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# PUBLIC PROCUREMENT LAW AROUND THE WORLD

Collection of articles

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## **PUBLIC PROCUREMENT LAWS IN INDIA**

### **I. Introduction**

There is no umbrella legislation governing public procurement in India. On the contrary, public procurement in India is governed by a framework involving constitutional provisions, guidelines contained in certain judgements of the Supreme Court of India, various central and state legislations and guidelines contained in various policies, rules and manuals formulated by the Central Government and the State Governments which are updated from time to time.

Public procurement is a commercial contract between procurer (buyer of goods and services) and suppliers (sellers of goods and provision of services). Commercial contracts have terms and conditions which when accepted by both the procurer and the supplier bind

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them with the contractual obligations in-built in the contract or the tender document. In public procurement, the contract emanates from sharing the “tender document” in public domain by a government or government-owned enterprise for all willing suppliers (enterprises) to consider, negotiate and finalise and thereafter both parties implement the terms and conditions of the tender document to logical conclusion of commercial activities.

## II. Framework of constitutional provisions and legislations

Amongst other constitutional provisions, the mandate of Article 14 of the Constitution of India and the judicially evolved rule of administrative law in India requires a public procurer “not to act arbitrarily”. For instance, if a norm or a standard has been laid down by the procurer in the notice inviting tender, then the procurer must conform to such standard.

In *Ramana Dayaram Shetty v. The International Airport Authority of India and Others*<sup>1</sup>, the procurer by a public notice had invited tender for putting up and running a second-class restaurant and two snack bars at the Bombay International Airport. One of the tender conditions in the notice inviting tender stipulated that only a person running a registered Hind Class hotel or restaurant and having at least 5 years’ experience would be eligible to tender. However, subsequently, the procurer accepted tender of an applicant which did not satisfy the condition of eligibility prescribed in the notice inviting tender. The Supreme Court held that action of the procurer was in contravention of the mandate of Article 14 of the Constitution of India and the judicially evolved principles of administrative law. In the Supreme Court’s view, the procurer was bound to conform to a reasonable and non-discriminatory standard or norm laid down in the notice inviting tender. The Supreme Court held that:

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<sup>1</sup> 1979 AIR 1682.

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*“...Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by Article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory”.*

Similarly, in *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir and Anr.*<sup>1</sup>, a case where an award of contract to a party was questioned on the ground that it was arbitrary, *malafide* and not in public interest and was made without affording an opportunity to others to compete, the Supreme Court of India held that:

*“Though ordinarily a private individual would be guided by economic considerations of self-gain any action taken by him, it is always open to under the law to act contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the Government is not free to act as it likes in granting largess such as awarding a contractor selling or leasing out its property. Whatever be its activity, the Government is still the Government and is, subject to restraints inherent in its position in a democratic society. The constitutional power conferred on the Government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the Government has a public element in it, and it must, therefore, be informed with reason and guided by public interest. Every action taken by the Government must be in public interest; the Government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the Government awards*

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<sup>1</sup> [1980] 3 SCR 1338.

*a contract of leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid”.*

In addition to the constitutional and administrative law principals evolved by the Constitutional Courts of India, there is also body of central and state legislations which applies to and regulates public procurement activities. Some of the most important central legislations (or central statutes) which apply to procurement activities of the Central Government and the various State Governments are:

1. The Competition Act, 2002 (“**Competition Act**”) which has established the Competition Commission of India to prevent practices having adverse effect on competition in the markets in India (the relevant provisions of the Competition Act have been dealt with in detail in Section III of the present chapter);
2. The Prevention of Corruption Act 1988 which is the principal anti-graft legislation in India with severe penal consequences for violators;
3. The Contract Act 1872 and the Sale of Goods Act 1930 which are the principal legislations governing commercial agreements in India;
4. Rules, Regulations and Guidelines framed from time to time by the Central and State Vigilance Commissions/authorities; and
5. The Right to Information Act, 2005 which mandates timely response to a citizen’s requests for government information and is extensively used to obtain information pertaining to tenders and assessment of tender bids.

It is pertinent to note that in addition to the aforementioned central legislations, certain State Legislative Assemblies in India have codified the procedures for inviting and accepting tenders to maintain transparency in the procurements undertaken by the respective State Governments. For instance, in the State of Tamil Nadu, the Tamil Nadu State Legislative Assembly has enacted the “Tamil Nadu Transparency in Tenders Act,

1998” which contains broad guidelines for regulation of procurement by the State Government of Tamil Nadu. The Tamil Nadu Transparency in Tenders Act, 1998, among other things, lays down the procedures for appointment of Tender Inviting Authority and the procedures for opening, evaluation and acceptance of tenders. The State of Karnataka and the State of Rajasthan have similar legislations called “The Karnataka Transparency in Public Procurements Act, 1999” and “the Rajasthan Transparency in Public Procurement Act, 2012, respectively.

### **III. Framework of administrative guidelines**

The most important set of rules in connection with public procurement in India are contained in the General Financial Rules, 2017 (“GFRs 2017”). The General Financial Rules (“GFRs”) are a compilation of rules and orders of Government of India to be followed while dealing with matters involving public finances.

These rules and orders are treated as executive instructions to be observed by all Departments and Organisations under the Government and specified Bodies except otherwise provided for in these Rules. General Financial Rules were issued for the first time in 1947 bringing together in one place all existing orders and instructions pertaining to financial matters. These have subsequently been modified and issued as GFRs 1963, GFRs 2005 and GFRs 2017.

Chapter No. 6 of the GFRs 2017 deals with *Procurement of Goods and Services* and is applicable to all Ministries or Departments, of Government of India regarding procurement of goods required for use in the public service. Government Departments are, however, free to formulate detailed instructions relating to procurement of goods broadly in conformity with the GFRs.

Among other things, Rule 163 of the GFRs introduces a “Two bid system”, that is a system involving simultaneous receipt of separate technical and financial bids. The GFR prescribes that for purchasing high value plant, machinery etc. of a complex and technical nature, bids may be obtained in two parts as under :

- (i) Technical bid consisting of all technical details along with commercial terms and conditions; and
- (ii) Financial bid indicating item-wise price for the items mentioned in the technical bid.

Further, the technical bid and the financial bid should be sealed by the bidder in separate covers duly super-scribed and both these sealed covers are to be put in a bigger cover which should also be sealed and duly super-scribed. The technical bids are to be opened by the purchasing Ministry or Department at the first instance and evaluated by a competent committee or authority. At the second stage financial bids of only these technically acceptable offers should be opened after intimating them the date and time of opening the financial bid for further evaluation and ranking before awarding the contract.

However, as per Rule 146, subject to satisfaction of the following conditions, a two-stage bidding may also be adopted:

- It is not feasible to formulate detailed specifications or identify specific characteristics for the subject matter of procurement, without receiving inputs regarding its technical aspects from bidders; or
- The character of the subject matter of procurement is subject to rapid technological advances or market fluctuations or both; or
- Ministry/Department seeks to enter into a contract for the purpose of research, experiment study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs; or
- The bidder is expected to carry out a detailed survey or investigation and undertake a comprehensive assessment of risks, costs and obligations associated with the particular procurement.

The GFR (Rule 175) also contains a very strict code of integrity which applies to both the procurer and the bidder and covers a wide range of undesirable and unlawful conduct such as solicitation or acceptance of bribe, bid rigging or collusive bidding, providing false declarations, suppression of previous transgressions, etc.

In addition to the GFR there are also sector specific guidance and policies for public procurement in India. For instance, defence procurement is governed by the Defence Procurement Procedure, 2016 and the Defence Procurement Manual 2009 (as amended from time to time), New Exploration Licensing Policy (“NELP”) governs the energy sector, the Preference for Domestically Manufactured Electronic Products Policy (2013) applies to electronic product procurement for government purposes, National Policy on Biofuels and a Strategic Plan for New and Renewable Energy Sector applies to the Renewable Energy sector, Pharmaceutical Purchase Policy 2013 applies to procurement of medicine, etc.

Ministry of Finance, Government of India in terms of its Office Memorandum No. F.1/26/2018-PPD dated 02 April 2019 has introduced adoption of “Government e-Marketplace” (GeM) norms by making suitable amendments to the GFR-2017 strengthening the concept of transparency in public procurement and ensuring fairness in the process encouraging electronically-backed public procurement methods.

#### **IV. Competition Act, 2002**

##### *Competition Concerns in Public Procurement<sup>1</sup>*

The competition concerns arising from public procurement are largely the same that can arise in an ordinary market context such as collusive agreements between bidders during the auction process or across actions. In past, many Comptroller and Auditor General of India (CAG) audit reports, vigilance reports of Central Vigilance Commission (CVC) and various studies have highlighted wide scale prevalence of cartelization and bid rigging in government procurements. The overarching concern with public procurement is that, because formal rules governing public procurement make communication among rivals easier, they can promote collusion among bidders and therefore reduce rivalry, with detrimental effects on the efficiency of the procurement process. In particular, in

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<sup>1</sup> Extracts from the Competition Commission of India Advocacy literature.



those instances where entry is difficult and when bidding is not based on a “*winner-takes all*” competition, collusion can emerge as easily in auctions and bidding processes as in ordinary economic markets. It is frequently noticed that the procurement mechanism adopted in most government departments is itself not designed keeping in mind the importance of competition in ensuring efficient outcome. Moreover, in some cases the mechanism itself is facilitating anti-competitive practices. The peculiarity in case of public procurements is that, due to the regulations and legislations, the officials have limited strategic options to curb such practices. Whereas a private purchaser can choose his purchasing strategy flexibly, the public sector has limited options to respond dynamically to anti-competitive behaviours owing to strict regulatory/ legislative framework and detailed administrative regulations/ procedures at multiple levels. These rules are set as an attempt to avoid any abuse of discretion by the public sector. However, full transparency of the procurement process and its outcome can promote collusion. Disclosing information such as the identity of the bidders and the terms and conditions of each bid allows competitors to detect deviations from a collusive agreement, punish those firms and better coordinate future tenders.

#### *Importance of Competition in Public Procurement*

An efficient public procurement policy can affect competition in a number of ways: (i) Short-term effects on competition amongst potential suppliers i.e., effects on the intensity of competition amongst existing suppliers in a particular tender is just one possible effect, but it is not the only one. (ii) Apart from immediate impact (loss of public money) of anti-competitive practices, there is a deeper consequence on overall efficiency in the domestic market. Public procurement can have other, longer-term effects on competition as public procurement can affect important features of an industry sector (such as the degree of innovation, the level of investment, vertical integration, etc. This in turn would be reflected in the level of competition in future tenders.

Public procurement, it is reiterated and reaffirmed, a process by which the purchase of goods and services by the public sector i.e., State-Owned-Enterprises (SOEs) engage into a key economic activity

of governments, accounting for on average, for 15% of GDP worldwide. In India, government procurement constitutes about 30% of its 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. The primary objective of an effective procurement policy is the promotion of efficiency, i.e., selection of a supplier with the lowest price or, more generally, the achievement of the best value for money. Effective public procurement avoids mismanagement and waste of public funds. Vigorous competition among suppliers helps governments realize these objectives. Conversely, when competition is curtailed – for example when suppliers engage in bid rigging -taxpayers’ money is wasted as governments pay more than a fair price. It is critical that procurement regulations do not unwittingly facilitate collusive arrangements. The formal rules that govern procurement, the way in which an auction is carried out and the design of the auction itself can all act to hinder competition and help promote or sustain bid-rigging conspiracies.

#### *Role of Competition Agency in Public Procurement*

Reducing collusion in public procurement requires strict enforcement of competition laws and the education of public procurement agencies at all levels of government to help them design efficient procurement processes and detect and remedy collusions.

## **IV. Conclusion**

As per the World Bank data provided on the website of the Department for Promotion of Industry & Internal Trade (“DPIIT”), Ministry of Commerce & Industry, the size of public procurement spending in India is estimated to be around 30% of the Gross Domestic Product (“GDP”). According to the Central Public Procurement Platform (CPPP) Report, e-tenders worth INR twenty lacs crores (approximately equal to USD 265 billion) were invited on NIC e-tendering platform alone in 2018-19.

However, according to the DPIIT, public procurement is not only a very significant portion of the GDP but is also a tool to achieve various development objectives of the Government such as supporting domestic industries, supporting innovation, preserving competition in the domestic market, etc. Further, the DPIIT considers public procurement as an important instrument to support domestic manufacturing activity and to build a strong ecosystem of entire value chain of production including that of components, subcomponents and ancillary services base in the country. Given the importance attributed to public procurement, its regulation remains strict and as mentioned in earlier portions of the present chapter involves various frameworks. In this backdrop, it is crucial for suppliers to remain aware and sufficiently prepare to tackle the complexities of the regulations surrounding public procurement in India.