemptions, available at both central and state levels, which include benefits such as exemption from input taxes and refund of output taxes. State governments may also offer subsidised costs of utilities and waive statutory and administrative fees.

Law stated - 22 November 2021

Forming legal entities

Describe the process for forming legal entities, including joint ventures, in this jurisdiction.

Legal entities such as companies and limited liability partnerships are formed under the procedures defined under their respective legislation. The standard process involves applying with the name of the proposed legal entity, the antecedents of the promoters, the proposed capital and the name, objects and by-laws governing the legal entity.

Joint ventures can be incorporated or unincorporated in nature. Unincorporated joint ventures are formed by parties without setting up a separate legal entity and are typically governed by the contractual terms between the party for the venture. Incorporated joint ventures follow the process outlined above for the formation of legal entities.

In incorporated joint ventures, the ownership of the legal entity is governed by the shareholder agreements incorporated into the by-laws of the legal entity. Foreign ownership in joint ventures engaged in defence manufacturing is subject to ownership restrictions according to the foreign investment norms of India. Currently, foreign investment is permitted up to 74 per cent and can be permitted up to 100 per cent if the investment provides access to modern and state-of-the-art technology.

Law stated - 22 November 2021

Access to government records

Are there statutes or regulations enabling access to copies of government records? How does it work? Can one obtain versions of previous contracts?

The Right to Information Act 2005 (RTI) empowers any citizen of India to request information and documents pertaining to the functioning of a government ministry or department, including government-owned enterprises and autonomous organisations. However, the RTI mechanism contains certain exceptions based on which requests can be denied. These exceptions include disclosure of information likely to compromise the national security of India, commercial and trade secrets, confidential information relating to the parliament or state legislatures, information likely to impede a running investigation, information likely to endanger life or physical safety of any person, etc.

To obtain information under the RTI mechanism, the applicant (being an Indian citizen) is required to apply on the RTI website of the relevant ministry or department. Each ministry and department is required to have a designated Public Information Officer (PIO), who reviews the application and decides on the disclosure of the information. Subject to such determination, the PIO will either supply or deny the information to the applicant. In cases of denial, the applicant is permitted to appeal against the withholding of information.

RTI applications seeking specific information or contracts from the MoD are usually denied on grounds of national security. In the event any vendor-specific information is sought to be obtained from the MoD, the MoD would be statutorily bound to seek the consent of the third party before offering such information.

Law stated - 22 November 2021

Supply chain management

What are the rules regarding eligible suppliers and supply chain management and anti-counterfeit parts for defence and security procurements?

Each request for proposal issued by the MoD is required to mention the applicable procurement category, which may, in turn, specify the eligibility criteria of suppliers. For example, procurements under the Indian Designed Developed and Manufactured category can only be undertaken from companies owned and controlled by resident Indian nationals. In certain procurements, the MoD may also specify financial eligibility criteria to ensure the capability of suppliers to fulfil the contract. Entities related to blacklisted suppliers are also frequently denied participation in procurements under the DAP.

In terms of supply chain management, bidders for procurements under the DAP are required to assume responsibility for misconduct or non-performance by entities in their supply chain, including sub-vendors and offset partners. Therefore, the discovery of any counterfeit parts by the MoD is likely to be considered as a material breach of the contract by the main contractor under the principal supply contract.

Law stated - 22 November 2021

INTERNATIONAL TRADE RULES

Export controls

What export controls limit international trade in defence and security articles? Who administers them?

Export controls in India are specified under the Foreign Trade Policy issued by the Ministry of Commerce and

administered through the office of the Director General Foreign Trade (DGFT).

Defence and security articles are defined under the Special Chemicals, Organisms, Materials, Equipment and Technology (SCOMET) list. The SCOMET list identifies categories of dual-use and military goods and technologies considered sensitive and requiring protection from unauthorised proliferation. These export controls have been instituted in pursuance of India's entry into multilateral non-proliferation treaties including the Wassenaar Arrangement and the Australia Group.

Export of SCOMET articles requires an exporter to apply for authorisation to the DGFT. Once applied, the application is reviewed by an inter-ministerial group to assess the end-use and adequacy of proliferation controls in the destination country. The process usually takes 45 to 60 working days.

Law stated - 22 November 2021

Domestic preferences

What domestic preferences are applied to defence and security procurements? Can a foreign contractor bid on a procurement directly?

Defence and security procurements, whether under the General Financial Rules 2017 (GFR) or the Defence Acquisition Procedure (DAP), have a stated preference for domestic suppliers. Under the GFR, all procurements of a specified threshold value and available from

domestic suppliers are required to be fulfilled from such suppliers. For larger procurements, the government is required to exhaust domestic suppliers before considering foreign vendors. The preference for domestic sources includes requiring goods and services to incorporate a specified percentage of local content by value.

The DAP also specifies a preference for domestic suppliers. During the categorisation phase of initiating a procurement under the DAP, the Ministry of Defence (MoD) evaluates sources for procuring the articles and typically opts for categories allowing only domestic bidders, if such suppliers are available. Procurements from domestic suppliers also incorporate local content norms provided under the DAP.

Global bids are invited if the domestic industry is unable to supply the articles. In a global tender, foreign vendors are permitted to bid independently or in partnership with an Indian entity. However, participating with an Indian entity in a global tender does not accord any preference to the bidder.

Law stated - 22 November 2021

Favourable treatment

Are certain treaty partners treated more favourably?

Defence procurements undertaken by India have historically not been linked to any bilateral or multilateral treaties. Recently, India has executed several agreements with the United States for cooperation in military logistics and communications interoperability. However, adherence to the agreements is not contingent on either country procuring defence products and articles from each other.

Law stated - 22 November 2021

Sanctions

Are there any boycotts, embargoes or other trade sanctions between this jurisdiction and others?

India has implemented trade sanctions announced by the United Nations Security Council. Therefore, India prohibits trade in specified goods with Iran, North Korea and Somalia. Further, India does not trade with Islamic State and Al-Qaeda affiliates. It is relevant to highlight that India does not recognise unilateral sanctions imposed by any individual country.

Law stated - 22 November 2021

Trade offsets

Are defence trade offsets part of this country's defence and security procurement regime? How are they administered?

Offsets are applicable to procurements from foreign sellers, which are valued above 20 billion rupees, with exceptions for single-vendor situations and intergovernmental procurements. The governing principles for offsets are specified in the offset guidelines under the DAP and are administered by a specialised body under the supervision of the MoD, called the Defence Offsets Management Wing (DOMW). The DOMW has the following primary roles in the procurement process:

- formulating the offset guidelines;
- monitoring the discharge of offset obligations (including audit and review of yearly progress);
- participating in the technical and commercial evaluation of offset proposals; and
- administering penalties under offset contracts.

The standard offset obligation is defined as 30 per cent of the value of the procurement contract but may be higher subject to the discretion of the MoD. Offset obligations may be discharged through specified routes in the DAP, including the purchase of eligible products and services from the domestic industry, direct equity investment or supply of equipment to defence companies in India, transfer of technology to Indian companies, etc. The offset norms have undergone significant revisions with the DAP 2020 compared to previous iterations. The notable changes include enhanced multipliers for various offset routes, an overhaul of the list of products and services eligible for discharge of offsets, and improved viability of transfer of technology and investment-in-kind routes.

In terms of the procurement process, offset obligations are incorporated into the request for proposal issued by the MoD to eligible vendors. As part of the bid submissions, bidders are required to submit separate technical and commercial offset proposals for the same. The vendor is required to select eligible Indian partners and notify the quantum of offsets that will be fulfilled through each partner. The vendor may modify its Indian partners and their share of the offsets, subject to the overall offset obligation remaining the same.

The vendor has to undertake the mandatory compliance to submit rolling claims to the DOMW along with documentary evidence in support of the claim of the fulfilment of offsets. If the vendor is unable to meet its offset obligations within the prescribed period, the MoD may choose to terminate the main contract, impose liquidated damages and blacklist or suspend dealings with the vendor for future contracts.

Law stated - 22 November 2021

ETHICS AND ANTI-CORRUPTION

Private sector appointments

When and how may former government employees take up appointments in the private sector and vice versa?

Government employees may take up appointments in the private sector either by taking voluntary retirement or after reaching the age of superannuation, subject to service rules applicable to their employment. Service rules typically specify a period between one to two years of retirement, within which the employee must take prior permission from the government to take appointments in the private sector. After such period, government employees are not required to take permission but may be required to make certain declarations to their parent organisation before accepting appointments.

Employment with the Indian government is undertaken through entrance tests. As employment with the government is a career decision, the government usually does not have a mechanism to employ people from the private sector beyond the selection process. Appointments from the private sector are usually undertaken on a temporary contractual basis for advisory positions in special committees and task forces.

Law stated - 22 November 2021

Addressing corruption

How is domestic and foreign corruption addressed and what requirements are placed on contractors?

Government procurements in India are required to adhere to a high standard of ethical conduct. All procurement frameworks prohibit both buyers and sellers from engaging in any activity that may be construed as having influenced the decision to award the contract.

The scope of such activities includes the offer or supply of any bribe, gift, consideration, reward, favour, any material or immaterial benefit or other advantages to government officials involved in the bidding process with a view to inducing awarding the contract to a vendor. Further, bidders are prohibited from engaging any person to intercede, facilitate or recommend the award of the contract. Collusion between bidders to influence the outcome of the procurement also constitutes unethical conduct under the procurement framework.

For defence and security procurements under the DAP, prospective bidders are required to submit a legal undertaking, in the form of an Integrity Pact, to refrain from unethical and corrupt activities specified in the regulations. Further, bidders are also required to furnish a bank guarantee as security against such conduct. If the MoD gains knowledge of the bidder having engaged in such activities, the bank guarantee is typically invoked in addition to blacklisting, suspending dealings and initiating punitive proceedings under any other law.

Law stated - 22 November 2021

Lobbyists

What are the registration requirements for lobbyists or commercial agents?

The General Financial Rules 2017 provides that each procuring ministry may require agents to be registered in such manner as the ministry may prescribe. Therefore, the requirement for the registration of agents varies across ministries. Typically, the use of agents in procurements is discouraged and in certain contracts may be entirely

prohibited in certain procurement programmes.

The procurements by the MoD under the DAP require the mandatory registration of commercial agents. The process of registration involves applying to the MoD with details of the bidder and its agents, including the contractual and commercial terms agreed between the parties. Failure to register or declare agents would attract penal implications that extend to fines, rescinding of contract or blacklisting of a vendor from future procurements.

Law stated - 22 November 2021

Limitations on agents

Are there limitations on the use of agents or representatives that earn a commission on the transaction?

Depending on the framework applicable to the procurement, commission structures for agents are either regulated or prohibited. Further, where permitted, the scope of the agent's role plays an important part in determining whether the commission arrangement steps into the boundaries of unethical conduct. Most procurement frameworks read with applicable vigilance guidelines prohibit remuneration for an agent based on the success or failure in obtaining a contract.

Law stated - 22 November 2021

AVIATION

Conversion of aircraft

How are aircraft converted from military to civil use, and vice versa?

India does not have a clearly defined legislative framework for the conversion of military aircraft to civil aircraft and vice versa. A civil aircraft can be deployed for military uses, subject to requisite permissions from the Ministry of Defence.

Military aircraft sought to be used either temporarily or permanently for civil purposes would require registration with the Directorate General of Civil Aviation (DGCA). Further, such aircraft would be subject to compliances and applicable standards under the Aircraft Act 1934, the Aircraft Rules 1937 and the Civil Aviation Requirements prescribed by the DGCA.

Law stated - 22 November 2021

Drones

What restrictions are there on manufacture and trade of unmanned aircraft systems or drones?

The manufacturing of unmanned aircraft systems (UASs) is a regulated activity and requires both the product and the manufacturing facility to be licensed by the Ministry of Commerce. The sale and operation of UASs is regulated by the DGCA. The DGCA categorises a UAS based on its weight and flying range and provides for specific operational conditions for each category of UAS. Any person seeking to use a UAS in India is required to obtain an operators' permit from the DGCA.

From an international trade perspective, both the import and export of UASs is restricted. The import of a UAS into India requires a licence from the DGCA, whereas exports are subject to restrictions under the Wassenaar Arrangement and require prior authorisation from the Ministry of Commerce.

Law stated - 22 November 2021

MISCELLANEOUS

Employment law

Which domestic labour and employment rules apply to foreign defence contractors?

Domestic labour and employment rules are not applicable to companies that have no presence in India. The labour and employment laws apply to entities that have been incorporated under the laws of India or have a presence in the country through a permanent establishment.

India has mature jurisprudence with respect to labour and employment laws, and the applicability of the laws varies based on the nature and size of the business. The Indian labour and employment laws cover aspects such as minimum wages, employee remuneration (including bonus and gratuity), health and life insurance benefits, employee safety and maternal benefits, etc.

Law stated - 22 November 2021

Defence contract rules

Are there any specific rules that contractors, foreign or domestic, are bound by in defence contracts?

Defence contracts are governed by the procurement framework governing the transaction (ie, the Defence Acquisition Procedure (DAP) or the Defence Procurement Manual) read with advisories from the Central Vigilance Commission, the chief anti-corruption monitoring institution in India. Accordingly, defence contractors are bound by the terms of the contract, which in turn is derived from the procurement framework.

Law stated - 22 November 2021

Do contractors avail themselves of these rules when they perform work exclusively outside of the jurisdiction?

Defence procurement frameworks, such as the DAP, are not expressly extra-territorial in their scope and applicability. However, any act undertaken at any place in violation of undertakings and representations given by the contractor in the procurement process would entail the Ministry of Defence exercising its contractual rights, which include the right to cancel the tender or terminate the contract, blacklist the vendor, invoke bank guarantees and initiate criminal prosecution in India.

Law stated - 22 November 2021

Personal information

Must directors, officers or employees of the contractor provide personal information or certify that they fulfil any particular requirements to contract with a government entity?

The General Financial Rules 2017 and the DAP do not require directors, officers and employees of the contractor to provide personal information or certifications. However, the government reserves the discretion to require key management personnel of the contractor to submit information in certain eventualities, for example, foreign citizens visiting secured facilities are required to submit personal information for verification by the Ministry of Home Affairs.

Licensing requirements

What registration or licensing requirements exist to operate in the defence and security sector in the jurisdiction?

Foreign vendors supplying defence and security articles manufactured outside India are typically not required to procure registrations or licences in India. Registration and licensing requirements are triggered if the operations involve the import, manufacture or sale of regulated defence and security articles in India. The licensing requirements are extensive and vary based on the nature of the product, nature of the activity, distribution model and location of operations.

Law stated - 22 November 2021

Environmental legislation

What environmental statutes or regulations must contractors comply with?

Environmental safety in India is administered and enforced both at federal and state levels. The regulations apply to manufacturing and production activities undertaken in India. Such activities necessitate compliance with air, ground and water standards and may require industries to install specialised pollution control equipment or establish emission treatment plants. Environmental regulations also apply to the importation of hazardous substances (including chemicals); but the burden of compliance is on the importer and not the foreign supplier.

The principal legislation governing environmental protection include:

- the Environmental Protection Act 1986;
- the Water (Prevention and Control of Pollution) Act 1974; and
- the Air (Prevention and Control of Pollution) Act 1981 and the rules framed under these laws.

The environmental law regulations also include specialised legislations that apply to specific industries.

Law stated - 22 November 2021

Must companies meet environmental targets? What are these initiatives and what agency determines compliance?

Entities that have industrial facilities in India are required to adhere to applicable environmental norms on emissions and waste disposal, enforced jointly by the Central Pollution Control Board and the State Pollution Control Boards constituted under environmental legislations. Failure to meet compliance is strictly enforced and can result in heavy penalties and the closure of units.

Law stated - 22 November 2021

Do 'green' solutions have an advantage in procurements?

India does not recognise environmental responsibility as a qualification or procurement criteria, therefore 'green'

solutions receive no preference in government procurement.

Law stated - 22 November 2021

UPDATE AND TRENDS

Key developments of the past year

What were the key cases, decisions, judgments and policy and legislative developments of the past year?

Due to the significant revision brought within the acquisition procedures in 2020, 2021 witnessed no significant decisions, judgments, policy and legislative developments with respect to defence and security procurements. However, the Ministry of Defence (MoD) has initiated the process of amending the Defence Procurement Manual and the new manual is expected to be released before the second quarter of 2022.

The other significant policy development was the announcement of the corporatisation of the Ordnance Factory Board (OFB). The OFB is a department of the MoD that owns and operates more than 40 factories across the country. The corporatisation process has resulted in the creation of self-sustaining, professionally managed public-sector undertakings. The corporatisation process has also diluted the product monopolies exercised by the OFB in the past.

Law stated - 22 November 2021

Jurisdictions

	India	Khaitan & Co
	Japan	Atsumi & Sakai
	Norway	Brækhus Advokatfirma
	South Korea	Yoon & Yang LLC
	Sweden	Advokatfirman Florenius & Co. AB
	United Kingdom	Bird & Bird LLP