Practical Law™
MULTI-JURISDICTIONAL GUIDE 2014/15
PUBLIC PROCUREMENT

Public Procurement in India: overview

Sunil Seth and Vasanth Rajasekaran
Seth Dua and Associates

global.practicallaw.com/4-573-7465

LEGISLATIVE FRAMEWORK

1. What is the principal legislation that regulates public procurement? What regulatory authorities are responsible for public procurement enforcement?

Regulatory framework

In India, the legislative framework on public procurement is a motley scaffold 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:

- **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. There are additional guidelines issued from time to time with the aim of fostering transparency and integrity in public sector procurement by the Directorate General of Supplies and Disposals (DGS&D) and the Central Vigilance Commission (CVC) under the instructions and office memorandums of the Ministry of Finance (MoF).
- **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.

- **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.
- **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 legislation 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.
- **Public Procurement Bill 2012 (Bill).** The Bill has been introduced in the Parliament of India for the Legislature's approval and derives its essence from the UNCITRAL Model Law of July 2011. It seeks 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.

- **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. 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. This examines the technical and financial capability of the bidders, the proposed work schedule and the monetary package.

Regulatory authorities

India is a federal union of states comprising 29 states and seven union territories. The states and union territories are further subdivided into districts. 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 of the competent jurisdiction.

2. What are the overriding principles of the legislation listed in *Question 1*?

There are no overriding principles as there is currently no specific dedicated legislation governing the subject of procurement.

The law is stated as at 1 July 2014.

Regulation of specific industries

3. Are any industries subject to specific regulation?

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. For example, the Ministry of Defence is under an obligation to adhere to the Defence Procurement Manual and Defence Procurement Procedures.

RECENT TRENDS

4. What are the recent trends in the public procurement sector?

A major development occurred in 2012 when the Supreme Court of India (Supreme Court) 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

5. Which entities must comply with the procurement rules? Are there any exemptions?

Entities covered

Both the procurer being a Government Department, Public Sector Undertakings (PSU), a state government, local government, or from any qualified sector and the bidder must adhere to the procurement rules.

The Public Procurement Bill 2012 (Bill) proposes that the following entities are specifically covered under the Bill:

- Government departments and ministries.
- 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).
- 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

6. What contracts do procurement rules cover? Are there any exemptions?

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 thought to equal or exceed INR50 million. Examples include:

- **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.
- **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.
- **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.
- **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, the circumstances leading to the outsourcing and the special interest or purpose must be an integral part of the proposal.

7. Are there specific thresholds to determine if a contract is subject to the public procurement regime? Are there any aggregation/anti-avoidance rules?

Thresholds

If the value of the contract is below the limit of INR5 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

8. Does the procurement regime apply to concession contracts? If not, how is the award of concession contracts regulated?

Concession contracts are covered under the procurement regime in India. The first stage is generally referred to as 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. The contract is then awarded.

Privatisations and PPPs

9. Are privatisations and PPPs subject to the procurement regime? If not, what are the relevant legal rules?

Privatisations

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.

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 Bill.

More specific provision can be found alongside the MoF's Model request for proposal (RFP) and request for qualification provisions. In addition, the government authorities are expected to adopt an integrity pact on the CVC's recommendation.

Shared services and "in-house" arrangements

10. Do shared services projects and "in-house" arrangements trigger the application of the public procurement requirements? Are there any exemptions?

In-house arrangements attract the provisions of the various guidelines and set of rules governing procurement in India. There are no exceptions because there is no release from the rules permissible for in-house arrangements unless the project comes under the threshold limit (*see Question 7*).

PROCUREMENT PROCEDURES

11. What procedures do regulated entities use when carrying out procurements? Can regulated entities freely choose between the procedures? When is it appropriate to use each procedure?

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*):

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

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.

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 anti-competitiveness and act accordingly. Judicious use of public money and equal treatment to all the bidders must also be applied in assessing the suitability of a bid.

Key features

12. What are the key features of each procedure? What are the applicable time limits?

Open competitive bidding process

Key features. Under this procedure the sealed bids are opened in public to enable the parties and persons interested to be aware of the selection.

Time limits. 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

Key features. This procedure of bidding delimits the number of participants when the procurers create an attroupement of prequalified bidders through a thorough screening process.

Time limits. See above, *Open competitive bidding process: Time limits*.

Two stage bidding

Key features. 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.

Time limits. See above, *Open competitive bidding process: Time limits*.

Single source procurement and spot purchases

Key features. 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.

Time limits. See above *Open competitive bidding process: Time limits*.

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

13. Are there any requirements concerning technical specifications of tenders?

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

14. Are there specific rules in relation to 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

15. What are the requirements relating to 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. 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.
- 358 items that have been categorised as reserved for exclusive purchase from small scale industries.
- 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

16. Does an extension or amendment of an existing contract require a new procurement procedure?

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. The intent is always to prevent losses to the public exchequer.

ENFORCEMENT

17. Who can bring a claim for non-compliance with procurement legislation? What are the available review procedures? Are there any associated statutes of limitation?

Right to bring a claim

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.

The Public Procurement Bill 2012 suggests the setting up of independent procurement redressal committees presided over by ex-High Court judges of "high moral character". The monitor appointed under the pact can ask for a review and the forum's decision will be binding unless challenged in a court of law of the appropriate jurisdiction.

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.

REFORM

18. Are there any proposals for reform of the procurement legislation? If so, when are they likely to be implemented?

Official Government estimates predict 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 surprising that India lacks a specific procurement law. The Public Procurement Bill 2012 is currently pending in the Union Parliament. Its provisions lay down various principles of law such as good faith, equity and anti-arbitrariness to make the process of procurement transparent and enhance its competency.

Practical Law Contributor profiles

Sunil Seth, Senior Partner

Seth Dua and Associates
T +91 11 4164 4700
F +91 11 4164 4500
E sunil.seth@sethdua.com
W www.sethdua.com

Professional qualifications. Enrolled with Bar Council of Delhi; practising Advocate before the Supreme Court of India and various High Courts

Areas of practice. Corporate law; M&A; infrastructure projects; procurements laws; aerospace and aviation; defence; PPP projects; real estate.

- Advising multinational and Indian corporations in setting-up business operations in India either as joint ventures and wholly-owned subsidiaries either as greenfield projects or through the M&A route.
- Advising clients in sectors as diverse as aerospace, defence, automotive, industrial, engineering, consumer goods, infrastructure, construction, real estate, hospitality, health care, power, oil and gas, water, roads and transport.
- Advising clients on procurement laws, policies and regulations across various sectors.

Languages. English, Hindi, Punjabi

Vasanth Rajasekaran, Partner

Seth Dua and Associates
T +91 11 4150 6665
F +91 11 4164 4700
E vasanth.rajasekaran@sethdua.com
W www.sethdua.com

Professional qualifications. Enrolled with Bar Council of Delhi; practising Advocate before the Supreme Court of India and various High Courts

Areas of practice. International commercial arbitration; infrastructure projects (roads, power, airports, ports, railways, water and sanitation); defence; aerospace and aviation; PPP projects; procurement laws; general litigation.

Recent transactions. Advising the Ministry of Finance of the Government of India on procurement process and drafted the Procurement Manual for Socio–Economic PPP.

Languages. English, Hindi, Tamil