

The Public Procurement Bill: Good Law, Poor Reality

The size of the public procurement market in India is approximately 29 percent of its gross domestic product. There is no central law or policy to govern this market. In 2012, a Public Procurement Bill was tabled in the lower house of Parliament under the previous government; however this Bill has lapsed with dissolution of the house holding General Elections. Thus, it needs to be reintroduced if it is to become a law. Looking at the current situation of corruption and other anti-competitive activities faced by India, the issue note suggests that the Public Procurement Bill 2012 should no more just remain on table, in fact it should be passed without any further delays, to have a corruption free procurement process by government.

Public procurement is the purchase of goods or services by the public sector and it generally accounts for a large share of public expenditure in a domestic economy. Public procurement¹ may be defined as, “the purchase of goods and services by governments and state-owned enterprises. It involves a sequence of related activities starting with the assessment of needs through awards to contract management and final payment.” The prime objective of procurement by any government is to get the right product or service, at the right price and quality and at the right time.

Government Procurement accounts for about 30 per cent of India’s GDP. The process of procurement in India has been vulnerable to corruption, collusion, fraud and manipulation. As a response to this, the Government of India has already taken a stand to streamline all public procurement. As a first step to strengthen the public procurement process, the government through the Ministry of Finance, has formulated a draft Public Procurement Bill (PPB) 2012, which is yet to become a law.

The PPB 2012, would go a long way in strengthening the competition enforcement regime in the country as it entails many provisions specially designed to counter the anti-competitive concerns in procurement process.

Apart from following stated highlights of the Bill, the following core provisions of the Bill also emphasises that main thrust of the PPB is on improving competition and probity.

¹ OECD (2013), Government at a Glance 2013, OECD publishing. Available at: http://dx.doi.org/10.1787/gov_glance-2013-en Last accessed on 20.10.2014

HIGHLIGHTS OF THE BILL

Clause 6(2)	Codifies the basic norms governing public procurement and requires the procuring entities and their officials to comply with the norms
Clause 4(1)	Exemption of procurement below Rs. 50 lakhs and those made for disaster management
Clause 29(1) 29(2)	Bill prefers Open Competitive Bidding, but give adequate flexibility for other methods of procurement also
Clause 38(1)	To promote transparency the bill promotes setting up of Central Public Procurement Portal by Central Government
Clause 45(1)	prescribes penalty for those who engage in any form of anti-competitive behaviour

Competition-Promoting Procedures in Public Procurement

Currently there is no single law governing procurement by central government. Instead, public procurement is governed by multiple regulations such as guidelines of GFR 2005, CVC, CAG and many others. Although GFR favours open competition, still public procurement in India is marked by departure from competitive bidding because GFRs do not have the status of law.

On the other hand PPB 2012 comprehensively addresses competition issues by incorporating pre-bidding criteria for bidders, promoting open competitive bidding as the norm, fixing timelines for processing of bids, promoting e-procurement. Such provisions bring the Bill at par with best international practices.

However, the jewel-in-the-crown of any system of rules is its ability to address perceived transgressions i.e. whether the rules have enforceability or they are just best intention clauses. Unfortunately, in this area the Bill weakens. In addition, to promote competition the bill treats domestic and foreign bidders on par.² Some commentators have criticised the Bill on the ground that the provision of non-discrimination

² The Public Procurement Bill,2012: Clause 11(1)

between foreign and domestic players goes against the rationale of government procurement in general. The second major point made by those who critique the non-discriminatory nature of PPB is that it goes against the recent policy developments in India.³ Contrary to this, promoters of the Bill claim that in promoting competition through non-discrimination, the concerns for promoting domestic bidders wherever required is taken care of through the wording of the Bill.

Public Procurement and Trade Policy

Public procurement covers around Euro 1000 billion of world trade per year. Opening up of public procurement market would imply more number of potential suppliers and benefits in terms of:⁴

- Efficient use of resources
- Enhanced competition leading to powerful fight against corruption
- Increased transparency
- Improved access to foreign markets

Indian government procurement market is sufficiently open though government has the right to place restrictions on foreign companies. For example: In case of railways foreign firms are free to participate in tenders advertised in India, as in case of rolling stock, wheels, machinery etc. However to safeguard interest of domestic players, the bill allows central government to provide mandatory procurement of any subject matter of procurement from any category of bidders, or purchase preference in procurement on grounds of : (a) promotion of domestic industry; (b) socio-economic policy of the Central Government; (c) any other consideration in public interest. These preferential treatments to safeguard domestic industries are globally justified since the GPA has a special provision for developing countries to extend preference for development of domestic industries.⁵

Public Procurement and Sustainability

The Thirteenth Finance Commission of India emphasised the need for incentivising growth of India

³ For example: In order to increase the share of manufacturing in GDP, the National Manufacturing Policy (NMP) 2011 has considered the use of public procurement in various sectors such as solar energy equipment, electronic hardware etc., but treating foreign and domestic bidders at par goes against this criteria of NMP.

⁴ Public Procurement: Need for a National Policy in India, CUTS International, 2014.

⁵ The Public Procurement Bill, 2012: Clause 11(2)

with lower environmental and resource footprint. In this respect, sustainable public procurement is a necessary tool for fulfilling the stated commitment of the country towards a green and inclusive growth.

Given the rapid population and industrial growth India has experienced, the impacts on the environment seem to be manifold. Over the years, India has experienced decrease in availability of water levels, increasing water pollution etc. Thus given the alarming situation, addressing sustainability becomes an important issue. In this regards, the PPB 2012, introduces a clause that professes to include environmental criteria of a product as one of the criteria for evaluation of tenders.⁶ This could help in revolutionising Public procurement policy by introducing sustainability concepts in government procurement.

India is witnessing new cases of corruption by the passing of each day. These cases are raising serious questions over the intent and efficiency of government. Keeping these facts in mind, anyone can understand the importance of an effective and transparent public procurement system.

The introduction of Public Procurement Bill 2012, which will be debated in parliament anytime soon, is an opportunity to put India on the track to have an effective and efficient public procurement system. The bill ensures adoption of competitive methods of procurement, but as integration of the world economy increases, cross-border anti-competitive conduct makes cooperation amongst competition authorities as a necessity in promoting competition.

The Bill ensures country's commitment to sustainable development, but such a law should be complemented by the actions, such as defining roles and responsibilities for agents at each stage of procurement process.

In end, Looking at the current situation of corruption and other anti-competitive activities faced by India, with inclusion of some safeguards to protect the interest of domestic players and others, the Public Procurement Bill 2012 should no more just remain on table, in fact it should be passed without any further delays, to have a corruption free procurement process by government.

⁶ The Public Procurement Bill, 2012: Clause 21(d)

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the views or position of CUTS Institute for Regulation & Competition (CIRC).

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