

INDIA DEFENCE UPDATE is a periodical from Singhania & Partners, which offers to provide the latest on Defence sector related policies, laws, case studies, news and events.

defence procurements

Your Policy Folder

INSIDE THIS ISSUE

Policy on agents in defence procurements – a dilemma for foreign vendors.

By Sunil Kumar & Nikhil Kohli

NEWS UPDATES

- National
- International

**POLICY
TRACKER**

Policy on agents in defence procurements – a dilemma for foreign vendors

Introduction

The engagement of agents by foreign vendors in defence sector has been a subject of intense controversy and even political embarrassment for governments in India due to allegations of payment of commissions to influence government decisions in purchases of weapons and defence systems. Earlier the government had not only allowed the engagement of agents by foreign vendors of defence equipment's but also required compulsory registration of such agents. With the passage of time, government has tightened the regime governing the engagement of agents. One reason could be the apprehension based on certain glaring instances brought to light in the past where such agents were used for influencing the Government decision making process. At one point, the procurement guidelines of the Ministry of Defence (MOD) outright prohibited engagement of agents and payment of commission to them. But this begged the question whether a foreign supplier could not engage an agent in India even for bonafide commercial activities. And as this article asserts arguably there can be no legal bar on agents being engaged. It also examines whether it is required to register such agents. This article attempts to analyze the legal position and clears the fog shrouding these issues. We would first examine the issues in the light of Indian Constitutional and Contract law followed by an analysis of the guidelines issued by MOD.



Constitutional right to carry any trade/profession

In India a person is allowed to carry on any law full profession, trade, vocation or occupation. This right is guaranteed by the supreme law of the land, namely, the Constitution of India. Article 19 of the Constitution of India, inter alia, confers upon the citizens of India the right to practice any profession or trade. Article 19(g) provides that-

"All citizens shall have the right to practice any profession or to carry on any occupation, trade or business".

By virtue of Article 19(g), the citizens of India have the constitutional right to engage in any occupation or business which they wish to undertake. However, this right is not unrestricted and may be subjected to reasonable restrictions as contemplated by Article 19(6). The sub-article 6 provides that the right of citizens in sub-clause (g) would not prevent the State from making any law which may impose, in the interests of the general public, reasonable restrictions on the exercise of such right or which may prescribe any professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business. Thus, despite the right to practice any profession having been conferred, the State may frame a law which requires possessing or acquiring a particular qualification or competency before a person could practice a profession. Subject to these restrictions, no authority in India can take away such right of a citizen, and any law or regulation, which restricts or prohibits a person to engage in any lawful trade or occupation, would be bad in law as being in violation of the Constitution.

No restriction on carrying any trade or profession through agreement

Section 27 of Indian Contract Act, 1872 (ICA) provides that an agreement, which restricts a person from exercising a profession, trade or business, is bad in law. Section 27 provides that –

"Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void".

In view of Section 27 of ICA, no one can contract an agreement which will prevent him or any other person from practicing or exercising a lawful profession or trade and if such agreement is contracted, the same shall be void and have no force.

Further, ICA also contains provisions which govern the relationship of a principal and his agent. Accordingly, a person can engage another person as his agent for any purpose, which should be lawful, and their agency relationship shall be governed by the ICA. ICA does not provide as to for what purpose an agent can be or cannot be appointed and it lays down general principles which apply to every agency arrangement intended for lawful objects.

This being the legal position in India, it is clear that there can be no legal embargo on engaging an agent for any legal purpose in India. A person may be appointed as agent for merchandising his principal's goods; a person may be engaged for recovery of receivables, arranging finance, promoting business, searching prospective business opportunities and so on and so forth. Going by the same logic, a foreign principal can appoint a person as an agent to give advice on marketing and sale strategies, organize meetings with government officials, accompany his principal and act as an interpreter in such meetings, etc. Under the Indian law, engaging an agent for performing such activities cannot be said as an engagement contracted for unlawful or illegal activities.

Whether guidelines issued by MOD restrict engagement of agents

Engagement of agents

We now analyze the issues of engagement of agent in India and their registration requirements having regard to the policy laid down in Defence Procurement Manual, 2009 (DPM 2009) and Defence Procurement Procedure 2011 (DPP 2011). There are various clauses contained in the Standard format of RFP and Standard Clauses of Contract in the DPP 2011, which provide that no agent can be engaged to intercede, facilitate or to influence the concerned officials of the Government of India or any of its functionaries, whether officially or unofficially, to procure the contract. The bidder is also required to undertake and declare that he will not engage an agent to intercede, facilitate or to influence the Government officials to procure the contract. A reading of all these provisions does not lead to the conclusion that there is any prohibition on the engagement of an agent for bonafide purposes by a foreign supplier. A related question arises what are the bonafide purposes for which agents may be engaged and this aspect is discussed below.

Clause 14 Schedule I to Chapter I of DPP 2011, which is a part of Standard RFP format and is applicable to foreign vendors only, requires the bidders to disclose full details of any agents / technical consultants / authorized vendors who may have been appointed by them for marketing of their equipment's in India. It further provides that the details disclosed should include the scope of work and responsibilities that have been entrusted to the agent in India. In our view, agents may, therefore, legitimately undertake trial evaluations of system, providing additional information/updates on the latest advances in the technology, etc., provided the details are disclosed as required by the said clause of the DPP 2011. What emerges is that engaging agents for marketing is not prohibited, and this clause only requires that the agency arrangement has to be disclosed. Foreign vendors may have to clearly define the role of agents so that in their interaction with the MOD they are not viewed as exceeding their brief such that they may not be accused of interceding or facilitating or influencing government machinery to procure a contract.

The government's policy regarding agents can also be gathered from the current disclosure and integrity pact requirements which are provided for in Annexure I to Appendix H in DPP 2011. Clause 6.6 of **Pre-Contract** Integrity Pact requires the bidders to disclose any payments made to agents, brokers or any other intermediaries in connection with the contract and the details of services agreed upon for such payments. The language of this clause clearly indicates that a bidder may engage an agent for performing services though the scope of "services" has not been detailed, and if the bidder engages such an agent, the bidder is required to disclose details of the agency arrangement. This clause also supports our view that even in terms of the present DPP 2011, agents may be engaged for bonafide purposes though it is subject to the condition that the agents must not be engaged to intercede, facilitate or influence the officials in awarding the contract.

Having said that, it needs to be emphasized that the government should distinctly clarify the scope of services for which an agent may be appointed by a bidder. If the government clarifies, the scope, the bidder would have greater certainty that if he appointed an agent for the services as specified by the government, it would not run the risk of being accused of having appointed an agent to intercede or influence the government machinery.

Registration of agents

There is a widely held view that agents of foreign suppliers need to be registered though there is no clear or categorical requirement currently under DPP 2011. The requirement of registration was specifically provided for in DPM 2006. It appears that DPM 2006 had incorporated the contents of Supplementary Instructions No. 3(2)/PO(Def)2001 of November 2, 2001 under which registration was a specific requirement at the time. We are supported in this view by para 9.16 of Chapter IX and Appendix 'L' of DPM 2006 which employs the language of Supplementary Instructions of 2001. It also needs to be highlighted that even in 2006 MoD had initiated a review of this policy as is evident from para 1.(a) of Appendix 'L' (DPM 2006), which stated that the policy of compulsory registration was under review by MoD and that in its place a detailed checklist and disclosure norms had been proposed. It is also significant that in DPM 2009, (which succeeded DPM 2006), there is no reference to or requirement of compulsory registration. It is clear that the policy of registration, which was a requirement of DPM 2006, was not carried forward in DPM 2009. We are, therefore, of the considered view that the policy of compulsory registration has been discontinued. It is desirable that MOD should dispel the surrounding confusion and the prevailing ambiguity by issuing a circular revoking Supplementary Instructions of 2001 though we believe this circular is not operative any longer.

Conclusion

To conclude, foreign vendors are free to appoint agents for utilizing their services for bonafide purposes, but would be well advised to understand the MOD guidelines while appointing agents, and define the scope of the services that may be assigned to them having regard to the nature of the regulatory prohibition and the integrity pact signed by them with the government. The challenge for vendors is really where to draw the line given the contradiction between the enabling legal regime and the reality they encounter in practice. The government on its part still continues to tread an ambivalent policy in its reluctance to deal with agents though it does not prohibit their engagement.



Sunil Kumar
skumar@singhania.in



Nikhil Kohli
skumar@singhania.in



[Indian Navy's Anti-Submarine Warfare-Centric Force modernisation efforts are progressing](#)

[Mirage upgrade finalised](#)

[MiG-21s to be phased out; Su-30MKIs, Light Combat Air-crafts to replace it](#)

[GE Aviation trains guns on Indian defence sector](#)

[China's Defence budget double of India's](#)

[EADS Signs Five Accords with German and Indian Companies](#)

[Eurocopter- Hindustan Aeronautics Limited strengthen their 50 year ties](#)

[UK proposes building future warships with India](#)

[India boosts Coastal Defence](#)

[Defence Acquisition Council approves acquisition of six submarines](#)

[India to get 5 MiG-29K fighters from Russia](#)

[Army successfully conducts trial of BrahMos Block-III missile](#)

[Israel, India to advance work on unmanned Chetak](#)

[India gifted 109 vehicles to Nepal Army](#)

[Hindustan Aeronautics Limited to Deliver 57 Hawk Advanced Jet Trainers to Indian Air Force and Navy By 2016](#)

[India plans to develop solar-powered Unmanned Aerial Vehicles](#)



INTERNATIONAL

[**SOUTH KOREA:** F-X3 fighter competition is widened](#)

[**FRANCE:** More details on F-Heron TP selection](#)

[**US/RUSSIA:** NORAD and Russia Team for Exercise Vigilant Eagle 2011.](#)

[**USA:** US Army looks to attract \\$7.1 bn in private funds for renewables](#)

[**ISRAEL:** Israel Defence Force 's Tsayad digital army programme to undergo automation upgrade](#)

*India Defence Update is published solely for the interests of clients and associations of Singhanian & Partners. This document is for general guidance only and does not constitute definitive advice. For specific information on recent developments or particular factual situations, the opinion of legal counsel should be sought.
Copyright © 2010 Singhanian & Partners.*