

# PUBLIC PROCUREMENT

Public procurement is the process of purchase of goods and services by the public sector. It is a key economic activity of governments, accounting for, on average, 15% of GDP worldwide.

In India, government procurement constitutes about 30% of the GDP. Procurement of goods and services is carried out by various ministries, departments, municipal and other local bodies, statutory corporations and public undertakings both at the Centre and at the State level. 'Procurement' as such does not figure in any of the lists as a distinct subject though the subject is covered under the State List heading 'Trade and Commerce'. The Union can also legislate on the subject under its residuary powers. Parliament has not enacted any legislation on the subject so far. Several states have enacted legislation on the subject, but the law is not comprehensive. Hence, public procurement is governed by government policies, rules, regulations and court judgments.

The policy framework primarily covered by the General Financial Rules (GFRs) 1963 (amended in 2005 and 2017) framed by the Ministry of Finance by executive order and the Delegation of Financial Powers Rules 1978, framed by the Ministry of Finance. In August 2006 the Central Government, through the Ministry of Finance, carried out a detailed exercise and issued three manuals providing for procurement of goods, works and services. These manuals were meant to be the guidelines to government ministries, relevant departments and public sector undertakings. The GFRs 2017 were issued by the Ministry of Finance on 11<sup>th</sup> February 2017 and came into force on 8<sup>th</sup> March 2017. Rule 153(iii) of the GFRs 2017 allows the Central Government to provide (by way of notification) mandatory procurement of any goods or services from any category of bidders, or provide for preference to bidders on the grounds of promotion of locally manufactured goods or locally provided services.

Pursuant to the GFRs 2017, the Ministry of Commerce and Industry on 15<sup>th</sup> June 2017, issued the Public Procurement (Preference to Make in India) Order 2017. The Directorate General of Supplies and Disposals Manual on Procurement and the Central Vigilance Commission (CVC) Guidelines prescribe the procurement procedure to be followed by all central ministries. The Ministry of Finance, Department of Expenditure issued a revised manual on the Procurement of Goods 2017 on 5<sup>th</sup> April 2017 and manual for Procurement of Consultancy and Other Services 2017 on 18<sup>th</sup> April 2017.

In furtherance of the Public Procurement (Preference to Make in India) Order 2017 notified vide reference cited above, the Ministry of Electronics and Information Technology (MeitY) the Public Procurement (Preference to Make in India) Order 2018 for Cyber Security Products on 2<sup>nd</sup> July 2018. State governments generally follow the same procedure as the Central Government.

## **Regulatory framework**

In common parlance, a private purchaser can choose his purchasing strategy flexibly but in case of the public sector, the options are limited in order to respond dynamically to anti-competitive behaviour owing to strict regulatory/

legislative framework and detailed administrative regulations/ procedures at multiple levels. Public procurement is subject to transparency requirements as in legislation/ administrative regulations /procedures *etc.* to avoid abuse of discretion.

In India, the legislative framework on public procurement is a mixed framework of Guidelines. Though purchases made through tenders have been a desirable and viable method of fortifying large procurements, there is still no comprehensive law on the subject. In the absence of any national legislation, prominence is given to rules, procedures and manuals that govern the process of procurement.

The following generic or sector-specific guidelines apply to Government departments and public sector undertakings:

**1. General Financial Rules 2005 (GFR) supplemented by Delegation of Financial Powers Rules 1978 (DFPR).**

The GFR provide a broad legal framework and contains the general rules on procurement applicable to all Ministries and Departments. The DFPR are rules reflecting the principles of the GFR giving the Central Government through the Ministry of Finance (MoF), the power to sanction expenditure for the purchase and execution of contracts.

**2. Defence Procurement Manual (DPM) and Defence Procurement Procedures (DPP).**

These procedures seek to balance the competing requirements of expeditious procurement and development of an indigenous defence ministry through expeditious decision-making and simplification of contractual procedures. These guidelines have expanded into the following procedures:

- Buy and Make through Transfer of Technology;
- Buy and Make (Indian); and
- Make.

DPPs were revised in 2011 and 2013 to further streamline the procurement process.

**3. Indian Penal Code 1860 and the Prevention of Corruption Act 1988.**

This two pieces of legislation prescribe criminal penalties for bidders indulging in malicious, corrupt and fraudulent practices.

**4. Rules for Central Public Sector Undertakings (CPSU).**

State Governments as well as the CPSUs have their own set of GFR that are consistent with the principles of the GFR. Some state legislations such as the Tamil Nadu Transparency in Tenders Act 1998 (and the rules framed under it in 2000) and the Karnataka Transparency in Public Procurement Act 1999 govern the issue of procurement within their respective jurisdictions.

## 5. Public Procurement Bill 2012 (Bill).

The Bill was introduced in the Lok Sabha for approval and derived its essence from the UNCITRAL Model Law of July 2011. But unfortunately the bill lapsed within 3 months of its introduction. It sought to regulate public procurement to:

- Ensure transparency, accountability and probity in the process;
- Ensure the fair and equitable treatment of bidders;
- Promote competition;
- Enhance efficiency and economy;
- Maintain integrity and public confidence in the Public Procurement process.

The Bill covers procurements for goods, services, works, procurements by PPPs, special purpose vehicles (SPVs) for execution of contracts awarded through the procurement process, and others as notified by the Central Government.

## 6. Sector specific legislations and policies.

There is no specific procurement legislation in India. However, the Electricity Act 2003 provides for determination of tariffs through a bidding process by distribution licensees for procurement of power. Similarly, the New Exploration Licensing Policy (NELP) under the Petroleum and Natural Gas Regulatory Act 2006 provides for the evaluation of bids according to the transparent quantitative bid evaluation criteria.

### Regulatory authorities.

There are no precise regulatory authorities governing the whole procurement process for the federal union, states, and local governments. The procurer must follow the due process expressed under the applicable rules at all stages until the award of contract is made. Therefore, there is no separate and exclusive regulating authority governing any material breach in the case of public procurements. However, the administrative actions of the procurers are subject to judicial review by the respective High Courts and are not subject to any overriding principles as currently no specific dedicated legislations govern the subject of public procurement.

## 7. Regulation of specific industries

There are no specific regulations pertaining to procurement for any particular industry. However, the Government ministry or department concerned must strictly comply with the requirements of the guidelines, various manuals, and the procedures for the purpose of public procurement.

### Recent trends

A major development occurred in 2012 when the Supreme Court in CBI vs. Dayanidhi Maran & others (vide Civil Appeal No. 10660 of 2010) cancelled the licences of various telecom companies for **2G Spectrum**. The Indian Government had adopted a "first come, first serve" policy at archaic rates, to keep the new licensees at par with the old licensees and to keep public costs reasonable. The policy resulted in windfall gains of billions of rupees to

the licensees and incurred losses to the public exchequer followed by serious charges of fraud and corruption levelled against the telecoms Minister.

The Supreme Court concluded that spectrum is a natural resource and as it cannot be defined universally, its value depends on its availability and demand and its distribution must promote public good against private gain. In a controversial move, the Supreme Court struck down all licences granted under the first come, first served policy and held that an auction held fairly and impartially is the best method for the state to allocate public or natural resources. The Government's view was that it cannot be bound by a defined and specific method only for the distribution of natural resources. The case has been a stepping stone towards the Bill to introduce a specific and exclusive procurement law in India.

### **Scope of Rules- Entities Covered**

In case of Public Procurement, the procurer being a Government Department, a Public Sector Undertakings (PSU), a state government, local government, or from any qualified sector therefore the bidder must adhere to the procurement rules. The Public Procurement Bill 2012 (Bill) proposed that the following entities are specifically covered under the Bill:

1. Government departments and ministries.
2. Constitutional bodies or entities that may be set up under any acts of parliament and central government undertakings (entities or companies with government shareholdings of 50% or more, directly or indirectly).
3. Special Purpose Vehicles (SPVs) incorporated for executing Public Private Partnership (PPP) contracts.

### **Exemptions-**

Entities not covered under Article 12 of the Indian Constitution can be considered as beyond the scope of the procurement rules. This implies that private bodies that are unfettered by government control are not bound by any procurement rule or guideline.

### **Contracts covered**

The rules on procurement apply to all the contracts offered by government bodies at the central, state or local level. The monetary benchmark of these contracts is approximately INR50 million. The Contracts covering the procurement rules are as given under:

1. **Public private partnership (PPP) contracts-** These concern projects based on a contract or concession agreement between a government or any statutory entity and a private company for investing in the maintenance and construction of an infrastructure asset or delivering infrastructure service.
2. **Engineering procurement and construction (EPC) contracts-** EPC contracts involve the detailed engineering design of the project by procuring all the necessary materials and equipment and constructing the facility or asset within a prescribed time frame.

3. **Concession agreements-** This is a contract between a company and a government giving the company a right to design, build, operate and maintain business within the government's jurisdiction.
4. **Operation and management (O&M) contracts-** Here a project company delegates its work to a reputed expert operator to operate and maintain projects that are owned and controlled by the government.

#### **Exemptions-**

In an exceptional situation, any ministry or government department may, by consulting with the competent authority, outsource a job that would be allowed by the competent authority to a specifically preferred contractor (Rule 184, General Financial Rules 2005). A detailed justification of the circumstances in this regard must be included in the proposal.

#### **Thresholds of contracts:**

If the value of the contract is below the limit of INR 5 million, the contract escapes the jurisdiction of the procurement regime.

#### **Aggregation/anti-avoidance rules**

There are no aggregation or anti-avoidance rules pertaining to procurements in India.

#### **Concessions**

Concession contracts are covered under the procurement regime in India. The first stage is the expression of interest (EOI) or request for qualification (RFQ). The aim is to pick out eligible bidders for the second stage of the process. The second stage is generally referred to as request for proposal (RFP) or invitation of financial bids. At this stage short-listed bidders conduct an all-inclusive assessment of the project and submit their fiscal offers before the contract is awarded.

#### **Privatizations and PPPs**

In India, privatisation is subject to the law on procurement. A due process must be complied with. These procedures are laid down in the General Financial Rules 2005 (GFR) and various other guidelines issued by the Central Vigilance Commission (CVC) and Ministry of Finance (MoF). These rules are modified from time to time through ministry notifications. The Public Procurement Bill (Bill) aims to incorporate the principles of UNCITRAL Model Law of 2011 into domestic law.

#### **Public Private Partnerships (PPPs)-**

The Government has evolved special procedures and guidelines for procurement of PPP projects based on:

- Government policy issued by the CVC and the MoF.
- Sector specific policies.
- The Public Procurement Bill.

More specific provision can be found alongside the MoF's Model request for proposal (RFP) and request for qualification provisions in addition to adoption of an integrity pact on the CVC's recommendation as a future proposal.

#### **Shared Services and "In-House" Arrangements-**

In-house arrangements attract the provisions of the various guidelines and set of rules governing procurement in India. There are no exceptions as there is no release from the rules permissible unless the project comes under threshold limit.

#### **Procurement procedures- Available procedures**

In most cases, there is one rigid procedure of bidding for procurement: the precondition of a notice that determines future procedure. Procurement is generally conducted through the advertised enquiries of tenders. The advertisement must be published by the Government in the *Indian Trade Law Journal*. The Government has now created a central public procurement portal (CPPP) within which all the prerequisites and authentications are carried out and documents are published. Proposed bidding procedures include (*Public Procurement Bill 2012*):

1. Open competitive bidding.
2. Restrictive bidding.
3. Two-stage bidding.
4. Single source procurement.
5. Electronic procurement (the procurement of goods and services effected by electronic means).
6. Spot purchase.
7. Other methods notified by the Government.

- **Open competitive bidding process-** Under this procedure the sealed bids are opened in public to enable the parties and persons interested to be aware of the selection. The time limits vary depending on the nature of the procurement and can range from six to 15 weeks (in the case of global tenders).
- **Restrictive bidding-** This procedure of bidding delimits the number of participants when the procurers create an atroupement of prequalified bidders through a thorough screening process. The time limits vary depending on the nature of the procurement and can range from six to 15 weeks (in the case of global tenders).
- **Two stage bidding-** This procedure is usually taken up in cases where a heightened sense of professional proficiency is requisite. Two bids (technical and financial) are invited from the procurers. The time limits vary depending on the nature of the procurement and can range from six to 15 weeks (in the case of global tenders).
- **Single source procurement and spot purchases-** These methods are non-competitive and are used only in exceptional circumstances after the approval of a competent authority. Procurements qualifying under this category are made in special circumstances such as emergency, limitation of cost or continuance of previous work.

The time limits vary depending on the nature of the procurement and can range from six to 15 weeks (in global tenders).

### **Procedures for procurements by regulated entities**

#### **1. Freedom of choice**

The procurer chooses to subscribe to one of the above procedures when deciding on the subject matter and nature of the procurement. The method chosen must be consistent with the criteria of pre-qualification and any restrictions that are imposed before execution.

#### **2. Suitability**

The available procedures must comply with the general principles of Rule 160 and 161 of the General Financial Rules. The parties must act in good faith, exhibit prudence and fairness in their dealings without any hint of arbitrariness or anticompetitiveness and act accordingly.

The Public Procurement Bill 2012 states that in fixing the last date for submission of bids, the procuring entity must take into account the need of the bidders to be given reasonable time to prepare and submit their bids.

### **Technical specifications**

The basic objectives of procurement activity that governs the technical specifications while inviting tenders are to promote (*Rule 137, General Financial*

*Rules*):

- Economic efficiency.
- Transparency.
- Fair and equitable treatment of suppliers.
- Competition.

Rule 137 lays down detailed procedures to avoid cartelisation, such as clarity in the specification of quality and quantity of goods to be procured while giving specifications in the tender in an equitable manner. The overriding objective is to put all the bidders on the same footing as they submit their bids without any undue advantage to a particular party.

**Alternative bids-** Generally, such bids are not recognised. In principle, a bid once placed by a bidder cannot be altered unless it is permitted by the terms and conditions comprehensively set out in the tender. Acceptance of alternative bids is circumstantial and would depend on the rarity and gravity of the case.

### **Contract award criteria Evaluation.**

The main criterion for the grant of an award is evaluation of the tender as guided by the mandate of the Constitution of India via provisions of article 53. The procurer evaluates the bid on the basis of price, quality, costs of operation, terms of payment and guarantee, and the technical and professional competence of bidders. A common ground for

selecting a bidder includes selection of the lowest bid (L1 method). These bidders are selected for projects that are economically less or not viable. The highest bidder method (H1) is for bidders who are technically qualified to participate in revenue share-based pacts ensuring a considerable margin of return for the procurer. Collectively, a procurer's scores from evaluation of the technical and financial bids are also a means to give leverage to the favourable bidder.

#### **Exception to the highest bid rule.**

Procurers are not obliged to accept the bid quoting the highest price and can settle with another bidder if they are convinced of the fact that the selection process was unbiased, fair, reasonable and non-arbitrary.

#### **National interest and public policy considerations.**

There can be outsourcing of the job of a contractor if there are exceptional circumstances (*Rule 184, General Financial Rules*). Outsourcing performed in the national interest in times of war or any disaster is considered an exceptional circumstance. Specific examples include:

- Exclusive purchase of handlooms from *khadi* and village industries notified handloom units of the Association of Corporations Apex Societies of Handlooms and the Women's Development Organisation, Dehradun.

#### **Requirements relating to contract award criteria.**

Offers of SSI Units that are given a price preference of about 15% over the lowest bid of a large scale private sector entity. The price preference is usually decided on a case sensitive footing.

#### **Changes to an existing contract**

- Extension of contract- Existing contracts cannot be automatically extended. However, they can be extended but only in extraordinary circumstances for reasons that must be in writing, with the authorisation of a competent authority.
- Amendment of contract- Generally, relaxation in the terms and specifications of the contract after its conclusion is not acceptable and is permitted only in extraordinary cases. However, where the modifications and amendments are considered to be imperative, these may be allowed after considering the financial consequences mainly to prevent losses to the public exchequer.

#### **Enforcement**

A claim can be brought against the procurer by any bidder if the contract has been awarded on irrational, arbitrary, unfair or anti-competitive grounds. A claim becomes enforceable where the procurer has discriminated illegally between parties and has not disclosed documents material to the interested parties.

### **Enforcement procedures**

A bidder can make an application for review before a procuring entity. The bidding process can be subject to limited judicial review in the exercise of the writ jurisdiction of the High Courts and the Supreme Court of India. The courts intercede in the bidding process only in cases of violation of the constitutional or any statutory requirements, or due to a lack of transparency or reasonableness, or arbitrary conduct. The same process applies to contracts that have been executed. They are subject to judicial review or specific performance through judicial intervention, with respect to breach of contract.

### **Statutes of limitation**

The Limitations Act 1963 stipulates that an award must be challenged in court within three years from the date the cause of action arose.

### **Issues in the Public Procurement in India**

In view of the preceding discussion in this article, the reality of the on-site procurement practices in the country often differs from what is prescribed because of the hurdles such as inefficient monitoring process, limited accountability and governance, limited awareness, and organizational culture. The major challenges involved in the Indian Public Procurement System may be summed up as follows:

- The absence of a comprehensive procurement Act
- Lack of standard bid documents
- Delays in activities in procurement cycle
- Unfair practices and corruption
- Anti-competitive elements
- Low participation of the domestic MSEs
- Absence of an independent grievance redressal mechanism
- Competency and skill of the procurement officials

If media reports are to be believed then the Official Government estimates predict an investment worth US\$1 trillion will be poured into the infrastructure sector over the next five years. In view of this and India's growing status as a hotspot for infrastructure projects, it is unfortunate that India lacks a specific procurement law. Hopefully, the parliament wake up to the ground realities so that the existing loopholes in the system may be plugged in time.

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