



Notification of Force Majeure Clause in Defence Contracts

June 18, 2020

The Ministry of Finance (**MoF**) vide notifications dated February 19, 2020 and May 13, 2020, has already clarified that supply chain disruptions will be covered in the Force Majeure (**FM**) clauses of public procurement contracts depending on the circumstances of the case. The Ministry of Defence, in relation to defence capital acquisition contracts, has prescribed the Defence Procurement Procedure (**DPP**) Standard Contract Document (under Chapter VI of DPP 2016 which contains a FM Clause in Article 24). This FM clause is typically negotiated and agreed in most of the defence capital acquisition contracts. The Ministry of Defence has issued a notification on June 12, 2020 communicating its decision on the invocation of FM clauses.

Recognizing that the defence industry may be unable to operate at 100% level immediately after lockdown is lifted, the Ministry of Defence has decided the following in respect of FM Clauses of capital acquisition contracts between the Armed Forces/ Coast Guard and Indian contractors/sellers/vendors:

- Force Majeure shall be applicable for a period of 4 months i.e. from March 25, 2020 to July 24, 2020;
- Duration of this Force Majeure will be excluded while calculating the delay in delivery of contracted equipment and imposition of Liquidated Damages;
- Interim and Final Delivery Period of the stages of the contract that are affected by the lockdown, will stand extended by a period of 4 months without imposition of any Liquidated Damages (**LD**);
- No separate contract or specific amendments are required to be made to give effect to this order;
- It is further provided that foreign vendors may approach the SHQs/ MoD which will consider their cases on the basis of the situation prevailing in their country.

ELP Comments:

By eliminating the need for a separate contract amendment, the MoD has proactively eased this one concern on LD that many defence contractors have had as after-effects of the lockdown in India. To alleviate these concerns, the MoD has clarified that under all circumstances, irrespective of the stage of the contract, the period of the contract shall be extended by a period of 4 months and no vendor shall be liable for liquidated damages as a result of such delay. It must be noted that under Clause 8 of the Defence Offset Guidelines of the Defence Procurement Procedure, 2016 it is clarified that any general term/clause not included in the offset contract but included in the main procurement contract would ipso facto apply to the offset contract. Hence Offset contracts would also be able to avail this Force Majeure Clause even if the same is not included in the offset contract. The most important point of concern for vendors would be the imposition of liquidated damages as a result of delay in delivery of the contracted equipment. While the above steps are necessary to ensure the continuity of business in light of the Covid-19 pandemic, the invocation of the Force Majeure Clause would be held valid only in a situation where the parties to the contract were not in default of their contractual obligations as on February 19, 2020.

On the one hand, this notification is beneficial in that there appears to be no discretion for the grant or rejection of the invocation of a FM clause, which is unlike the Ministry of Finance notifications mentioned above. However, the FM is now restricted to the specific period mentioned and a contractor may be hard-pressed to claim a period preceding the national lockdown towards this relief (not taking into account that the impact of the coronavirus could be said to have commenced in January in some cases and several States imposed lockdowns even prior to the national lockdown). Further, we are still unclear as to the period of the impact of the coronavirus on supply chains.

Like in the May 13, 2020 notification of the Ministry of Finance, the availability of relief for FM is limited to cases where there are no defaults. It may be noted that this stipulation may not be a part of the original contracts and hence the present notification imposes an additional condition to enable a contractor to enforce an FM clause.

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