# BUSINESS RECOMMENDATIONS FOR PUBLIC PROCUREMENT LEGISLATION IN INDIA:
## *THE SEVEN PROPOSITIONS*

*WORKING PAPER*

**CENTRE OF EXCELLENCE**
**FOR GOVERNANCE, ETHICS AND TRANSPARENCY**
**Global Compact Network India**

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# EXECUTIVE SUMMARY

The Public Procurement Bill, 2012, introduced in the Parliament in May 2012, with the objective, inter alia, of bringing through the certainty of law, transparency, fair competition and probity in Public Procurement, lapsed in 2014, with the dissolution of the 15th Lok Sabha. Government of India held consultations with stakeholders for suggesting modifications, if any, to the Bill of 2012, to ascertain whether the Bill meets the requirements of the present socio-economic situation.

**Centre of Excellence for Governance, Ethics and Transparency (CEGET)** at the Global Compact Network, India (GCNI) has the mandate of providing an enabling platform for innovative solutions around the 10th UNGC Principle, to businesses, policymakers, civil society, industry associations, UN agencies and academia. CEGET is of the opinion that it has a role in advocating the introduction of a Public Procurement Act that would effectively strengthen transparency and ethics, ensuring a level playing field in Public Procurement. With this in mind CEGET engaged an independent external expert Ms. Bulbul Sen, to explore available knowledge on the subject and engage with relevant experts on the subject.

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 facilitated the process of knowledge sharing and supporting the work of businesses in practicing transparent and ethical procurement practices in a proactive manner. (White Paper from the event is Annex 3).

With the government initializing a second phase of pushing forth the Public Procurement Bill in Parliament, GCNI initiated its second innings in the endeavor. 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 above mentioned paper will be discussed at a National Consultation in New Delhi in June 2016 and feedback received from stakeholders would lead to the finalization of the paper, inclusive of a concrete list of business recommendations that would be shared with the government. GCNI CEGET intends to come up with policy solutions, and recommendations for guidelines, based on industry procurement experiences. This would significantly contribute to development of Public Procurement legislation in India, as well as delegated legislation at the Centre, and similar legislations at the State level since procurement is a state subject.

# INTRODUCTION

The present Government has declared, vide the President of India's inaugural address to Parliament, 2014, that “putting the economy back on track” and steps “to enhance the ease of doing business” in India is its top priority. The example of most developed and several developing countries, which have adopted effective public procurement law, gives India a cue that having a single effective regulatory framework is important to stimulate growth of business and economic activity in the country. The current Government's initiatives for 'Make in India', 'Digital India', 'Start up India' are also likely to get a boost if proper direction is given through the public procurement policy to achieve these ends.

The incumbent Government held public consultations on the Public Procurement Bill, 2012, which is taken as a baseline regulation and invited suggestions and recommendations on effecting changes in it, so as to give it a fresh orientation necessary to bring it in tune with present socio-economic needs of the country. The National Consultation held by the Public Procurement Division, Department of Expenditure, Ministry of Finance, (vide PPD Notice No. F.1-2/2-12-PPD dated 8.7.2015) on 21.7.2015 obtained the participation of major stakeholders, including the major procuring departments of the Government, major public sector enterprises, private sector, civil society, and the World Bank. The Consultation Note prepared by the Public Procurement Division, Ministry of Finance, was based on inputs from stakeholders, was discussed and debated at the said consultation and an array of suggestions emerged. The core subjects discussed ranged around:

1. **Coverage** – who and what should be covered under the PP Act;
2. **Competition** – competitive modes of procurement, methods of evaluation, award of bids, transparency allowing equal opportunity to all;
3. **Transparency** – timely publicity to relevant procurement information for the public to ensure a level playing field to all aspirants;
4. **Market Access** – how much access to domestic markets be given to non-domestic players;
5. **Grievance Review and Redressal**– regarding the need or otherwise of *independent* procurement redressal committees *to address* grievances of bidders/ prospective bidders;
6. **Probity** – the enforcement mechanism to adopt for compliance with the Act;
7. **Green public procurement**– the need for integrating environmental norms in public procurement.

Based on a wide range of stakeholders’ inputs on the above issues, the Department of Expenditure is putting up the matter to Government for decision regarding different options for framing an appropriate public procurement framework.

# PUBLIC PROCUREMENT HIGHLIGHTS IN INDIA

The formulation of the Public Procurement Bill, 2012 shows that it is highly influenced by international laws and customs like UNCITRAL Model Laws on Public Procurement, 2011 and the WTO's plurilateral Government Procurement Agreement (GPA), both of which mainly highlight best practices in terms of non-discrimination and fair competition to facilitate international trade. PPB 2012 is also inspired by the UN Convention Against Corruption (UNCAC), ratified by India in 2011 and the Transparency International's Model Law on Integrity Pacts, whose main focus is on probity and ethics in business.

**HIGHLIGHTS OF THE PUBLIC PROCUREMENT BILL, 2012**

- The Bill was introduced in the Lok Sabha on May 14, 2012 by the Minister of Finance.
- The Bill seeks to regulate and ensure transparency in procurement by the central government and its entities.
- It exempts procurements for disaster management, for security or strategic purposes, and those below Rs 50 lakh. The government can also exempt, in public interest, any procurements or procuring entities from any of the provisions of the Bill.
- The government can prescribe a code of integrity for the officials of procuring entities and the bidders. The Bill empowers the government and procuring entity to debar a bidder under certain circumstances.
- The Bill mandates publication of all procurement-related information on a Central Public Procurement Portal.
- The Bill sets Open Competitive Bidding as the preferred procurement method; an entity must provide reasons for using any other method. It also specifies the conditions and procedure for the use of other methods.
- The Bill provides for setting up Procurement Redressal Committees. An aggrieved bidder may approach the concerned Committee for redressal.
- The Bill penalises both the acceptance of a bribe by a public servant as well as the offering of a bribe or undue influencing of the procurement process by the bidder with imprisonment and a fine.

Currently there is no single union law specifically governing procurement at the Centre. However, as part of financial management, procurement of goods and services fall under the ambit of Ministry of Finance (MoF), whereby under the General Financial Rules (GFR), 2005 and Delegation of Financial Power Rules (DFPR), 1978, it lays down generic guiding principles, which are to be adopted by the procuring agencies. MoF has also come up with Manuals on Policies and Procedures for Purchase of Goods, Works and Consultancy in conformity with GFR, 2005. In fact, Odisha Finance Department has its own guidelines in conjunction with this Manual. The Central Vigilance Commission (CVC), the apex vigilance institution, also lays down guidelines on tenders, procurement of works, goods and services.

Though GFRs are considered to be the main rules governing public procurement in India, there is a plethora of guidelines, each government department/sector has their own procurement manuals, and there are court rulings on the subject and observations of the CAG, as also preferential market access policies of different government departments. These guidelines and rulings are not always in harmony with each other and thus create confusion which gives an opportunity to procuring entities to interpret rules subjectively, often with an eye to personal gain rather than public interest. The guidelines issued by the CVC are stringent and at times curtail the operational freedom to explore the flexibility provided within the GFRs but in many cases CVC guidelines complement GFRs which includes, inter alia, mandating/advocating e-procurement, integrity pact and Independent External Monitoring (IEM).

**CVC Guidelines**

- Codified Procurement Manual containing the detailed procurement procedures and guidelines
- Well defined scope of work giving an overview of the proposed procurement
- Administrative Approval & Expenditure Sanction is an important component of procurement process
- Designing of the products/structures of a Project using the latest codal provisions and latest engineering practices
- Pre-qualification is a process to select competent contractors having technical and financial capability commensurate with the requirements of the particular procurement.
- Normally three modes of tendering are adopted. Namely:
  - Open Tenders
  - Limited Tenders
  - Single Tender/Nomination Basis
- Evaluation of tenders done as per pre-notified criteria. ensuring that conditions / specifications are not relaxed in favour of contractor to whom the work is awarded
- Records connected with the execution of the work should be maintained in a proper manner
- To maintain the quality of work, testing of the material at various stages of the work is required. Site inspection should highlight the specific quality compromises w.r.t. the benchmark i.e. specified standards / specifications rather than general observation
- E-Governance to improve transparency in government functioning in the form of E-Tendering, E-Procurements, E-Payments & uploading of post tender details on the website
- Mandatory provision of Integrity Pact in the procurement contracts and appointment of Independent Monitors in the organisation

**Main Principles of GFR 2005**

- Specifications in terms of quality, type and quantity should be clearly spelt out.
- Excess quantities and superfluous features to be avoided.
- Selected offer should adequately comply with requirements in In all respects.
- The considerations taken into account while taking the final decision must be placed on record in precise terms.
- Central Purchase Organization (eg. DGS&D) shall conclude Rate Contracts with the registered suppliers for commonly used items and post on its website.
- Ministries and Departments will follow These Rate Contracts to the maximum extent possible.

# RECOMMENDATIONS FOR MODIFICATIONS TO THE PUBLIC PROCUREMENT BILL (PPB) 2012 FROM BUSINESS PERSPECTIVE

Effective business practices, as per new global norms, encompass good business ethics and environmental stewardship, while doing away with excessive controls and complex regulations, which stifle business initiative. These recommendations are based on inputs garnered from analysis of latest literature on the subject, the public procurement laws of developed and emerging markets that provide us with relevant comparables, and advice of experts from the point of view of improving ease of doing business while maintaining ethical standards and encouraging sustainable consumptions.

## 1. COVERAGE

The PPB 2012, through its sections 3, 4 and 5 has specified that the Bill covers all public procurement by procuring entities which are above Rs. 50 lakhs. The Consultation Note on the other hand, recommends that this threshold level be removed (through deletion of section 4(1) (a)) in order to bring all public procurement under the proposed PP Act and introduce uniformity of procurement procedure. It goes on to say that since so far small purchases below Rs. 25 lakhs are usually being done through limited or single tendering process, the conditions for limited and single tendering should be specified in the PP Rules and not in the main Act.

However, it is recommended that tendering procedures should be defined in the Act, as is prescribed under the PP Bill 2012 at present, for them to have sufficient weight. This is also the situation in the PP legislation of the UK and China, where the conditions for different modes of tendering are defined in the main legislation, rather than in the subsidiary rules.

Our recommendation is to opt for a two-fold approach. For procurements above the threshold, all provisions of the Act would apply. However, for procurements below the threshold level, it would be necessary to follow the general principles of procurement as laid down in the Act, but the full paraphernalia such as grievance redressal procedures need not apply.

## 2. COMPETITION[1]

Article 9 of UNCAC states promotion of fair competition as one of the key tasks of the public procurement policy and law. The UK, for instance, for particularly complex contracts, where a contracting authority is not able to define the technical means to satisfy its needs or is not able to identify in advance the legal and/or financial make up of a project, it can enter into a competitive dialogue. No parallel for this mode of tendering is there in India's PPB 2012.

The nearest approximation to the competitive dialogue mode is the 'Swiss Challenge' used by various States in India and being proposed in 2015 to be used by Central Government for modernizing railway stations in the country. It is a new process, elaborated in the Rajasthan Transparency in Public Procurement Amendment Rules, 2015, by which any person with credentials can submit an online development proposal to government and others can give suggestions to improve and beat the proposal. If the original proponent can better the other proposals, it is awarded the contract or it goes to the second proponent. But, because of information asymmetry, 'Swiss Challenge' favours the original proponent, whereas the 'competitive dialogue' mode of the UK gives equal opportunity to all viable parties who wish to enter into competitive dialogue with the government.

Keeping in view the ever-growing technical complexities in goods/services/works which procuring entities are required to supply, it may be worth considering that we opt for a provision for "competitive dialogue" type of tendering, based, to the extent appropriate, on the UK model.

Conflict of interest – As mentioned above in this Note, Section 45 of PPB 2012 casts the obligation on the supplier to refrain from conflict of interest. The Consultation Note of the MOF of 21.7.2015 has brought out some genuine difficulties in tackling the problem of conflict of interest. It suggests to do away with this clause as it is "practically impossible for the bidder to keep a track of these obligations vis-a- vis a particular official", since multiple procurements keep going on at a time.

Our recommendations is that it is perhaps more practical to tackle the issue of conflict of interest in the manner provided in the UK law by putting the onus on a contracting authority to guard against conflict of interest, since the contracting authority is a public entity, rather than putting this onus on a private bidder i.e. the supplier, as is currently being done through the present wording of Section 45 of PPB 2012. The clause of prohibition of conflict of interest should be *retained* in the public procurement law, but remodeled in terms of the UK Regulation 24, for facilitating its implementation.

Acceptance of L-2 offer if L-1 withdraws – Whether this clause, in Section 24 of the PPB 2012 is to be retained is in contention. The Consultation Note of Ministry of Finance dated 21.7.2015 proposes that this clause may be done away with, as it is "fraught with danger of corruption/collusion on one hand and professional hazards for the procurement officers taking such decisions". However, experts on public procurement were of the opinion that the clause ought not to be deleted as re-tendering can cause delays/cost escalation for government. Instead 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 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.

Abnormally low tenders - To meet the dilemma of Indian tendering regarding price overtaking quality considerations, causing perennial dismay about our poor public service quality, we recommend that abnormally low tenders should be questioned to determine the genuineness of their price advantage

before being awarded the contract, on the lines of Regulation 69 of the UK PCR 2015 and the WTO GPA.

**Procurement of proprietary items, sole suppliers and single tenders**

In the Indian procurement system, procurement from a single supplier is often resorted to, which gives the single source supplier an unjustified discretion in pricing of its products. In single tender, the procuring entity knows that there is only a particular manufacturer in the market and in that case, products have to be purchased from this source only. The 'Proprietary Article Certificate', which is prescribed in the General Financial Rules (GFR), usually never gets furnished and there is no evidence brought on record that the supplier selected is the sole one for that item and that more efficient suppliers are not available in the market. Thus single source procurement, which is justifiable under the PPB 2012 mainly for emergency purchases, for the purpose of standardization, spare parts acquisition and for proprietary items, is not safeguarded from risk of being beset by corruption.

It was noted that the most significant lacunae in Single Source Procurement were that

- The proposals for standards did not spell out the requirements of the field/ the users of those products, nor how the product or company being selected would fulfill those specific requirements (if any).
- In the absence of such focus on the actual field requirements, there arises a risk of procuring products of specifications disproportionate to the requirements of the users.
- The claims of the selected manufacturers that their products are the most reliable are used to justify non-consideration of any other competitive product that could also have been a standard.
- The dominant position of a firm/product in the market and on continuity and inter-operability gets over-emphasized to the detriment of undertaking a cost-benefit analysis with competing firms/products/services, as envisaged under the financial rules and regulations. (Inadequate scanning of the market place).
- Another conclusion was that while either bringing in new technologies or replacing/migrating to new technologies, the costs involved in the change and for managing such change in the short and long term, such as replacement of old equipment and legacy systems by new ones and also, retraining and re-skilling existing staff on the new system/technology besides recruitment of new experts in the field, were not reflected in the business analysis.

## 3. TRANSPARENCY

The standards for transparency are set very high through the PPB 2012. Chapter III provides the institutional framework for the transparency mechanism. The important provisions here are for the setting up and maintenance of a Central Public Procurement Portal accessible to the public for posting and exhibiting matters relating to public procurement (section 38); requirement for a procuring entity to

maintain a documentary record of procurement proceedings and communications (section 39); empowerment of government to declare adoption of electronic procurement mandatory "for different stages and types of procurement…" (section 29(4)); and providing for Electronic Reverse Auction (Section 34(1)).

It is recommended that the use of safeguards, modeled on Regulation 22 of the PCR 2015 of UK, must be provided for in the Public Procurement law alongside the provisions which empower Central Government in India to make e-procurement compulsory for different stages and types of procurement or for a procuring entity to opt for procurement through Electronic Reverse Auction, for example (i) to ensure that competition is not distorted due to electronic means of tendering, through a 'digital divide' of some sort between more technically equipped suppliers vis-a-vis those less technically equipped and (ii) to protect information of a particularly sensitive nature.

## 4. MARKET ACCESS

The Consultation Note of the Ministry of Finance dated 21.7.2015 has suggested modification of Clause 11 (1) of PPB 2012 which provides non-discriminatory market access for all categories of bidders without regard to nationality, stating that through it "the procuring entity is prevented from discriminating in favour of domestic suppliers," and suggested modification "to promote domestic industry as an important element of 'Make in India'."

However, India does not produce many of the high value and hi-technology items needed in its public procurement. Thus, if Section 11(1) of its Public Procurement Bill is given a "Buy National" complexion to encourage 'Make in India', in that case, there has to be a supplementary clause to the effect that where a Ministry/Department is of the opinion that the goods of the required quality, specifications etc. are not available in the country/ or it is necessary to look for suitable competitive offers from abroad, the Ministry/Department may opt for foreign tendering. We recommend that as in the UK public procurement law, PPB 2012 to retain the non-discriminatory market access clause, making no open distinction on grounds of nationality for access to the domestic public procurement market, but simultaneously using non-tariff measures to insulate our markets, as and when justified, on the ground of compliance with Indian health, sanitary and technical standards and trade defense mechanisms like anti-dumping, countervailing duties, which are justifiable under our WTO commitments.

As an emerging economy, we may reserve specified sectors of public procurement for preferential market access to domestic industry on the grounds contained in Section 11(2). These specified sectors would be in areas of critical technologies wherever deemed necessary and in which Indian producers can compete, such as electronic and IT hardware systems, solar energy equipment, as is currently being done through Preferential Market Access Policy in these sectors. Preference can also be extended, as at present, to the disadvantaged SME sector, which forms the backbone of our economy. We will be within our rights in so doing, as government procurement is outside the purview of WTO rules/India is not a

member of the plurilateral Agreement on Government Procurement.

## 5. GRIEVANCE REDRESSAL AND REVIEW

In keeping with international norms, such as those prescribed in the UNCITRAL Model Law on public procurement, the WTO's Government Procurement Agreement and the exhortation contained in the UN Convention Against Corruption for "an effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed," the Public Procurement Bill 2012 provides, through its Section 41, for an independent grievance redressal or remedies mechanism. The mechanism, which is activated if review by the procuring entity is unsatisfactory to the aggrieved bidder, comprises of a Procurement Redressal Committee of not less than three persons including its Chairman, who shall be a retired High Court Judge. The members of the Committee shall be of proven integrity, with relevant experience. The independence of the Committee is provided for in that such Committees will be constituted by the Central Government (Section 41(3)) and their seating fees and allowances will be 'prescribed' by the Central Government.

The Consultation Note of the Ministry of Finance, has observed that (i) the formation of such committees outside the procuring entity will be very difficult at various locations, which may be in different parts of the country; (ii) the procurement process would become lengthy, inefficient and sometimes unwieldy and current experience of such similar tribunals is not satisfactory; (iii) the review of the procurement process is essentially an administrative process, hence it should be dealt with only within the procuring entity; (iv) already there are oversight mechanisms in place in the form of CVC, CBI and CAG and all the procurement officers are answerable to these authorities.

It was therefore proposed in the Consultation Note that appeal from the decision of the procurement officer should be decided by the immediate superior officer of the procurement officer. In addition, the total period for redressal of grievances (vide clause 40 and 41) is also proposed to be reduced from the existing 135 days to 60 days.

We are of the opinion that an internal review by a superior officer within the procuring entity will not inspire the same level of confidence as review by an independent authority, such as a Committee set up by Government. Also the role of existing oversight mechanisms, like the CVC, CBI and CAG are post-facto. They are not the bodies to whom one can go for a speedy remedy, even as the procurement process is in progress. Therefore, it is essential to maintain the features of an independent review body as mentioned in the original Bill of 2012.

To avoid the real apprehension that the procurement would get stalled indefinitely, harming the public interest, it is recommended that the time limit given under section 41 (14) of 30 days plus 15 days further (if necessary) can be shortened to 15 days in all. Also the aspect of 'public interest' in

proceedings of the authority for remedies should be prescribed as one of the parameters to be kept in mind when deciding whether to suspend the procurement process on the basis of a grievance.

It is further recommended to opt for a two-tier redressal mechanism. For cases with smaller financial implication, it may be sufficient to have a single-member body, comprising of an individual with high integrity, domain knowledge and proven track record as an Independent External Monitor (IEM) or Ombudsman to hear and recommend resolution of the grievance. This practice is already prevalent in the numerous Public Sector Enterprises (who have adopted the Integrity Pact mechanism advocated by the Central Vigilance Commission) and different economic sectors (like public sector banks, insurance companies, income tax department, who each have their own specialized Ombudsman). For only those tenders where financial implication is high (the threshold level may be appropriately fixed by government), a full-fledged Procurement Redressal Committee as envisaged in PPB 2012 would be necessary.

Under the UNCITRAL Model Law on the subject, the review body has specific powers to prohibit/overturn/revise decisions by the contracting authority that are not in consonance with the provisions of the procurement legislation, including when a contract has already been finalized. Payment of compensation can also be awarded. It is recommended that the grievance redressal or remedies authority in India should be vested with similar powers.

## 6. PROBITY AND PENAL PROVISIONS

The enforcement provisions of the Public Procurement bill, 2012 are contained mainly through provisions for **exclusion/debarment from the procurement process,** activated by infringement of the 'Code of Integrity for the procuring entity and bidder'. Additionally, for similar or other offences detailed in Section 49 (under the Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860 or causing harm to life/property/public health in execution of a public procurement contract), severe penal provisions ranging from imprisonment for a term which may extend to five years and also fine which may extend to 10% of the assessed value of procurement has been provided for under Sections 44 and 45 of the Bill. The punishments are for offences which range from criminal activities, like taking or soliciting illegal gratification, misrepresentation etc. to anti-competitive acts like interference with the procurement process for unfair advantage, engaging in lobbying for restricting competition, influencing any procuring entity unfairly, engaging in bid-rigging, collusive bidding etc., breaching confidentiality for undue gain or engaging a former official of a procuring entity within a period of one year after such former official was disassociated with a procurement in which the bidder has an interest.

There are also punitive actions under Section 46 prescribed for vexatious, frivolous or malicious complaints under the Act for delaying or defeating any procurement etc. Importantly, it has also been provided under Section 47 that in the case of offenses under the Act by a company, not only the persons who were responsible for the conduct of the business of the company at the time of committing of the

offence, but also the company itself shall be deemed to be guilty of having committed the offence and shall be liable to be proceeded against accordingly. Abetment of offences is also punishable under Section 48 of the Act.

In the Consultation Note of MOF, it has been observed that offences mentioned in Sections 44 to 48 of the Act are mostly covered under other extant Indian laws, and it was held that these offences may not be treated as offences de novo under the public procurement law.

We recommend that to the extent that these offences are sufficiently covered under existing Indian laws, there was no need to make them punishable once again under the public procurement law. These offences may be punished, if proved, under the existing penal provisions under existing laws. However, the offences themselves covered under sections 44 to 48 should be *mentioned* in the Act, with the explanation that these would be punishable as per existing relevant laws. Non-mention of these offences/ punishments would serve to give a more business-friendly face to public procurement, by lessening the threat perception. However, in the interest of making the PP legislation a self-contained code, *mentioning* these offences in the Act, while clarifying that these would be punishable as per existing laws is important.

## 7. GREEN PROCUREMENT

The PPB 2012, in its present form, has already set a major trend in the greening of public procurement. For a greater emphasis on green public procurement, a more detailed formulation of green procurement norms in the evaluation criteria of the subject matter of procurement in the legislation is recommended.

It is further recommended that the concept of cost in Section 21(1) of the Bill would have been more effective had it included costs of use, such as consumption of energy and other resources; end of life costs, such as collection and re-cycling costs; costs imputed to environmental externality linked to the product, service or works during its life-cycle, provided their monetary value can be determined and verified, such as the cost of polluting emissions and other climate change mitigation costs.

## 8. SPECIAL RECOMMENDATION

Under the draft PPB 2012, the regulations appear to be mainly geared to meeting the situation arising in the procurement of goods. Separate detailed regulations exist in the General Financial Rules, 2005 for services and works sectors. The Department of Economic Affairs of the Union Ministry of Finance in India has put on its website a draft regulation for public procurements entered into in the Public Private Partnership mode. Each of these sectors is very different from each other and from the goods sector. Hence there is a need for specific regulations for public procurement for each of them.

Thus specific regulations, in alignment with international best practices, has to be developed, brought out and discussed in the public domain in each of these sectors for adoption as Rules under the public procurement law, if not as full-fledged laws. In the alternative, sector-specific regulations could be incorporated in the public procurement law itself. This is necessary to introduce clarity and thereby improve ease of doing business in these specific sectors.

A provision for time-bound payment of undisputed bills of suppliers, lack of enforcement of which deters reputed firms from bidding in public contracts, should be considered, modeled on Regulation 113 of the UK PCR, 2015, as a further measure, which would have immediate and concrete impact in boosting confidence in government's intention in enhancing ease of doing business through a reformed Public Procurement law.

## CONCLUSION

The Public Procurement Bill 2012, as a first attempt to codify and create an overarching law on the subject, closely followed the UNCITRAL Model Law/other relevant model conventions. But to address local market conditions/prevailing legal and business cultures both domestic and international, the need of the hour is to transit to more sophisticated business systems, whose basis is a more business-friendly regime, which, while it removes unnecessarily regulation, promotes responsible business ethics and environmental stewardship in public procurement. A fresh approach is required to make public procurement regulations more in tune with the changing economic climate, business thinking, global concern on sustainable development as reflected, for example, in the Sustainable Development Goals adopted in the UN General Assembly in 2015.

The UK law contains concepts of 'self -cleaning', vide Regulation 57 (13) and (14), which are in tune with the thrust of present international thinking that the approach to regulation must contain more of the incentive approach rather than the punitive approach. Thus, if a supplier provides evidence that despite the existence of grounds for exclusion, it has taken sufficient compensatory measures to prevent the issue happening again, the procuring entity shall not exclude it from the procurement process.

India may also like to consider introduction of 'self-cleaning' measures on these kind of lines, in view of the recent thinking that better business compliance flows from the incentives approach combined with the punitive approach, rather than implementing enforcement exclusively through the traditional approach of disincentives.

**ANNEX 1**


## Rajasthan

- **RAJASTHAN TRANSPARENCY IN PUBLIC PROCUREMENT ACT, 2012**
- Applicable to all departments and their attached and subordinate offices; All State PSEs; All Constitutional Bodies whose expenditure is met from the Consolidated Fund of the State; Any body established by an Act of State Legislature or a body owned or controlled by State Government; Any other entity notified by State Govt.
- Each procurement process undertaken shall have a **Unique Bid Number (UBN)** used for tracking purpose during and after the bid process.
- Normally the procedure of National Competitive Bidding (NCB) shall be adopted. The procedure of **International Competitive Bidding (ICB)** may be adopted in case of a condition or in public interest.
- It is the duty of the State Procurement Facilitation Cell (SPFC) to encourage procuring entities to adopt **electronic procurement**. The State may, by notification, declare adoption of electronic procurement as compulsory for different stages and types of procurement.
- **Competitive negotiation** – a method of procurement to be adopted in case of an urgency brought about by unforeseen events or if the subject matter involves livestock, cotton, oilseeds or such other agricultural produces whose prices fluctuate frequently, the procuring entity is of the opinion that the subject matter cannot be usefully obtained by adopting the method of open competitive bidding or any other method.


## Tamil Nadu

- **TAMILNADU TRANSPARENCY IN TENDER RULES, 2000 BASED ON TAMIL NADU TRANSPARENCY IN TENDER ACT, 1998**
- Procurement of different categories shall be effected by the following methods of tendering namely :- Piece-work contract; Lumpsum contract; Turn-key contract; Multistage contacting including pre-qualification and two cover system; Fixed rate contract; and The Tender inviting authority shall decide the method of tendering to be followed in each case having regard to the category, size and complexity of the Procurement.
- E-tendering- free downloads of tender documents from the website, for open tenders exceeding Rs.10 Lakhs.
- Special cases: Procedure provided for instances where it is necessary to have more than one supplier
- **Exemptions in Tender Act: 1.** During natural calamities and emergencies declared; 2. Available from **single source** only from a supplier or cases in which a particular supplier or contractor has exclusive rights and no reasonable alternative or substitute exists or where the procuring entity having procuring goods, equipment, technology from a supplier.
- Two Cover System
- TAA to negotiate for a reduction of price with the tenderer where he decides that the price of lowest tender is higher than market prices.
- No procurement from tenderers barred by any procuring entity
- In case of a tie between price quotes by two or more tenderers, there will be split procurement
- Tender can be rejected if the TAA feels price quoted is higher by prescribed percentages than prevailing market price.


## Maharashtra

- **MAHARASHTRA E-GOVERNANCE POLICY, 2011**
- Covers larger issue of e-governance & procurement of IT products and services
- Policy aims to take e-governance to m-governance in the State
- Applicability: (i) Authority/body in Maharashtra or constituted by any Central or State Government; (ii) Any body owned/controlled by the State Government; (iii) To partnerships, Joint Venture Companies of State Government.
- Applicable in advisory nature to any other organization which receives any Government aid directly or indirectly by the State Government, or the functions of such body are of public nature or interest or on which office bearers are appointed by the State Government.
- Introduces a time bound approach to incorporate and encourage the use of UID for various e-Governance projects to facilitate the delivery of services to the right beneficiary.
- Adopt a standardized e-procurement solution for the state to bring in efficiency and transparency in Government and public sector purchases and sales.
- Public Private Partnership shall be encouraged in all e-Governance projects and the state will adopt transaction based payments instead of outright purchases wherever possible, to reduce costs and/or development/roll-out time
- To promote electronic service delivery of citizen centric services, "Maharashtra Mandatory Electronic Delivery of Public Services Act (MMEDPS Act )" to be prepared to make it mandatory for all government offices/departments to provide certain citizen centric services electronically to citizens.


## Karnataka

- **RNATAKA TRANSPARENCY IN PUBLIC PROCUREMENT ACT, 1999**
- Ensures transparency in public procurement of goods and services by streamlining the procedure in inviting, processing and acceptance of tenders by procurement entities and related matters
- KTTP Rules, 2000 deal in detail with publication of tender notices, contents of the Notice of Inviting Tenders and tender documents (technical and commercial conditions), receipt and opening of tenders, procedure for evaluation of tenders and appeals of aggrieved parties.
- The Act provides exception to the applicability of the provisions of the Act in so far as they are inconsistent with the procedure specified in respect of the Projects funded by International Financial Agencies or Projects covered under International Agreements.
- The provisions shall not apply during the period of natural calamity or emergency declared by the Government or where the goods or services are available from a single source or where a particular supplier or contractor has exclusive rights.
- An **expert committee** of three representing procuring entity, government and from research/academic or non-commercial background.
- **Tender Bulletin Officers (TBO)** May be appointed for the State in respect of the Department s/he represents, where the procurement of that department covers more than one district. Deputy Commissioner of district will be District Bullitin Officer.
- The tender inviting authority shall have the notice inviting tenders published in the Indian Trade Journal in all cases where the value of procurement exceeds Rs 10 Crores
- **Tender Scrutiny Committee**
- Provision of Appeal
- State government may call for the records relating to invitation, processing and acceptance of tenders, tender document, estimates / statements /accounts or statistics relating to such tenders.

**ANNEX 2**

# LESSONS FOR INDIA FROM UK AND CHINA

While India is working out the nuances of its Public Procurement Bill, it is interesting to derive some key lessons from UK's Public Contracts Regulations (PCR) 2015 and China's Government Procurement Law (GPL) 2002 and Tendering Law (TL) 1999; especially on seven core subjects that we will focus on in this Background Note.

China's experience of conflicts between multiple public procurement regulations confirms India's own learning experience that having a single overarching procurement law is necessary to achieving its objectives of having legal consistency and legal certainty in this field. Thus, it is imperative for India, to get passage through Parliament, of a single overarching Public Procurement law for maintaining integrity, fair play, competition, transparency, sustainability and appropriate market access in public procurement. This would ensure ease of doing business in the country, which is presently our prime focus for economic development.

## 1. COVERAGE

'In-house awards' - Regulation 12 of PCR 2015 mentions where a contracting authority awards the contract to an entity which it controls, such a contract is exempt from the purview of the regulations. India's Public Procurement Bill (PPB) 2012 does not provide for this type of exemption, but the Consultation Note dated 21.7.2015 of the Ministry of Finance (MOF) has proposed in its paragraph 4 to exempt in-house awards in strategic purchases by Central Public Sector Enterprises (CPSEs) from their own subsidiaries/joint ventures from the operations of the legislation.

The economic logic for excluding in-house awards from coverage under public procurement law is that this would facilitate the procuring entities to buy items from their own subsidiaries without going into the formalities of a public tender and generate assured business opportunity for these subsidiaries.

In China procurement by government agencies at all levels and institutions using fiscal funds for construction works, goods and services listed in certain catalogues and above specified threshold levels are done under GPL and procurement of State enterprises, commonly regarded as public procurement are subject to existing regulations under TL. Procurement of State enterprises however, is not within the scope of "government procurement" defined by the GPL. The conflicts between the TL and the GPL, especially regarding coverage, remaining unresolved, the exact coverage of the public procurement regime in China is not clear[2].

## 2. COMPETITION

Competitive Dialogue – Regulation 30 of the PCR 2015 provides that for particularly complex contracts, where a contracting authority is not able to define the technical means to satisfy its needs or is not able to identify in advance the legal and/or financial make up of a project, it can enter into a 'competitive dialogue'. Interested bidders then, after prequalifying, are invited to enter into a dialogue with the contracting authority to identify and develop a solution. The dialogue may be conducted in successive stages, with the aim of arriving at the best solution/bidders. Final tenders are based on each tenderer's proposed solution. The contracting authority pursues negotiations ***after*** the confirmation of the contract award with the tenderer presenting the best price – quality ratio, with the purpose of confirming financial commitments or other terms contained in the tender.

Such a regulation is essential in the Indian context keeping in view the ever-growing technical complexities in goods / services / works which procuring entities are required to supply. Also it would meet the complaints of many current and prospective tenderers who believe that the specifications put out by Indian contracting authorities are in many cases either very vague, or, so specific that they are biased towards particular suppliers. Or that they do not take into account latest technology / business solutions.

Abnormally low tenders – Regulation 69 of the PCR 2015 provides that *"Contracting authorities shall require tenderers to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services*".

This provision may be useful for consideration in India, to meet the oft-cited complaint that there is over-emphasis on price criteria at the cost of quality in general.

Conflict of interest – Conflict of interest is an important criterion to ensure fair competition in the procurement process. Section 45 of the PPB 2012 casts the obligation on the supplier to refrain from conflict of interest arising from engaging a formal official of a procuring entity within a year after such former official was disassociated with a procurement in which the employer has an interest. Regulation 24 of PCR 2015 reverses the onus and puts it on the contracting authority (and not the bidder) to prevent distortion of competition through conflict of interest by specifically stating, "*Contracting authorities shall take appropriate measures to effectively prevent, identify and remedy conflict of interest arising in the conduct of procurement procedures so as to avoid any distortion of competition and to ensure equal treatment of all economic operators*".

While in China, in the sphere of competition in public procurement, conflicting provisions again mar clarity on the issue. Article 22 of the TL provides that "the procuring entity may, if necessary, consult *experts* or *suppliers* on the solicitation documents". On the other hand, the GPL Article 77 states that the supplier is forbidden from negotiating with the procuring entity in tendering proceedings and such negotiations, if they occur, will invalidate the procurement.

## 3. TRANSPARENCY

PPB 2012 contains provisions by virtue of section 29 (4) that the Central Government "may make rules relating to electronic procurement and may, by notification, declare adoption of electronic procurement as compulsory for different stages and types of procurement". Under section 34 of PPB 2012, a procuring entity may choose to procure through e-reverse auction under certain conditions. This enshrinement of digital systems in public procurement system puts India on par with global best practices in transparency in public procurement.

However, UK's Regulation is more detailed and contains more safeguards in some aspects of digitized public procurement. The 'Dynamic Purchasing System' in PCR 2015 (Regulation 34), which is operated as 'a completely electronic process', has in-built safeguards to ensure that competition is not distorted due to electronic means of tendering, through a "digital divide" of some sort between more technically equipped suppliers' vis-a-vis those less technically equipped by requiring certain safeguards. Regulation 22 (2), lays down that "*the tools and devices to be used for communication by electronic means and their technical characteristics shall be non-discriminatory, generally available and inter-operable, with the information and communication technology products in general use and shall not restrict economic operators' access to the procurement procedure*".

Additionally contracting authorities are not obliged to require electronic means of communication in the submission process where the use of means of communication other than electronic is necessary for the protection of information of a particularly sensitive nature which cannot be properly ensured by using electronic tools that are generally available [Regulation 22(5)]; the contracting authority is duty bound to *"...ensure that the integrity of data and the confidentiality of tenders and requests to participate are preserved"* [Regulation 22(11)].

## 4. MARKET ACCESS

Non-discrimination – Regulation 18 of PCR 2015 provides for non-discriminatory market access to all bidders, irrespective of nationality. In actuality the de jure market access accorded by this regulation is de facto restricted through non-tariff barriers of different sorts. In fact, during 2009-11, UK awarded only 1.3% of its public contracts by value directly to suppliers in other Member States of the EU.

The Section 11(1) of PPB 2012 provides for non-discrimination in market access to public contracts for all bidders, irrespective of nationality. However, Section 11 (2) gives the right, as an exception, to government to provide for mandatory procurement of any subject matter from a particular category of bidders / extending price preference to them only in *exceptional circumstances*, with the purpose of promotion of domestic industry / socio-economic policy of the government / any other consideration in

public interest.

Since India does not itself produce much of the high value and high technology items needed in its public procurement, it is in its interest to retain the non- discriminatory market access clause, making no open distinction on grounds of nationality for access to the domestic public procurement market, but simultaneously using tariff and non-tariff barriers ***outside*** the public procurement law as and when justified, on the ground of compliance with Indian health, sanitary and technical standards, as also through the use of trade defense instruments, like anti-dumping or anti-subsidies action in circumstances justified through our rights under the WTO Agreements.

Simultaneously, through the exceptions clause contained in sub-section (2) to section 11 of the Public procurement Bill 2012, preferential market access can be extended on the grounds of socio-economic policy to MSMEs (as provided by Ministry of MSMEs vide 'Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012') and on the grounds of promotion of domestic industry to critical areas of technology, like information technology, telecommunications, solar energy equipment etc. Such action will not be contrary to India's WTO obligations, since the WTO Agreement does not include any obligations on government procurement (India has only an 'Observer' status in Government Procurement Agreement).

In China, the case is just the opposite, with domestic preference the rule, vide section 10 of GPL, with access to foreign suppliers being extended only on exceptional grounds, such as when the needed items cannot be procured domestically / on reasonable commercial terms and conditions. The TL gives domestic industry even more scope, with Tendering Regulation 8 providing that domestic suppliers participating in public contracts must supply *domestic goods and services*, except in certain exceptional circumstances.

## 5. GRIEVANCE REVIEW AND REDRESSAL

In this area, both India and China have to learn from each other. Section 41 of PPB 2012 provides for Central Government to constitute ***"independent procurement redressal committees"*** under the chairmanship of a retired Judge of a High Court. In China, in contrast, the Ministry of Finance (MOF) and its various branches at different levels of the administration are in charge of redressal of complaints. The MOF can hardly be called an 'independent' agent in the procurement process, as it is finally the 'cashier' which has to pay for the procurement orders.

The absence of an independent challenge mechanism deprives the Chinese procurement regime of credibility and in actual operation, discourages aggrieved parties to go for bid challenge.

However, where the Chinese model is praiseworthy is the fact that the decision of the review body is binding. It can mandatorily order remedies such as correction of procurement documents, declaring the

procurement unlawful followed by re-tendering, order payment of compensation etc. In India, the weakness of the review process lies in that the review authority can only ***"****communicate its recommendations, including the corrective measures to be taken, to the procuring entity and to the applicant****"*** under section 41 (8) of the Public Procurement Bill, 2012.

## 6. PROBITY AND PENAL PROVISIONS

Exclusion of bidders is very much linked to prevention of misconduct under India's PPB 2012. Under section 12 of PPB, 'Qualification of bidders' is subject to certain probity concerns, like filing of tax returns to Central Government, not being insolvent / bankrupt, not being subject to legal proceedings for any of the above, not being guilty of professional misconduct nor misrepresentation of their qualifications with reference to a procurement process. Over and above this, section 6 of the PPB provides for a Code of Integrity which is binding on the procuring entity and bidders, and non - compliance with this Code may lead to exclusion of the bidder from the procurement process. The offences under the Code of Integrity include the offering, soliciting or accepting of illegal gratification to influence the procurement process; indulging in anti-competitive behavior like collusion or bid-rigging; threats to influence the procurement process; obstruction of any investigation and / or conflict of interest in the procurement process, among others.

On the other hand, the list of mandatory and discretionary exclusions under the UK PCR 2015 is much wider and can include offences beyond those related to public procurement, vide Regulation 57. This ranges from conspiracy to corruption under the laws of the land, offences listed under the Counter Terrorism Act 2008 and offences under the Sexual Offences Act, 2003.

The UK Regulation is also more nuanced on when to impose exclusion. The obligation to use an exclusion may be disregarded where it would be clearly disproportionate, for example, where minor amounts of taxes/social security contributions are unpaid.

## 7. GREEN PUBLIC PROCUREMENT

Through PPB 2012 Section 21 (1), India has taken a bold new step in GPP by including "environmental characteristics" of the subject matter as one of the evaluation criteria. However, better articulation of GPP in our law could perhaps be made through integrating the concept of life-cycle costs, as elaborated in Regulation 67 and 68 of the UK PCR 2015, which involves consideration of costs of use, such as consumption of energy and other resources, collection and re-cycling costs, costs imputed to environmental externalities like cost of emission of greenhouse gases and other climate change mitigation costs during the life-cycle of the subject matter of procurement.

The eco- labeling concept contained in Regulation 43 of UK legislation, as a means of proof that the required environmental characteristics are provided for in the subject matter of procurement, can also

be integrated into our approach on GPP to strengthen it.

For the above changes to come about, the bias in India against higher capital costs usually linked to sustainable alternatives, which has generally stood in the way of the introduction of green procurement, has to be gradually removed.

**Annex 3**

## WHITE PAPER ON PROCUREMENT
## 'National Consultation on Transparency and Anti-Corruption Measures in Procurement in India'
## APRIL 2012

### Background

Procurement is an integral part of governance and financial management system in any country. It is particularly important in developing countries with active infrastructure and social programmes. Public procurement spending accounts for about 15% of world's Gross Domestic Product (GDP) (OECD, 2005) and is often much higher as a proportion of GDP in developing countries. Estimates of public procurement in India, by public sector companies and statutory authorities, vary between 20 per cent of GDP (WTO estimates) to 30 per cent of GDP (OECD estimates). On a conservative estimate, this amount could be about Rs. 15 lakh crores.

Public procurement impacts the economy significantly by generating demand and consumption. Government, by virtue of its purchasing power can steer the market in a particular direction. Of late procurement is being leveraged to promote the causes of environment, human rights, protection of children and gender equality.

Public procurement though, is also the government activity most vulnerable to corruption. The multiplicity of institutions with overlapping functions and jurisdictions especially lead to a negative influence on procurement itself.

### Introduction

India ratified the United Nations Convention Against Corruption in May 2011. This obligates India to adopt appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law. Accordingly, Indian government introduced legislations in the Parliament like The Public Procurement Bill, 2012; The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011; The Whistle-blowers' Protection Bill, 2010 and the Company's Bill 2011 which are in different stages of enactment.

In lieu of growing importance on the process of procurement, the Collective Action Project, at Global Compact Network, India organised a 'National Consultation on Transparency and Anti-Corruption Measures in Procurement in India' on April 18-19, 2012, at Hotel Claridges, New Delhi, in collaboration with United Nations Office on Drugs and Crime (UNODC). The Consultation drew attention of the various stakeholders and provided a collective platform to ascertain views and arguments, explore challenges and good practices, and suggest standards in procurement so as to ensure transparent, fair and equitable treatment of bidders, promote competition and enhance efficiency and economy in the procurement process.

The present White Paper draws its inputs from the suggestions emerging out of the deliberations of the Consultation, and a thorough review of the draft Public Procurement Bill 2012 and Protection to Persons Making the Disclosure Bill, 2010 or the Whistle-blower Bill.

**I] Institutional Framework for Public Procurement**

1. *Section 18 of the Public Procurement Bill 2012 provides details of successful bids; list of bidders excluded with reasons, particulars of debarred bidders and that cause of debarment action would be communicated through the Central Procurement Portal.* However, there is a need to further strengthen transparency provisions by providing, on request, to an unsuccessful tenderer, the reasons why his tender was not selected, and the characteristics and relative advantages of the selected tender. Similarly, it should be considered to provide a supplier on request why her/his application to be considered as a registered bidder under Section 20 or a pre-qualified bidder under Section 19 was rejected. This is likely to inspire greater public confidence in the procurement process and lessen unnecessary challenges to the bid process.
2. *Section 12 describes the subject matter of procurement with reference to national/international standards/building codes, etc.* In order to further ensure that there is no 'over-specification' which would have the effect of limiting competition it will be useful to state that technical specifications, where appropriate, will be in terms of performance, rather than design or descriptive characteristics.
3. *Section 29 (Methods of Procurement) provides that notwithstanding other modes of procurement being available, entities may make procurement by means of a rate contract concluded by a Central Purchase Organisation (Sub Section 3 of Section 29).* In view of drawbacks of the rate contract system, it is suggested that rate contracts entered into by a Central Procurement Organisation only be opted for by procuring entities only where the per unit cost of the product is low and/or likely annual off-take is also low (thresholds may be prescribed in Rules to the Act) and subject to other safeguards for limited use of this mode of procurement, as recommended in many model laws on public procurement.
4. *Section 6 provides well considered grounds (like promotion of domestic industry especially with regard to MSMEs, considerations of public interest and other socio-economic considerations) on which the central government may base its preference policy.* It is recommended that even in this context the quality criteria should be in-built.
5. The selected bidders in above category should possess the capacity to supply as per minimum specified standards/building codes, etc. This will ensure that proper quality in public procurement is met and that the categories of entities which are the subject matter of preference are encouraged to be competitive.
6. *In 2012, the amendment made in the procurement rule of electronic goods laid out by the Indian Department of Information and Technology aims at providing preference to domestic manufactures.* However, the decision of procurement from the domestic manufacturers will depend upon the government guidelines prevalent during the time of procurement. The rule should provide a clear picture as to what kind of preference will be provided to the domestic manufacturers.
7. The legal existence and the registered office of the selected bidder (to check whether is formed in a tax haven country) should be disclosed in the tender documents so that defunct and special vehicle companies could be avoided while selecting the bidder. (USA example).

8. The procedure for procuring consultancy services has been relegated to be included in subordinate legislation. As consultancy services constitute a critical area of public procurement activities, it is necessary that the Bill applies the same objective criteria for this field of procurement.

Further, the Bill contains broad principles and provides flexibility for the variety of procuring entities to be covered which would be supplemented by Rules for procurement of Goods, Works and Services. However, it has been noted that while setting guidelines/rules on the procurement process in any department or in any PSU it should be based on the four canons of financial propriety:

1. First canon is that a person who is spending Government money must be using the highest standards of financial propriety and he should exercise same vigilance in incurring expenditure from Government funds, as a man of ordinary prudence will apply in incurring expenditure from his own money.
2. The authorization of expenditure should not be for personal benefit.
3. The third canon says that, no sanctioning authority should sanction an expenditure which will be for the benefit of the individual person or for a group of persons, unless it is being done through a court order or if the custom etc., permits that kind of an expenditure to be done.
4. The expenditure incurred in any occasion should not be prima-facie more than what the occasion demands.

In addition to four canons one should be careful about what the occasion demands and what kind of a discretion is applied by the decision makers in the entire process of procurement. Further, discretion has to be followed by accountability organizations like Comptroller and Auditor General (CAG), Central Vigilance Commission (CVC), Central Bureau of Investigation (CBI), among others that have the mandate to promote accountability in the public spending. This accountability should be encouraged towards the stakeholders such as tax payers, the parliament and the legislature.

**II] Private Sector Procurement**

In the private sector, most compliance related complaints are not in the public domain. An internal mechanism of dispute resolution may not be efficacious if companies that disclose their code of conduct and respective procurement policies fail to make public the number of cases that have been dealt with by their compliance department.

1. In addition to having rules and regulations in place, companies must also demonstrate visible concerted steps in ensuring transparency.
2. To infuse more transparency into the procurement process of the private sector, credible data needs to be made public that substantiate implementation of the codes. The data could be in the form of annual compendium of cases dealing with transparency and procurement and the subsequent dispute resolution by the compliance and ethics team.
3. The government should encourage the private entities to adopt Transparency International's Integrity Pact.
4. The companies can adopt Strategic Sourcing Process wherein same company is not selected year after year for the tender or similar kind of project. (USA example).

**III] Public Private Partnership in Procurement**

1. Department of Economic Affairs, Ministry of Finance has prepared the draft Public Private Partnership (PPP) (Preparation, Procurement and Management) Rules 2011 and had solicited views/suggestions from all stakeholders by 31st December, 2011. However, these rules are still under considerations for regulating Public Private Partnership (PPP) projects and so they are a major area of concern. It is, therefore, necessary to specify the rules that would regulate PPPs, as they affect a vast multitude of users in sectors such as rails, roads, ports, airports, power etc.
2. Over and above making rules and regulations, government should be involved in the PPP project on an on-going basis rather than just awarding the contract and forgetting about it.
3. The changing nature of procurement requires capacity building of public procurement agencies for effective and efficient implementation of PPP project.
4. In Central government, state government or urban local bodies, if the institution does not have the capacity to handle contracts, it is likely to falter much more in PPP project than in non PPP project.
5. PPP proposal including the draft agreement must be published for inviting comments from the people and objections before finalizing it.
6. The PPP agreement should necessarily include a condition that the Special Purpose Vehicle (SPV) or any other entity that comes into being as a result of the PPP, should be a public authority within the meaning of section-2 of the RTI act. This means that SPV itself would be directly responsible for giving access to information under the law, when somebody made a request. And the public relation officer of the concerned ministry, which caused the PPP to come into being, should also be equally responsible to provide all information about the PPP project by securing it from the PPP agency.
7. In case where they are not falling within the ambit of the RTI Act, then it is the concerned Ministry which has the power to summon those kinds of information and make a decision about disclosure.

**IV] Industry Associations and Procurement**

1. *If any member company does not follow set code of conduct/ethics there is no institutionalized mechanism at association level to monitor and enforce the ethics, or tale action if and when the codes are violated.* Industry associations should work towards promoting transparent and ethical business practices among the member companies in a more proactive manner.
2. Industry Associations need to make provisions of taking stringent actions (depending upon the offence committed) against the companies registered with them, if found indulging in manipulation of procurement procedures.

**V] Whistle Blower Mechanism in Procurement Process**

1. A whistle blower policy should be mandatory for all the private and public offices.
2. In India anonymous reporting should be allowed and the law enforcers should be more concerned with the verifiable issues than the details of the whistle blower.
3. The government may consider incentivising whistle blowers to expose corruption in procurement process similar in line with the Dodd-Frank Wall Street Reform and Consumer Protection Act (USA) (“Dodd-Frank”) in which provisions are designed to incentivize whistle blowers to expose securities fraud.

4. For encouraging people to open up about the wrong doings, the companies can delegate the duty of handling the whistle blower complains to an audit committee or to an independent agency.
5. To make stringent whistle-blower policy, the companies can maintain a database for reporting the wrong doings. The data can be used to make amendments in the existing laws and covering up the loopholes.
6. The companies can make a portal of filing complains wherein each whistle-blower gets a pin number to check the status and progress made in the case reported by him/her.
7. The Whistle-blower bill 2010, does not have the definition of a whistle-blower, so there is a requirement to clearly define the term as per the legal parameters.
8. The bill should ensure the protection of the identity of the whistle-blower, and there should be a special provision to provide safety to women whistle blowers, who seem to be active in reporting cases.
9. Punishment for the person who discloses the identity of the whistle blower needs to be clearly outlined in the bill.

## ENDNOTE

1. Based on CUTS International, 'Public Procurement: Need for a National Policy in India', July 2014, co-authored by this writer.
2. Ping Wang and Xinling Zhang, 'China Public Procurement Law', EU Asia Inter University Network for Teaching and Research in Public Procurement Regulation, 2011.