

Advanced Contracts, Tendering and Public Procurement
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Government Contracts - Part 05

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Stages of Bidding (Contd.)

e. Pre-Bid Conference



Pre-bid Conference

GFR - Rule 173

- In case of contracts of special nature for procurement of sophisticated and costly work/ services/ equipment or wherever felt necessary, a suitable provision is kept in the bidding documents for inviting the bidders or their official representatives to attend one or more pre-bid conference at a specified place and time, for clarifying issues and clearing doubts- This is called as a pre-bid conference.
- The date, time and place of pre-bid conference should be indicated in the bidding document. This date should be sufficiently ahead of bid opening date. The records of such conference shall be intimated to all bidders and, shall also be exhibited on the website(s) where tender was published.
- Bidders should be asked to submit written queries in advance of the conference. After the conference, Minutes of the pre-bid meeting including all the questions and replies shall be prepared and approved by the competent authority.
- The techno-commercial requirements may also be revised if considered necessary by way of issue of a formal corrigendum
- After the issue of clarifications/ modifications consequent to the pre-bid meeting, at least two clear weeks should be given for submission of bids.



The next stage in government procurement or public procurement is a Pre-bid Conference or as it is called a pre-bid meeting. Now, as per the General Financial Rules, Rule 173, in case of contracts of any special nature or complex nature, as we have seen in two-stage bidding processes or procurement, especially for procurement of sophisticated and costly work or services or equipment, and where there is a need for specialized expertise and deliberation by the procuring entity, a suitable provision is kept in the bidding document itself for inviting bidders or their official representatives to attend one or more big conferences or meetings at a particular time and place and this is done so for the purpose of clarifying issues and clearing doubts pertaining to the bid documents itself. Since this conference is conducted before the bids are evaluated, this is called a pre-bid conference.

Now, the date, time and place of the pre-bid conference should be clearly indicated in the bidding document, and this date should be sufficiently ahead of time of the bidding opening date. This is to ensure that the bidders get sufficient time to evaluate the contents of the bid

documents. And the records of such conference shall also be intimated to all bidders and shall be exhibited on the website or the portal of the procuring entity where the tender was published.


Now, bidders should also be asked to submit written inquiries or queries in advance of the conference. This is to ensure that the procuring entity is given sufficient time to answer these queries in detail. Now, after the conference, the minutes of the pre-bid meeting should include all discussions including questions and replies, and shall be prepared and approved by the competent authority of the procuring entity and shall be shared along with all the other revised bid documents with the prospective bidders.

Now, in the case of techno-commercial requirements, such requirements may also be revised if it is considered necessary by the procuring entity and this shall be issued by way of a corrigendum to the same. An issuance of a corrigendum relating to techno-commercial requirements must necessarily follow the rules and requirements stipulated for the issue of corrigendum under the General Financial Rules.

Now, after the issue of clarifications or modifications to the bid documents, which is consequent to the pre-bid meeting, at least two weeks should be given to the bidders to submit their bids. This is clearly to give a sense of time to the bidders to ensure that they can make an informed decision while submitting their technical and financial bids.

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f. Submission of Bids



SUBMISSION OF BIDS

Technical Bid Financial Bid

- **Sealing of Bids:** The tender document is to indicate the total number of tender sets (e.g., in duplicate or in triplicate etc.) required to be submitted. In case bids are asked in a number of copies, the tenderer is to seal the original and each copy of the tender in separate envelopes, duly marking them.
- **Withdrawal of Bids:** The tenderer, after submitting the tender, is permitted to withdraw, substitute or modify the tenders in writing without forfeiture of Bid Security, provided these are received duly sealed and marked like the original tender, up to the date and time of receipt of the tender. Any such request received after the prescribed date and time of receipt of tenders will not be considered.
- **Receipt of delayed submissions:** The tender received by the procuring entity after the deadline for the submission of tender, shall not be opened and shall be returned to the contractors or contractors that submitted it. In case of e-procurement, no submission is allowed after the deadline.
- **Opening of Bids:** Bids are typically opened by the Bid Opening Committee (BOD). In case of public bid openings, A record of opening of bids will be maintained, including signatures of bidders present. A bid opening report containing the names of the tenderers (serial number wise), salient features of the tenders, will be prepared by the tender opening officers, and duly signed by them along with the date and time.



Let us look into the process of submitting bids by the tenders or the bidders. As has been discussed earlier, in the stages of bidding, every bidder or every tenderer is required to submit two bids that is, one which is a technical bid stipulating technical qualifications and requirements, and the financial bid which generally includes the financial cost or overheads and the price quoted by the bidder.

So, the various stages involved in submitting a bid until the stage of opening a bid are as follows. When a bidder is required to submit a particular bid, the tender document must necessarily specify the total number of copies that a bidder must submit which can either be in a single envelope, in duplicate or in triplicate. Now, in case the bids are asked to be submitted in multiple copies, then the bidder or tenderer is required to seal the original copy along with each other copy in separate envelopes and duly mark them before posting them.

In case the tenderer wishes to withdraw the bid after submitting the tender, they are permitted to do so, and they are permitted to do so along with any substitutions or modifications in writing without for feature of the bid security. Now, this can be done provided these are received duly sealed and marked in original and they are up to date and time of receipt of the tender. Now any such requests received after the prescribed date or time of receipt of the tenders will not be considered by the procuring entity.

What happens in the case of delayed submissions? Now, the tender received by procuring entity after the deadline stipulated in the tender documents should not be opened at any cost and shall be returned to the bidder or the contractor that submitted it. Now, in the case of e-procurement, no submission is allowed after the deadline and the portal shall provide a lapse in terms of the submission of bids.

When we look at the process of opening bids, now, bids are typically opened by a bid opening committee that is specifically allotted and set up for the purpose of receiving bids by a procuring entity. In case of public bid openings, a record of opening the bids shall be maintained, including the signatures of any bidders present. A bid opening report containing the names of the tenderers, and any salient features of the tenders should necessarily be prepared by the bid opening committee or by the tender opening officers and it shall be duly signed by them along with the date and time. This is to ensure transparency and accountability in the entire process.

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BID SECURITY/EARNEST MONEY DEPOSIT

What is a Bid Security?

GFR - Rule 170

- A form of security to safeguard against a bidder's withdrawing or altering its bid during the bid validity period in the case of advertised or limited tender enquiry
- Amount of bid security should ordinarily range between **two percent to five percent** of the estimated value of the goods to be procured.
- The amount of bid security should be determined accordingly by the Ministry or Department and indicated in the bidding documents.
- Bid securities of the unsuccessful bidders should be returned to them at the earliest after expiry of the final bid validity
- The bid security may be accepted in the form of Account Payee Demand Draft, Fixed Deposit Receipt, Banker's Cheque or Bank Guarantee
- A bidder's bid security will be forfeited if the bidder:
 - i) withdraws or amends its/ his tender;
 - ii) impairs or derogates from the tender in any respect within the period of validity of the tender;
 - iii) If the bidder does not accept the correction of his bid price during evaluation; and
 - iv) If the successful bidder fails to sign the contract or furnish the required performance security within the specified period.



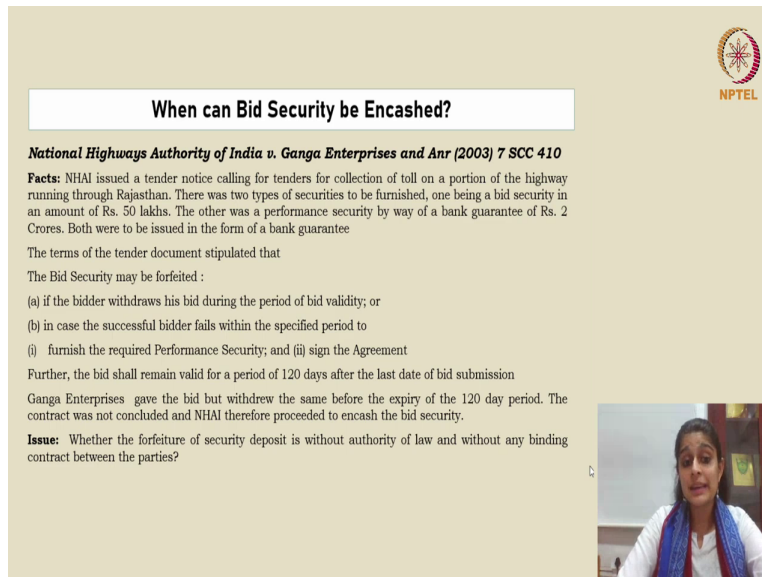
In many a case, along with the submission of bids, the bidders are also required to submit or provide something called bid security or earnest money deposit. So, what exactly is bid security? Now, as the name suggests, bid security is a form of security to safeguard against a bidder's withdrawal or alteration of its bid during the bid validity period in case of advertised or limited tender inquiry. This goes to show that in the event any bidder wishes to withdraw its bid to avoid any administrative technicalities or administrative glitches and to ensure security for bids submitted, the bidders are required to give a security which is pre-estimated in the bid documents.

The amount of bid security should ordinarily range between 2 per cent to 5 per cent of the estimated value of goods or services to be procured. The amount of bid security should also be determined accordingly by the ministry or department or the procuring entity and it must be indicated in the bidding documents. Bid securities of unsuccessful bidders should be returned to them at the earliest after the expiry of the final bid validity.

The bid security may be accepted in the form of an account payee demand draft, fixed deposit receipt, a banker's cheque or even a bank guarantee. The mode of paying a bid security must be provided clearly and explicitly in the bid documents.. A bidder's bid security can be forfeited in any of the following situations.

One, if the bidder withdraws or amends his tender before the bid validity period expires, if it impairs or derogates from the tender in any respect within the period of validity of the tender, if the bidder does not accept the correction of his bid price during the evaluation process, or if the successful bidder fails to sign the contract or furnish the required performance security within the specified period, then in such situations the bid security can be forfeited. This means that the bid security amount will not be returned to the bidder at any cost.

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When can Bid Security be Encashed?

National Highways Authority of India v. Ganga Enterprises and Anr (2003) 7 SCC 410

Facts: NHAI issued a tender notice calling for tenders for collection of toll on a portion of the highway running through Rajasthan. There was two types of securities to be furnished, one being a bid security in an amount of Rs. 50 lakhs. The other was a performance security by way of a bank guarantee of Rs. 2 Crores. Both were to be issued in the form of a bank guarantee

The terms of the tender document stipulated that

The Bid Security may be forfeited :

- (a) if the bidder withdraws his bid during the period of bid validity; or
- (b) in case the successful bidder fails within the specified period to
 - (i) furnish the required Performance Security; and (ii) sign the Agreement

Further, the bid shall remain valid for a period of 120 days after the last date of bid submission

Ganga Enterprises gave the bid but withdrew the same before the expiry of the 120 day period. The contract was not concluded and NHAI therefore proceeded to encash the bid security.

Issue: Whether the forfeiture of security deposit is without authority of law and without any binding contract between the parties?

When we talk about forfeiting with security or encashing bid security, a question may arise as to the circumstances where such an amount may be encashed. In this regard, the case of the National Highways Authority of India v. Ganga Enterprises and Anr may be pertinent.

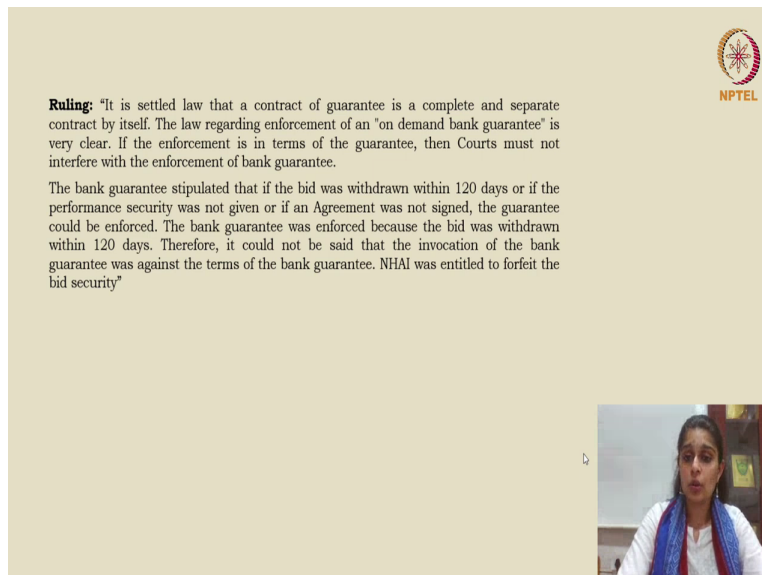
In this particular case, the facts were such that the National Highway Authority of India issued a tender notice inviting tenders for the collection of tolls on a portion of a highway running through the state of Rajasthan. There were two types of securities to be furnished by the bidders. One was a bid security amounting to rupees 50 lakhs and the other one was a performance security for the contract by way of a guarantee amounting to rupees 2 crores. Now, both of these bids were to be issued in the form of bank guarantees.

As per the tender documents or the bid document, the stipulations were such that the bid security may be forfeited if the bidder withdraws his bid during the period of the bid validity or in case the successful bidder fails within the specified period to furnish the required performance

security and sign the agreement. So, there were two specific and clear stipulations provided in the bid documents. Furthermore, it was also stipulated that the bid shall remain valid for a period of 120 days after the last date of the bid submission.

Now, in this particular case, Ganga Enterprises gave the bid but withdrew the same before the expiry of 120 days. Now, the contract was not concluded and the National Highways Authority of India proceeded to encash the bid security. Aggrieved by this, Ganga Enterprises challenged this move by the National Highways Authority of India. So, the issue before the court was whether the forfeiture of the security deposit was within the authority of law or was binding on the contracts between the parties.

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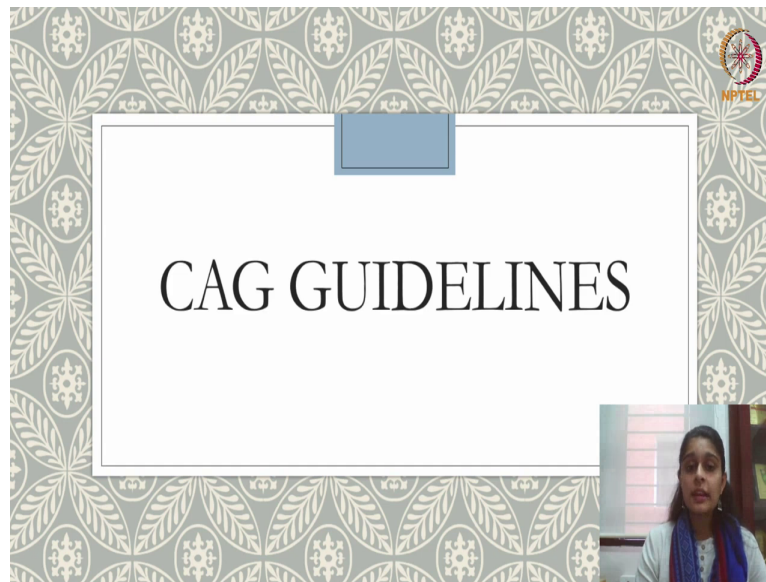
In this case, the court held that it was a settled principle of law that a contract of guarantee is complete and a separate contract by itself. So, the law regarding the enforcement of any demand bank guarantee is clear and if the enforcement in terms of the guarantee, then the courts did not interfere with the enforcement of the bank guarantee. So, what does this mean in this particular case?

In this case, it was stipulated that if the bid was withdrawn within 120 days or if the performance security was not given or if an agreement was not signed, the guarantee could be enforced. The bank guarantee was to be enforced before the bid was withdrawn within a period of 120 days. Therefore, in this particular case, it could not be said that the invocation of the bank guarantee

was against the terms of the bank guarantee itself. This meant that the National Highways Authority of India was entitled to forfeit the bid security and to encash the same as it was clearly against the expressed and explicit stipulations in the tender document.

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CAG Guidelines



Now, that we have looked at the general financial rules and the guidelines provided by the Central Vigilance Commission, in the final segment of our discourse on the laws and guidelines applicable to government contracts and processes of public procurement, we will be delving into the guidelines formulated and provided by the Comptroller and Auditor General.

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The Role of CAG in Government Contracts



What is the Role of the CAG in Government Contracts?


To ensure efficient utilization of public funds - GFR, Rule 21

*Every officer incurring or authorizing expenditure from public moneys should be guided by **high standards of financial propriety**. Every officer should also enforce financial order and strict economy and see that all relevant financial rules and regulations are observed, by his own office and by subordinate disbursing officers*

To ensure transparency and ethical standards in transactions - GFR, Rule 175

No official of a procuring entity or a bidder shall act in contravention of the code of integrity which includes

- offering, soliciting, accepting bribes
- Misrepresentation or misleading information
- Collusion, bidding, anti-competitive behaviour
- Improper use of information by procuring entity
- Financial transactions between bidders and officials of procuring entity in relation to the tender
- Coercion, threat of impairment, harm
- Obstruction to any investigation or auditing



Before delving into the guidelines and regulations formulated for the Comptroller and Auditor General, let us look at what the role of the Comptroller and Auditor General is in the context of government contracts. As discussed earlier in the previous slides, we have seen that the CAG has been entrusted with the sole responsibility of providing independent and credible assurance in the context of public resources and public money.

Therefore, under the General Financial Rules, there has been a specific mandate for every procuring entity that is governed under such rules to ensure the credibility of finances used in public procurement. As per the General Financial Rules, Rule 21, there is a mandate to ensure the efficient utilization of public funds and public money.

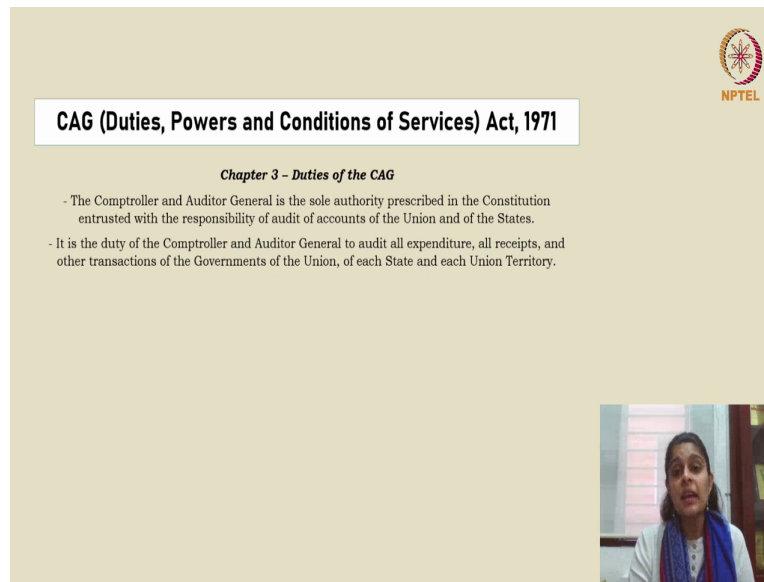
It explicitly and specifically states that every officer incurring or authorizing an expenditure from public monies for any process of public procurement must necessarily be guided by high standards of financial propriety. This means that every officer should also enforce financial order and strict economy and ensure that all relevant financial rules and regulations are observed by his or her own office, including subordinate dispersing officers.

Now, to ensure transparency, accountability and ethical standards in every transaction in the entire course of government procurement the General Financial Rules also provide certain responsibilities to procuring entities. As per Rule 175, no official of a procuring entity or a

bidder should act in contravention of the code of integrity. Now, this code of integrity includes the following activities which are prohibited.

This may include offering, soliciting or accepting bribes in the context of government contracts or government tendering, misrepresentation or misleading any information, collusion, bidding or anti-competitive behavior, improper use of information by procuring entities, financial transactions between bidders, officials or any other officers of the procuring entity in relation to the tender, coercion, threat or impairment or harm caused to any bidder or officer. The final may also include obstruction to any investigation or auditing of government contracts or processes of government tendering.

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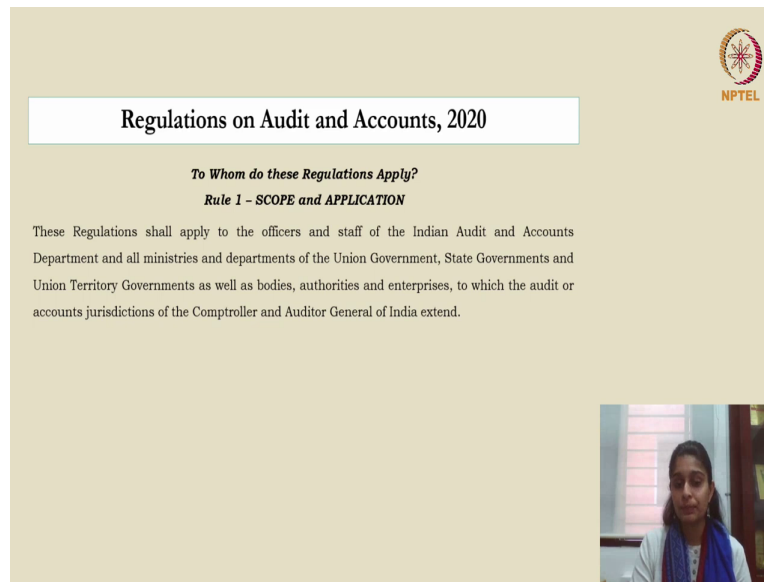
The slide features a title box at the top left with the text "CAG (Duties, Powers and Conditions of Services) Act, 1971". To the right of the title box is the NPTEL logo. Below the title box, the text reads "Chapter 3 - Duties of the CAG". Underneath, there are two bullet points: "- The Comptroller and Auditor General is the sole authority prescribed in the Constitution entrusted with the responsibility of audit of accounts of the Union and of the States." and "- It is the duty of the Comptroller and Auditor General to audit all expenditure, all receipts, and other transactions of the Governments of the Union, of each State and each Union Territory." In the bottom right corner of the slide, there is a small video inset showing a woman with a blue scarf speaking.

While there are specific duties for procuring entities and officers of procuring entities, the Comptroller and Auditor General is also vested with certain responsibilities to ensure transparency and accountability in government expenditure and government funding. So, where do these responsibilities instabilities arise from? Under the Comptroller and Auditor General, Duties Powers and Conditions of Services Act 1971, the CAG is vested with certain responsibilities and duties to ensure that there is a mindful expenditure and receipt of all transactions in the context of government contracts.

As per Chapter 3 of the Act, the Comptroller and Auditor General is regarded to be the sole authority prescribed particularly under the constitution with the responsibility of ensuring proper audit of accounts of the union as well as the states. Therefore, it is the duty of the Comptroller and Auditor General to audit all expenditures, all receipts and all transactions of the government of the union and of the states and union territories.

Now, this includes government corporations, public sector undertakings, government companies, and any other such institution, which may be regarded as a state under Article 12 of the Constitution of India.

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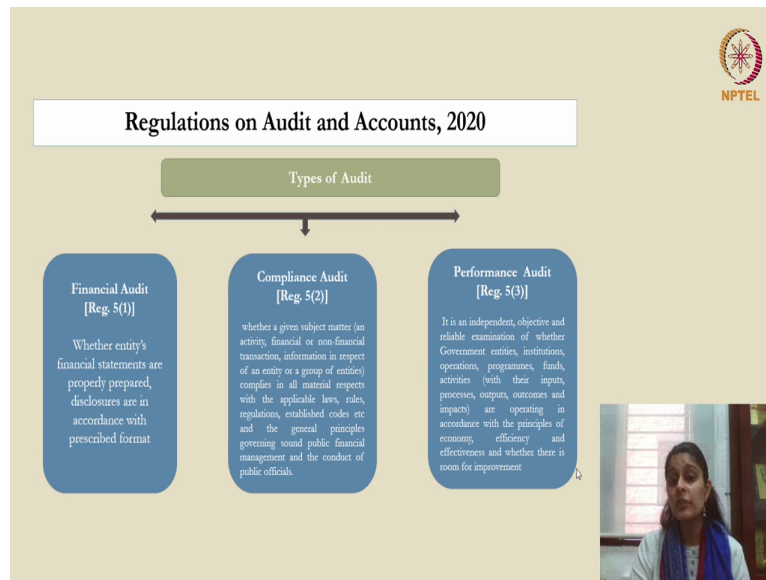
The slide features a title box at the top center containing the text "Regulations on Audit and Accounts, 2020". To the right of the title box is the NPTEL logo. Below the title box, the text reads: "To Whom do these Regulations Apply?" followed by "Rule 1 - SCOPE and APPLICATION". The main body of the slide contains the following text: "These Regulations shall apply to the officers and staff of the Indian Audit and Accounts Department and all ministries and departments of the Union Government, State Governments and Union Territory Governments as well as bodies, authorities and enterprises, to which the audit or accounts jurisdictions of the Comptroller and Auditor General of India extend." In the bottom right corner, there is a small video inset showing a woman with a blue scarf speaking.

As we have seen that the Comptroller and Auditor General is vested with certain duties for the purpose of ensuring transparency and accountability in government contracts and public procurement, let us look at the duties and responsibilities of procuring entities vis-a-vis the role of the Comptroller and Auditor General.

The Comptroller and Auditor General, Regulations on Audit and Accounts Regulations 2020 specifically applies to procure entities in the context of transactions incurred or transactions carried out for processes of public tendering, public procurement or executing government contracts. So, to whom do these regulations apply?

These regulations apply to officers and staff of the Indian Audit and Accounts Department and all ministries and departments of the central government, the state governments and the union territory governments as well as bodies, authorities and enterprises to which audit and accounts jurisdiction of the CAG applies. This means that all institutions that are regarded to be a state and are regarded to provide information of their receipts, their expenditure and transactions involving public money coming out of the public exchequer are required to be, are required to comply with the regulations on audit and accounts.

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So, how do the procuring entities comply with these regulations in providing their audits? Simply put, as per Regulation 5 of these regulations, there are three kinds of audits required to provide, to be provided by procuring entities, and they are financial audits, compliance audits, and performance audits.

So, what are financial audits? Financial audits typically relate to whether an entity's financial statements are properly prepared and whether disclosures are made in accordance with prescribed formats given by the Comptroller and Auditor General's office. As the name suggests, financial audits relate to finances and financial transactions incurred or carried out by procuring entities.

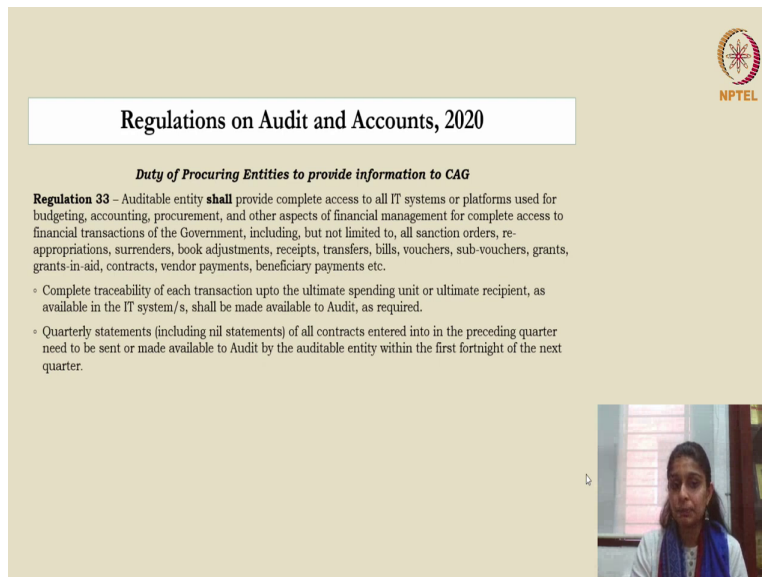
The second category of audits is compliance audits. As the name suggests, these audits pertain to compliance in relation to given transactions. So, they relate to whether a given subject matter complies in all material respects with applicable laws, rules, regulations, courts, and general principles governing public financial management and the conduct of public officials. Compliance audits specifically relate to the manner in which certain transactions are required to be carried out under a given law or guideline.

The third category of audits is performance audits. Now, performance audits are independent and objective and reliable examinations of whether certain government entities, institutions,

operations, programs, funds or activities are operating in accordance with principles of economy, efficiency and effectiveness and whether there is room for improvement.

So, performance audits generally relate to the efficiency, efficacy and economy of the manner in which transactions relating to government contracts are carried out. As we have seen in the 5Rs of the CVC manual, it is pertinent for every procuring entity to comply with the right quantity, right quality, right source, right price and the right time and place of carrying out government contracts. So, performance audits generally relate to whether such 5Rs parts have been complied with.

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The slide features a title box at the top center with the text "Regulations on Audit and Accounts, 2020". To the right of the title is the NPTEL logo. Below the title, the text reads "Duty of Procuring Entities to provide information to CAG". This is followed by "Regulation 33" which states that auditable entities must provide complete access to all IT systems and platforms used for budgeting, accounting, procurement, and other financial management aspects. A bulleted list below the regulation specifies two requirements: complete traceability of transactions up to the ultimate spending unit or recipient, and quarterly statements of all contracts entered into in the preceding quarter to be sent or made available to the audit within the first fortnight of the next quarter. In the bottom right corner, there is a small video inset showing a woman in a blue and white sari speaking.

In the final limb of our discussion on the compliances under the regulations pertaining to the Comptroller and Auditor General, let us look at the duty of procuring entities in relation to the regulations on audit and accounts. As per Regulation 33 of the 2020 Regulations, every procuring entity is duty-bound to provide certain information to the Comptroller and Auditor General in the context of certain transactions or certain expenditures and receipts pertaining to public procurement or tendering.

Under Regulation 33, auditable entities are compulsorily required to provide complete access to all IT systems, platforms or documents used for budgeting, accounting, procurement and other such aspects of financial management to ensure complete access to financial transactions of the

government or procuring entity, including all sanction orders, appropriations, re-appropriations, surrenders, book adjustments, receipts, bills, vouchers, grants, so on and so forth.

This should ensure complete traceability of each transaction up to the ultimate spending unit that is to the final transaction and this shall be made available for audits including financial performance and compliance audits. In addition to this, quarterly statements of all contracts entered into by procuring entities in the preceding quarter need to be sent or made available to the Comptroller and Auditor General's office by the auditable entity within the first fortnight of the next quarter.

So, this goes to show that every procuring entity must necessarily provide quarterly statements over and above the annual statements required to be provided in context or in the backdrop of transactions relating to certain tenders. With this discussion, we come to an end to our discourse on the laws, guidelines and general legal framework relating to government contracts, tendering and public procurement in India.