

BUSINESS INPUTS TO THE PUBLIC PROCUREMENT BILL, 2012

Observing the revival of interest in the subject of public procurement by present Government, manifested by the Finance Minister's reference in his Budget Speech of 2015 to a public procurement law on the UNCITRAL model to check "Malfeasance in public procurement", followed by public consultations for introduction of changes in the Public Procurement Bill, 2012, GCNI CEGET developed an initiative for garnering business inputs for the PPB, 2012.

Prior to this, in April 2012, GCNI had organized a National Consultation on Transparency and Anti-Corruption Measures in Procurement in India, in partnership with United Nations Office of Drug and Crime (UNODC). At this event GCNI had facilitated the process of knowledge – sharing and supporting the work of businesses in creating transparent and ethical procurement practices in a proactive manner.

Presently GCNI CEGET's Working Paper 'Business Recommendations for Public Procurement Legislation in India' focuses on seven propositions around – **Coverage, Competition, Transparency, Market Access, Grievance Review and Redressal, Probity and Sustainable Public Procurement**. The paper can be accessed at <.....>. *The set of recommendations put forth in this document should be read along with the working paper, as they complement each other.*

This paper was deliberated on at a Consultation in New Delhi on June 6, 2016 and the feedback received from subject experts and business stakeholders have been put forth in this document for further refining of recommendations. The final set of business recommendations would be shared with relevant ministries in the central government. CEGET is in the process of developing policy solutions, based on these recommendations as well as industry good practices in procurement. This process would significantly contribute to development of Public Procurement legislation in India, inclusive of delegated legislation at the Centre, as well as similar legislations at the State level (since procurement is a state subject).

- 1.1 The National Consultations held by the Department of Expenditure in July 2015 seemed to indicate that amendments which were being proposed to be made to the Bill of 2012 were most likely with the purpose of aligning the Bill to meet the present Government's emphasis on reviving the economy through improving 'ease of doing business'.
- 1.2 With the objective of viewing the Public Procurement Bill from the perspective of whether it meets the standards of 'ease of doing business', an initial analysis by a

subject expert was commissioned by GCNI, followed by a consultation with select business and industry stakeholders in New Delhi on 6th June 2016.

Public procurement law to optimize ‘ease of doing business’

2.0 At the business consultation, business stakeholders have expressed a view that a law on Public Procurement may not necessarily be a dampener on the ease of doing business, provided necessary changes were effected in the original draft Bill. The collective business view was that a public procurement law was necessary to optimize the ease of doing business for the following reasons :

- At the moment, the regulation of public procurement is riddled with too many rules¹, that are not always in harmony with each other, thus leading to a confused situation, subjective/arbitrary interpretation of rules, giving an opportunity for breeding both corruption and inefficiency
- The General Financial Rules (GFR), on which all public procurement procedures are currently based, is an internal set of administrative rules for government departments and do not carry any obligations for suppliers or the public.
- Another need for introducing a public procurement law lies in the high volume/value of public procurement, which is by some estimates 20-30% of India’s GDP and covers almost all spheres of government activity. Regulation having the weight of law then becomes necessary to properly govern such a large sector.
- The Central Public Sector Enterprises’ (CPSEs’) own procurement manuals prescribe high standards of procurement practices, and so the CPSEs are of the opinion that in case a central law is introduced on the subject, it would not add further to their compliance burden/ stifle business initiative.
- The small scale sector business feels that if public procurement law focuses only on the economic perspective, it would be a very narrow view. It was opined that the social and political aspects should also be considered and the procurement law should be framed for inclusive development of the country, including environmental aspects. Thus, as is the case with the General Financial Rules (GFR), all current public procurement procedures are concerned only with the ‘value for money’ or the economic aspect of public procurement. They need to be substituted with a comprehensive, overarching public procurement law, which ensures greater social and environmental equity.
- Public Procurement to offer better opportunities in procurement for the SME sector.
- Another view was that a single law on public procurement is a necessity from the perspective of our obligations under the UN Convention Against Corruption (UNCAC), that India ratified on 9th May 2011.

¹ Rules governing Central public procurement are mainly incorporated in the General Financial Rules (GFR) 2005; the Delegation of Financial Powers Rules (DFPR) 1978; Central Vigilance Commission (CVC) guidelines; the procurement directives of the MSME Ministry for encouraging procurement from the Small & Micro Enterprises (SMEs); the Ministry of Finance’s Manuals on Policies & Procedures for Purchase of Goods, Works & Consultancy; and the internal guidelines of major procuring Ministries and Central public Sector Enterprises (CPSEs) etc.

Shape of public procurement law

2.1 At the consultation of 6 June, '16, the view that an enactment on the subject which would be consistent with the 'ease of doing business' principle, was perceived by the business and industry as having the following 7 main elements:

COVERAGE

3.0 At present the Public Procurement (PPB) Bill 2012 prescribes a monetary threshold of Rs. 50 lakhs for coverage under the law. Both private and public sector business feel that there should not be any monetary threshold limit for the public procurement law to apply. This is necessary as small procurements could multiply and add up to or equal large (over threshold limit) procurements, leading to the same risk of corruption.

3.1 As regards sector-wise coverage, the PPB 2012 covers all sectors except for emergency procurement under the Disaster Management Act 2005, or procurement for national security or strategic considerations. Although business representatives initially felt that there should be no exempt sectors, when it was clarified that defence procurement is governed by the Defence Procurement Manual and emergency procurement is limited only to emergency as defined under the Disaster Management Act, and that such exemptions are aligned to international practice, they agreed that these sectors should be exempt from the purview of the law.

COMPETITION

4.0 It is felt by Business that the PPB 2012 is correct in enshrining open competitive bidding as the preferred mode of tendering (under section 30 PPB) and necessity for justification must be there if other tendering modes are used.

Appropriate bidding mode for complex procurements

4.1 However, it is felt that a lacuna exists in the tendering modes, in that there is no appropriate bidding mode to meet a situation involving complex types of procurement, where the procurer cannot in advance specify the technical, financial or legal aspects of a project and therefore needs inputs from the private sector to conceive and formulate the project. In India, in such situations, the State Governments have been resorting many a times to the 'Swiss Challenge' mode and it is understood that GOI is also using/going to use the Swiss Challenge mode in some projects, like the development and modernization of railway stations. Under the Swiss Challenge method, "an un-solicited proposal for a government project is received and allows third party to challenge the original proposal through open bidding and then lets the original proponent counter-match the most

advantages/most competitive offer". (Vide Rule 79 A of the Rajasthan Transparency in Public Procurement Amendment Rules of August 2015.) However, in utilizing the Swiss Challenge mode, it is observed that due to information asymmetry, the initial proponent is unduly favoured and therefore normally wins the contract. GCNI therefore believes that the Swiss Challenge is not the fairest mode of tendering in complex types of public procurement.

Instead the 'Pre-Bid Conference' mode, which is used in India for procurement in complex technical bids, where the specifications are not known in advance by the procuring authority, could be further developed to deal with large public procurement projects having complexity in their features².

Conflict of interest

4.2 Regarding the problem of conflict of interest, which often occurs to distort competition in public procurement, Section 45 of the PPB 2012 makes the supplier responsible for guarding against conflict of interest by prohibiting the supplier from hiring recently retired personnel who have worked in the procuring agency. The business community represented in the Consultation on 6th June, 2016 feels that conflict of interest is not a one-way traffic, and both the contracting agency as well as the supplier are responsible for ensuring that conflict of interest does not arise by mandating 'Disclosure' by personnel of both the procuring agency and the supplier and by prohibiting officials of either side who have a personal interest in a particular procurement to process or participate in that particular procurement.

This aspect finds support in the related party transactions covered by the Companies Act, 2013. The provisions in PPB 2012 can be made in sync with the Companies Act, 2013

Acceptance of the L-2 offer if L-1 withdraws

4.3 In case the L-1 method is used and the L-1 supplier backs out, then the best course of action would be to opt for limited bidding among all the remaining qualified bidders, rather than totally cancelling the process and commencing it de novo, in which the latter course of action would cause time and cost escalation.

Experts on public procurement also suggested that certain safeguards have to be maintained if the L-2 bidder is to be awarded the contract when L-1 has withdrawn. This safeguard can be the condition that the price and quality of the L-2 offer does not vary

² In the Swiss Challenge mode, in which the first proponent of a development project gets more advantage, in the Pre-Bid Conference Model, government starts a dialogue with all qualified interested bidders simultaneously to identify a solution to the problem, ensuring that all parties have equal opportunity to express their views/knowhow. When the public procuring agency has gathered the necessary information on the specifications, the bid is called for based on those specifications and the bidder offering the best price-quality ratio is selected for executing the project.

beyond a certain range from the original L-1 bid. The range could be fixed at a reasonable level plus/minus 10% of L-1 price.

Central Public Sector Enterprises (CPSEs) represented at the Consultation highlighted the new methods used by the CPSEs namely, the Quality based Cost Selection (QBCS) and the Least Cost Based Selection (LCBS). Opting for Quality Cost Based Selection (QCBS) implies maximum weight is given to Quality as opposed to Cost, usually in the ratio 70:30 (i.e. 70 per cent weight is given to Quality and 30 per cent weight is given to cost parameters respectively). LCBS is a mode in which pre-defined quality parameters are given in the bid itself and based on whether a bidder is meeting the minimum quality criteria, bids are evaluated on cost.

A good balance between price and quality should be the principle to be enshrined in the PPB regulations.

Abnormally low tenders

4.4 There is nothing in the PPB 2012 to guard against the non-genuineness of abnormally low tenders. It was felt by the business community that as in the UK Regulations³ that if an abnormally low tender was likely to be awarded the tender, in that case the genuineness of the price factor would need to be verified.

Procurement of proprietary items, sole suppliers and single tenders

4.5 The business community recommended that in modifications to PPB 2012 it should be ensured that provisions for introducing some of the important precautions to be taken in Single Source Procurement should be as follows:

- The requirements and standards of the field units should be clearly mentioned in the proposals for Single Source procurement.
- Before finalizing standards for Single Source procurement, required market research should be done with emphasis on the solution/benefit sought to be achieved, rather than emphasis on any brand, as similar products may also be delivering similar or better solution/benefit at a lesser cost.
- While adopting new technologies, a cost-benefit analysis should be undertaken and the cost incurred in changing technology to be reflected in the analysis.
- Compliance to Proprietary Certificate as prescribed in General Financial Rules 2005 should be mandatory, whereby the procurer has to certify that no other make or model is acceptable and reasons to be recorded.
- Publication by the buyer that he has identified a single source supplier should be mandated. In case there is a challenger who claims that they also have the same product

³ Regulation 69 of the Public Contracts Regulation, 2015

or service, they can approach the Grievance Redressal forum specified under the procurement regulations.

TRANSPARENCY

5.0 It was felt that the high transparency levels which have been prescribed in the PPB 2012 should be maintained, such as the mandate to maintain a Central Public Procurement Portal to make available prescribed procurement details to the public; empower government to make e-procurement compulsory for different stages/types of procurement as and when necessary; to provide for maintenance of documentary record of procurement proceedings etc.

5.1 The business community further suggested that certain safeguards should be built in so that competition is not distorted due to 'digital divide' between more and less technically equipped suppliers and that sensitive information submitted by suppliers to be kept confidential

5.2 The Business representatives cautioned that though transparency can be promoted through e-portals/ by e-tendering, the reality is that e-bidding could also be rigged. If the internal data base is well known, it can be hacked before the start of the bidding procedure. Electronic tendering is a good option to increase transparency, but we should constantly keep evaluating our systems/technology to see that transparency is not compromised.

5.3 Businesses from the SME sector suggested that the Central Public Procurement Portal should also carry information regards outstanding dues owed to suppliers by the procuring entities, beyond the contracted time limits on undisputed bills. The period and reason of delay should also be mentioned. A time limit for payment of bills should also be set in the public procurement law for the bills of the SMEs.⁴

5.4 To overcome the problem of the 'digital divide' affecting the small scale industry, which often cannot make use of bidding opportunities due to lack of timely information/ not enough experience in use of internet/ handling of websites, there should be an e-registration system for bidders, through which an email is issued automatically to all registered bidders whenever an invitation for bids is invited by a public procurement entity. This would enable more participation, especially by the SMEs, in public

⁴ This suggestion is comparable to Regulation 113 of the UK Public Procurement Regulations 2015, which sets a time limit of payment of undisputed invoices by contracting authorities, contractors and sub-contractors and contains a requirement to publish on the internet statistics showing , for the preceding financial year, how far the contracting authority has actually complied with its obligations under the regulation.

procurement. Such automated invitation to bid should also go to the industry associations of the SMEs for wider dissemination to their constituents.

MARKET ACCESS

6.0 Unlike 'Buy National' provisions of most jurisdictions with regard to access to their PP market, Sec. 11(1) of the PPB 2012 does not discriminate in favour of any category of bidders, not even on the grounds of nationality. However, in the perspective of the 'Make in India' campaign, it had been suggested that the non-discrimination of Section 11 (1) of PPB 2012 should be modified to favour domestic industry. The advice of business representatives present at the Consultation was that we need to be selective as regards how much protection to extend to domestic industry, as there is always a cost factor to be reckoned with, if we totally block global competition.

6.1 Business representatives recommended that in short term, protected markets are better to develop local industry, while in long term protection will weaken the domestic enterprises and hamper their competitiveness. It was suggested that system of 'mass customisation' should be introduced wherein product-wise identification was done of products and sectors where there is oligopoly or monopoly (and apparent abuse of monopoly), so that international competition is introduced in those sectors to break such monopoly/abuse.

6.2 Further, market access issue needs to be reviewed from time to time in order to keep pace with changing circumstances.

GRIEVANCE REDRESSAL

7.0 In keeping with international norms, the PPB 2012 provides for an independent grievance redressal mechanism (Sec.41), comprising of a Redressal Committee appointed by government, headed by a retired High Court Judge. This appeal mechanism is to be activated if review by the procuring entity does not yield satisfactory results for the aggrieved bidder. The Ministry of Finance now thinks that formation of such committees may be administratively difficult/might make the redressal process lengthy, and suggests instead internal grievance redressal, by an officer senior to the Procurement Officer.

7.1 Business stakeholders were of the opinion that it is important to maintain the independence of the redressal mechanism to retain public confidence. To simplify and streamline the process, it was recommended that a single independent Ombudsman or Independent External Monitor (IEM) could be appointed by Government.

7.2 For the Ombudsman/ IEM to be effective it was recommended to alter the advisory role of the Ombudsman, to make it mandatorily binding on the procuring entity. Given mandatory powers, the cooperation with the Ombudsman/ IEM of the procuring authority

would increase. Alternatively the Ombudsman/ IEM could be empowered in such a way that in case of non-cooperation by the procuring authority to the queries of the Ombudsman/ IEM or failure to act upon its advice, the Ombudsman/ IEM would be entitled to make a reference to the Central Vigilance Commission (CVC), who, in their wisdom, could institute an independent enquiry/ tender advice to government on whether to suspend/set aside the procurement process for retendering etc.

7.3 The time limit for grievance resolution by the independent Ombudsman/ IEM should be further restricted from that which is presently provided in the PPB 2012, so as not to hold up the procurement process unduly.

7.4 The Ombudsman/IEM to be assisted by a Grievance Officer, at least, familiar with the working of the company, as also of the public procurement law's provisions. There should also be a small secretariat, giving secretarial and miscellaneous support to the Ombudsman/IEM.

In cases of very large procurements, above a certain threshold level, there should be a collegium of at least two Ombudsmen/IEMs to decide on the grievance.

7.5 Another useful suggestion from industry is to provide for some 'Pre-Dispute Resolution Mechanism' inter alia, by ensuring proper contract management. The law can provide for time limits for certification by the procuring entity of work done/supplies received/services rendered by the supplier; for processing of bills; for payment of undisputed bills; and for amicable resolution of disputes by discussion between the procurer and the supplier.

7.6 The present scope for 'Review by the procuring entity' as given in Section 40 of the PPB 2012 can be expanded to encompass these concepts. Only in case of failure of the 'Pre-Dispute Resolution Mechanism' to arrive at a solution would there be a reference to the Grievance Redressal Mechanism, comprising of Ombudsman/ IEM.

PENAL PROVISIONS

8.0 The PPB 2012 has provisions for debarment (for a period of 2-3 years) from future participation in a procurement process if found guilty of certain offences and also penalties ranging from fines to imprisonment if found committing corrupt or anti-competitive acts under its provisions.

8.1 Our business stakeholders agree with the view expressed by Ministry of Finance in the course of public consultations last year, that since punishment mentioned for certain acts under the Bill are already punishable offences under other existing laws, the penal

provisions of PPB 2012 should be dropped. Business agrees that double punishment would be too harsh, but there should remain a mention of punishable offences under the law. Also, the provisions for debarment for 2-3 years from the procurement process should be retained for misdemeanor under the enactment. These amendments to the penal provisions of the PPB 2012 could make the law more business friendly, though not lax.

SUSTAINABLE PUBLIC PROCUREMENT

9.0 Business stakeholders appreciated the position stated in section 21(1) of the PPB 2012, which gives an option to use environmental characteristics in the evaluation criteria for award of a tender. This provision should be retained in any law on public procurement. The MSME sector, however, would have to be aided by Government to adopt means to generate less pollution in their production processes, so as to equip them to participate better in public procurement.

9.1 The evaluation criteria could also include social responsibility clauses, such as payment of living wages/extension of other social security benefits to workers by suppliers. These could be part of selection criteria of any supplier for award of a public contract.

CONCLUSION

A public procurement law which promotes transparency and fair competition is a natural safeguard against corruption, more so than rules on the subject, which do not have the weight of law. Businesses themselves have given the reasons as to why they consider a single overarching public procurement law necessary and the ways in which the Public Procurement Bill 2012, which provides a baseline regulation, can be amended to facilitate business better.