
THE
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EDITORS
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LAW BUSINESS RESEARCH

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Chapter 11

INDIA

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I INTRODUCTION

India has always lacked an exhaustive national law on procurement, even though purchase through tenders has been the most preferred and feasible method of securing large procurements. In the absence of any nationalised law, the legislators nominated the General Financial Rules, 2005 (GFR) and the Delegation of Financial Powers Rules, 1978 as the two pieces of subordinate legislation that regulated procurements in the public sector. In addition, guidelines were issued by the Directorate General of Supplies and Disposals and the Central Vigilance Commission (CVC) together with instructions by the Ministry of Finance (MoF) that were responsible for bringing about integrity in public sector procurement. Although these were essentially rules and guidelines, they gradually evolved into conventional laws of procurement practice.

The state governments and central public sector units (CPSUs) have their own general financial rules based on the broad principles outlined in the GFR. Some states, like Tamil Nadu and Karnataka, have introduced legislation for procurement, for example the Tamil Nadu Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tender Rules, 2000; and the Karnataka Transparency in Public Procurement Act, 1999.

Sectoral procurement procedures have been developed within the general framework keeping in mind the specific requirements of the sector. New defence procurement management structures and systems were set up in the Ministry of Defence that came into effect from 30 December 2002 and that are applicable to procurements resulting from the 'buy' decision of the Defence Acquisition Council. The Defence Procurement Manual 2005 and Defence Procurement Procedures, 2005 provide comprehensive guidelines in this regard. These were revised in 2008, and the Defence Procurement Procedures 2008 and 2009 enhanced the scope to include the 'make'

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procedure, and 'buy and make' (Indian) categories. These procedures were further revised in 2011 and 2013 to ensure expeditious procurement of the approved requirements of the armed forces in terms of the capabilities sought and time frame prescribed by optimally utilising the allocated budgetary resources.

Additionally, certain criminal penalties are also prescribed under the Indian Penal Code, 1860, and the Prevention of Corruption Act, 1988, for corrupt and fraudulent practices, which may be used in the case of bids where bidders undertake such practices to influence the bid process.

However, the public procurement laws underwent a recent reform in India when the Union cabinet approved the Public Procurement Bill, 2012 (the Bill) for the legislature's approval. The Bill draws substantially on the UNCITRAL Model Law of July 2011. The laws and procurement practices in the United States and European Union countries have also been taken into consideration to some extent. They have not only been suitably adapted for Indian conditions, but a number of new provisions have been formulated to suit the legal and institutional environment in India. The Bill envisages, within its ambit, procurements towards goods, works, services; procurements entered into with public-private partnerships, joint ventures (JVs) and special purpose vehicles; and such other procurements as have been specifically notified by the central government. It ensures accountability and probity in the procurement process, fair and equitable treatment of bidders, promotion of competition and enhancement of efficiency and economy, thereby maintaining integrity and public confidence in the public procurement process.

Although the Bill does not explicitly overrule the previous rules and guidelines, it proposes to restrict their applicability to the extent that such rules or guidelines are not inconsistent with the provisions of the Bill.

II YEAR IN REVIEW

India has shown remarkable economic and industrial growth in recent times. While the legislative focus remained on such growth, matters such as public procurement procedures, administrative management of agreements and purchase of services were governed by rules and instructions given by the concerned departments. Although these rules were extensive and elaborate, they lacked legislative authority and placed arbitrary powers in the hands of procurers. Thereafter, when the policy of improved industrialisation brought about a change in the scope of CPSUs, and the amount of procurements, corrupt practices and misuse of power became the main features of procurement processes. Many such cases came to light, highlighting a need for an immediate law to address this.

A recent landmark judgment² by the Supreme Court of India quashed the licences granted to telecom companies. On 2 February 2012, the Supreme Court decided upon the allocation of licences to telecom companies for the Second Generation spectrum. The government had adopted a 'first come, first served' policy at previous rates of 2001,

2 *Centre for Public Interest Litigation v. Union of India*. 2012 (3) SCC 1.

so that the new licensees were on a level playing field with the old licensees, and so that the cost to the public remained reasonable. In other words, a deliberate decision was taken not to maximise the commercial return to the government. This policy of first come, first served resulted in a windfall of billions of rupees to successful companies, and led to serious charges of fraud and corruption against the then Telecom Minister, A Raja, and other officials. The Supreme Court came to the conclusion that spectrum is a natural resource and observed that 'there cannot be a universally acceptable definition of natural resource'. It was held that a natural resource's value depends upon its availability and the demand for it, and the Supreme Court judged on these considerations that spectrum was a natural resource. The distribution of natural resources must promote public good against private gain. In a controversial move, the Court struck down all licences granted under the first come, first served policy. It held that an auction held fairly and impartially is the best method for the state to allocate public or natural resources. The state and the telecom companies have filed separate petitions challenging this view. The government's view is that it cannot be bound by a defined and specific method only for the distribution of natural resources. Some telecom companies have also threatened the government with large damages claims under their bilateral investment treaties. This case has been groundbreaking for procurement law in India.

III SCOPE OF PROCUREMENT REGULATION

In accordance with the theory of the separation of powers, India envisages a federal structure in the Constitution of India wherein the areas of operation are divided between the central and state governments. The seventh schedule of the Constitution contains three exhaustive lists of items (i.e., the union list, which enlists items that are legislated on by the central government; the state list, which recounts items that fall under the purview of the state legislature; and the concurrent list). As per the allocation of items to the authority of the state and the central government, although some items such as public health, hospitals and sanitation fall under the state list, the items that have wider ramification at the national level, such as family welfare and population control, medical education, prevention of food contamination and quality control in the manufacture of drugs, have been included in the concurrent list. 'Procurement' as a subject does not figure in the union list, state list or concurrent list that govern legislative functions in India. Therefore, the Union parliament has the exclusive power to make any laws on the subject of procurement. The public procurement legislation in India has its foundation in the Constitution specifically in light of the right to equality and non-discrimination under Article 14. This fundamental right has incorporated an obligation on all state entities to undertake all contractual arrangements through reasonable and non-arbitrary procedures and practices.

The Bill proposes to regulate the award of government contracts of over 5 million rupees by all 'procuring entities'. The 'procuring entities' falling within the scope of the Bill include public-private partnerships, central government departments and ministries, constitutional bodies or entities set up under any acts of the parliament and central government undertakings (i.e., entities or companies with 50 per cent or more direct or indirect government shareholding). As regards the monetarily defined limit, the

procuring entities are not permitted to package or divide the procurement so as to limit competition or prevent obligations under this Bill. Public procurements in certain scenarios, such as emergency procurements for disaster management or procurements for national security, have been carved out of the purview of the Bill.

IV SPECIAL CONTRACTUAL FORMS

i Framework agreements and central purchasing

The procuring entity is permitted to enter into framework agreements with one or more bidders, for a specified period of time, which sets out terms and conditions under which specific procurements can be made during the term of the agreement. A framework agreement will generally allow a purchaser more flexibility around the goods or services contracted for under the framework, both in terms of volume and also the detail of the relevant goods and services. Usually, such agreements are preferred when the procuring entity needs services and is unsure of its specific requirements and reluctant to incur the costs of the complete procurement procedure. These may include agreement on prices by way of 'rate contracts', which may be either predetermined or determined at the stage of actual procurement through competition or a process allowing their revision without further competition. Such agreements may be entered into through open competitive bidding or limited competitive bidding, wherein a defined number of participants are involved, yet unfair and anti-competitive behaviour is condemned.

ii Joint ventures

Intending bidders may form JVs to bring together their technical, financial, personnel and equipment capabilities to meet the requirements of particular contract work. For large and complex works involving higher net worth, JVs are preferred, as they provide division of cost and expertise to the bidder and serve a better guarantee to the procuring entity. Consequently, when qualifying JVs, the memorandum of understanding forming the JV agreement is thoroughly scrutinised by the procuring entity.

However, in the case of JVs involving a foreign company, the bid document may require the foreign company to incorporate a special purpose vehicle (SPV) in India for the purpose of participating and discharging the contractual obligations under the public procurement. The bid documents in most such cases also mandate that the successful bidder retains specified levels of ownership and control of the SPV so incorporated, which is typically in the form of shareholding lock-ins and change-of-control restrictions. A foreign bidder may participate on the guarantee of the Indian bidder; however, it shall be jointly and severally liable for the procurement so acquired or in any other manner as may be provided under the terms of the contract.

V THE BIDDING PROCESS

i Notice

The fundamental norms of the Indian procurement regulations stipulate transparency, and fair and equitable treatment of bidders. Thus, emphasis is placed on publishing the

pre-qualification document, bidder registration document or bidding document, as the case may be, with a detailed description of the subject matter of procurement. The Bill provides for standardisation of these documents even in terms of technical specifications. Ordinarily, procurement is conducted through advertised tender enquiries. The advertisement must be issued in the Indian Trade Journal (published by the government) and additionally in a national newspaper having wide circulation. In the past, these details were made available on the official website of the concerned departments; however, a central public procurement portal (CPPP) has been created by the government, which serves as a one-stop gateway wherein all bid documents or registration documents and other information are to be published. A panel for registration of eligible and reliable bidders may also be formed by a procuring entity, for which notice as well as the list of successfully registered bidders will be available on the CPPP.

ii Procedures

Every procuring entity would clearly identify the subject matter of the procurement, the method of procurement that it seeks to follow along with any criteria of pre-qualification, as well as any restrictions on bidders that it intends to put in place, before executing a framework agreement or initiating the procurement process.

The various procurement methods that a procuring entity may opt for under the Bill are:

- a* open competitive bidding;
- b* restrictive bidding;
- c* two-stage bidding;
- d* single-source procurement;
- e* electronic procurement;
- f* spot purchase; or
- g* any other method notified by the government.

Under open competitive bidding, the sealed bids are opened in public so that the interested persons may view the selection of the successful bidder. For convenience, the procuring entity may form a panel of pre-qualified bidders through a screening process that further participate in restrictive bidding. This limits the number of participants. In cases where greater technical and professional expertise is required, the procuring entity may follow the two-stage bidding process wherein two separate bids – a technical bid and a financial bid – are invited from the bidders. The bidders are first selected on the basis of the technical bid, and a financial bid of only successful technical bidders is taken into consideration for final selection. Single-source procurement and spot purchases are non-competitive procurement methods and should be used only after the approval of the competent authority under exceptional circumstances. Such procurement may be made in cases of emergency, cost limitation, continuance of previous or additional work that cannot be acquired from another firm or any other such circumstances that are justifiable to the satisfaction of the competent authority.

The government may also provide for electronic procurement and may also make such electronic procurement mandatory with respect to certain categories. Procurement of goods and services by governments through electronic means has been high on the

agenda in recent multilateral trade talks, and global financial institutions have also been advocating the introduction of public electronic marketplaces. Adequate research exists to show that the introduction of such mechanisms would bring greater transparency in government tenders and purchases, lead to greater savings and improved funds availability for reappropriation, and also result in downstream computerisation and streamlining of contract and inventory management, thereby bringing in further efficiencies. It is notified that communication in electronic form will be deemed to be equal to written communication.

While procuring entities cannot set out a bidding criterion that discriminates or limits the participation of any bidder, the procuring entities are empowered to promote certain categories of bidders and impose certain offsets against foreign bidders in order to promote domestic industry or further socioeconomic policies. Additionally, the government or procurers are authorised to impose norms to limit participation on grounds such as the protection of public health and policy, morality, safety, intellectual property or Indian strategic interests.

iii Amending bids

The overall technical and financial bid evaluation system is strong, with very few cases of allegations of bid modification or substitution of tender documents. Since e-tendering systems in India merely convert this traditional system into electronic format through the use of digitally signed bids submitted through the internet, the position of knowledge of bidding rules in the case of e-tendering remains equally strong in terms of the time available to study the evaluation system, transparency of the evaluation system and consistency in application of the bidding rules. In the event that any modification is made to the bidding document or any clarification is issued that materially affects the terms contained in the bidding document, the procuring entity is required to publish or communicate such modification or clarification in the same manner as the publication or communication of the initial bidding document was made. Under such circumstances, the last date of submission of bid may be postponed, and the bidder is permitted to modify or resubmit the bid within such extended time limit.

The PPP bid documents usually contain a restriction on changing the consortium members. The same, however, may be permitted by the procurer during the bidding stage where the lead member continues as before and the substitution is at least equal in terms of technical or financial capacity to the member sought to be replaced. Approval for change of composition is permitted under special circumstances and if the discretion of the authority is maintained.

VI ELIGIBILITY

i Qualification to bid

As a result of the mandate of the Constitution, the government and its agencies cannot treat citizens unequally, discriminatorily, arbitrarily or unreasonably. It must not waste public money and is accountable to judicial action if it attempts to do so. The tendering authority therefore must proceed in accordance with the limitations contained in the tender document or in the applicable manuals or rules. The bidder must possess the

necessary professional, technical, financial and managerial resources and competence required under the bidding document, pre-qualification document or bidder registration document, as the case may be, issued by the procuring entity.

A procuring entity may engage in a pre-qualification process, prior to inviting bids, for the purpose of identifying eligible bidders and qualifying such bidders on the basis of technical, professional, financial or any such reasonable grounds. However, any involvement of the bidder in the bidding process would lead to disqualification.

ii Conflicts of interest

If a bidder is in a position to materially affect fair competition or diligent performance of the procurement contract or framework agreement, or is prejudicial to the interests of the procuring entity, then such bid is required to be excluded by the procuring entity. The general rule prescribed by courts, as part of the administrative law of India, is that any person having a conflict of interest will not be part of the bid evaluation or award process. More specific provisions can be found in the documents created in relation to PPP projects under the model request for proposal (RFP) and model request for quotation (RFQ) as given by the MoF in 2009. The PPP bid document will require a declaration to the effect that the bidder intending to participate does not have any conflict of interest. A false declaration would give the procuring entity the right to forfeit the bid security. Conflict of interest may be understood to subsist when a bidder or its consortium members have a common controlling shareholding or other ownership interest, the same legal representation, access to each other's information or ability to influence the bid of any bidder, or has participated in the preparation of any document, design or technical specification for the project.

Further, most government authorities are required to adopt the Integrity Pact recommended by Transparency International, also adopted and recommended by the CVC, which additionally requires the owner to be excluded from the bidding process on involvement of any known prejudiced person. It is estimated that about 44 PSUs have duly adopted the Integrity Pact to date. A growing trend to adopt this Integrity Pact may be expected once the Bill is enacted.

iii Foreign suppliers

Foreign companies, as a general practice, may be required to set up branches, subsidiaries, or otherwise enter into JVs and other commercial arrangements, to participate in bid processes relating to public procurement processes in accordance with the terms and conditions of the bid document. In order to ensure greater accountability, the Bill proposes that the procuring entities financed under multilateral development banks, bilateral development agencies or foreign governments or pursuant to inter-governmental agreements may carry out a procurement process only after a prior approval from the central government. Under Indian law, there are no general reciprocity requirements in respect of public procurements. However, there may be bilateral or multilateral trade agreements that may extend beneficial regimes to certain nations, including direct tax avoidance regimes. Where the procuring entity has prior commercial arrangements with other international entities, the procuring entity may also be subject to requirements

of such international entities. At present, India has not entered into any such free trade agreements so as to govern procurement by foreign bidders differently.

VII AWARD

i Evaluating tenders

The criteria for evaluation and comparison of bid proposals, subject to adherence to the paramount requirements of non-arbitrariness and reasonableness (as mandated by the Constitution), would be dependent on the specifications and criterion prescribed by the procuring entity in its bid documents. As such, the procuring entity is required to evaluate bids on the basis of price, quality, cost of operation, terms of payments and guarantee, and the professional and technical competence of the bidder.

The commonly adopted mechanism for the selection of the successful bidder in bid documents includes selection of the lowest bidder (L1 method), typically adopted for the selection of the successful bidder, *inter se* technically qualified bidders, in respect of lump sum and rate contracts. Selection of the highest bidder (H1 method) is made for technically qualified bidders, in respect of revenue sharing-based contracts, and contracts that contemplate an upfront premium from the successful bidder or provide for a return on equity investment by the procuring entity. The bidder requiring the lowest government grant, or the lowest subsidy (as evaluated on a net present-value basis), is selected for projects that are financially not viable (or have low viability). Further, the selection of the bidder may also be based on the combined scores from the evaluation of their technical and financial bid, on the basis of a predetermined weightage mechanism. Under this mechanism, the financial proposals would continue to be evaluated on the basis of the methods identified above, as applicable given the nature of the bid process.

It is pertinent to note that procuring entities are not bound to accept the bid of the highest evaluated bidder and select other bidders, subject to the procuring entity being able to demonstrate that the selection process was undertaken on a reasonable, fair, transparent and non-arbitrary basis. Certain procuring entities may also reject bids that are extremely low or whose financial terms are extremely prejudicial to the bidder (this is typically evaluated on the basis of the prevailing market rates).

ii National interest and public policy considerations

Rule 184 of the GFR permits a diversion from the prescribed procurement process in cases where exceptional circumstances exist that necessitate the outsourcing of a job to a chosen contractor. The competent authority under the government or the concerned department, if satisfied by a detailed justification of the existence of exceptional circumstances, may allow the contract to be awarded on a nomination basis or by private negotiations, without following the due bidding process. Further, the provisions listed in the Bill for ensuring transparency and prohibiting anti-competitive behaviour are excluded from application if the central government deems it necessary to promote domestic industry, the socioeconomic policy of the government or in any other consideration in public interest. The central government may provide for mandatory procurement of any subject matter of procurement from any category of bidders, or purchase preference in procurement from any category of bidders. It may also limit participation on account

of the need to protect public policy, morality or safety, to protect intellectual property, or to protect the national security and strategic interests of India. Furthermore, for poor performance, a bidder may be blacklisted and prevented from all future procurement by the procuring entity.

Currently, handlooms are purchased exclusively from Khadi and Village Industries Commission, notified handloom units through the Association of Corporations Apex Societies of Handlooms and the Women's Development Organisation, Dehradun, and 358 items are reserved for exclusive purchase from small-scale industries (SSI). Where offers are received from large-scale units as well as SSI units, but some of the lowest offers were from large-scale units, the offers of SSI units were given a price preference of up to 15 per cent over the lowest acceptable offer from the large-scale private sector unit, provided that the stores were technically acceptable and satisfied the basic consideration of delivery schedule and capacity. However, the price preference admissible to SSI units will be accorded on a tender-to-tender basis. This has now been replaced with a cap of 20 per cent of the total value from the SSI.

VIII INFORMATION FLOW

The bid document will contain the requirements that a bidder must fulfil as well as the information a bidder may have to provide when submitting the bid. In addition, the bidder may also seek clarification with regard to the content of the bid document from the procuring entity within the prescribed time.

If the procuring entity has to clarify doubts of potential bidders, a pre-bid conference may be held, and records of such conference will be communicated to all bidders and exhibited at the CPPP. A record of every document, notification, decision or other information generated in the course of procurement and communicated is required to be maintained by the procuring entity.

Greater responsibility and accountability has been imposed on procuring entities for ensuring due and diligent performance of the procurement process. A procuring entity is prohibited from disclosing any such information that may impede or affect the enforcement of any law, the security or strategic interests of India, intellectual property, legitimate commercial interests of bidders or that may violate any pre-existing contractual obligations or the confidentiality of the procuring entity. The procuring entity is obliged to preserve any such information about a bidder that may be of interest to competing bidders.

IX CHALLENGING AWARDS

Generally, a contract can be challenged before a high court under its writ jurisdiction if it violates the basic provisions of the Constitution, including the fundamental provisions enlisted under Article 14 of equality, fairness and non-discrimination. To ensure efficiency and economy, the Bill also provides that the secretary-level officers of the Department of Procurement Policy will act as the chairperson and members of the Procurement Regulatory Authority that would oversee compliance with the Bill, in addition to discharging the quasi-judicial functions of investigations and settling

disputes. The Authority would also advise the government on various matters relating to public procurement.

i Procedures

A bidder unsatisfied by the conduct of the procuring entity may make an application for review before such procuring entity. The Bill also envisages setting up one or more independent procurement redressal committees chaired by retired high court judges of proven integrity and experience in public procurement, to determine whether a procuring entity has complied with the requirements of the Bill and any rules framed under it. These redressal committees would give recommendations that the procuring entity may or may not take into consideration.

Further, the monitor appointed under the Integrity Pact can be approached seeking review of any decision. Save for this, the decision of a contracting authority is final unless challenged before a court of law. Judicial review would lie before the high court of the relevant state. This is in exercise of the writ-issuing powers conferred on the high courts by the Constitution. The Indian judiciary is independent and proactive. It can review administrative actions if the same is vitiated by any bias, arbitrariness, unfairness or illegality, or if the same is discriminatory or irrational or even grossly unreasonable. However, the courts would interfere only in cases where the procedure followed is arbitrary, irrational or grossly unreasonable, or the procedure prescribed has not been followed.

ii Grounds for challenge

If the procuring entity discriminates or awards the contract in an irrational, illegal, arbitrary or unfair manner, or without making complete disclosures of material information, the interested parties may challenge such procurement process before the high court. In order to exclude the jurisdiction of courts, the Bill provides that a review application may first be filed before a grievance redressal committee if any of the provisions of the Bill are violated. However, a bidder is prohibited from challenging the determination of the need for procurement, provisions limiting participation of bidders, the decision to enter into negotiations, or the cancellation of the procurement process or the confidentiality provisions.

iii Remedies

As per the provisions of the Bill, the redressal committee, if it deems it necessary, may recommend the procuring entity for suspension of a procurement process pending disposal of the application, in the interests of justice. The time taken in settlement of disputes would vary from case to case. In cases of a violation of constitutional principles, the review procedure may take up to 60 days; in other cases, it may take up to two years. The courts may grant an injunction if necessary to prevent a miscarriage of justice or may cancel the entire procurement process *ab initio*, if necessary.

As a deterrent, penalties of up to 2 million rupees or 5 per cent of the procurement value, whichever is higher, may be imposed for any intentionally frivolous or malicious complaints before these redressal committees. In addition, an exhaustive list of offences and penalties has been provided under the Bill on account of corrupt practices,

interference in procurement processes or for breach of the code of integrity in the Bill. A bidder found guilty under such offences may be debarred or blacklisted and prevented from participating in any procurement procedures for a period of two years.

X OUTLOOK

The long-awaited Bill has laid down principles that make the process of procurement transparent and competent for all organisations, including public sector enterprises. However, the legislature is yet to provide clarification to bridge the gap between the provisions of the RFP, RFQ and CVC guidelines.

The defence procurement procedures have not been altered, and e-procurement is not yet the standard way of procuring routine and non-strategic goods and services in the government. Likewise, the implementation of 20 per cent procurement from small and medium-sized enterprises may result in lower standards, especially in the absence of any authority being made responsible for such procurement. Although certain aspects remain unclear, government procurement may be seen as an emerging tool of global integration and good governance in India.