LEGAL FRAMEWORK OF PUBLIC PROCUREMENT

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INTRODUCTION

Public Procurement is the process by which the Government procures goods and services from the private entities and in return pays them in monetary terms for the goods and services rendered by them. “Procurement or Public Procurement means the acquisition by purchase, lease, license or otherwise of goods, works, or services or any combination thereof, including award of Public Private Partnership projects, by a procuring entity, whether directly or indirectly through an agency with which a contract for procurement services is entered into, but does not include any acquisition of goods, works or services without consideration.”

Every year the Indian Government spends huge amount of money in Public Procurement. There is no Central Legislation in India that administers public procurement of goods and services. Public Procurement in India is decentralized and hence all States and the Public Sector Undertakings have their own procurement organizations. The Ministries and Departments at the Central level as well as the State Level carry out Public Procurement in India. The States of Karnataka (The Karnataka Transparency in Public Procurement Act, 1999) and Tamil Nadu (The Tamil Nadu Transparency in Tenders’ Act, 1998) have enacted State Legislations on public procurement. “It is the Ministry of Finance at the Central Level and the Department of Finance in the State Level that lay down various broad rules governing Governmental expenditure, including the expenditure on public procurement of goods and services.”

“The total value of public procurement represents 15% of the national budgets and over 30% of the Gross Domestic Product (GDP).” Thus the public procurement clearly has a...
tremendous and significant impact on the economy of India and hence the requirement for having an effective public procurement policy cannot be stressed enough. Since there is no Central legislation governing public procurement in India, multiple procurement procedures are in existence both at the Central as well as the State Level, except Karnataka and Tamil Nadu and this does cause some confusion.

In India, before the Public Procurement Bill, 2012 was tabled in the Parliament; different procurement guidelines were applicable at the Central Level, in the States and to the Central Public Sector Undertakings. The Ministry of Finance issued the General Financial Rules (GFR) that “laid down and established the procedure for public procurement of goods and services.” Although at the Central Level, there is no authority that is responsible and accountable for overseeing, supervising and controlling public procurement of goods and services in India, various functions by the Central Vigilance Commissioner and the Comptroller and Auditor General of India are carried out. “The office of the Comptroller and Auditor General of India (CAG) carries out ex-post audit of government expenditures and publish annual and special reports highlighting instances of irregular and wasteful expenditures, losses to the public exchequer and unjustified departures from established procedures.”5 The Central Vigilance Commissioner was established in 1964. The main aim of the Central Vigilance Commissioner was “to guide the Central Government and its agencies in tackling corrupt activities undertaken by the public officials.”6 The Central Vigilance Commissioner has also released various instructions and guidelines in order to curtail the problem of corruption and transparency in public procurement of goods and services.

Even though these rules were put in place and the Government was doing reasonable well in procuring goods and services, but the general perception of the Government among the people was not good. There were various reports of the Government and the bidder (the one who provided the goods and services to the Government) being involved in malpractices and corruption. “A few highly publicized scandals such as the Commonwealth Games, 2010 scam, the 2G Spectrum scam, the Fodder scam, Tehelka Scam, etc has resulted in

5 Organization for Economic Co-operation and Development (OECD), “Collusion and Corruption in Public Procurement”
6 Available at www.cvc.nic.in
There is a bidding process that the Government undertakes in order to procure the goods and services from the bidder. The Government opens up tenders and the bidders need to apply by quoting the price for the goods and services provided by them. Usually the entity that bids the lowest is the one that gets to supply goods and services to the Government. If this process is genuine, the procurer would chose the one who bids the lowest price since the Government would always want to maximize their savings. But sometimes, “it may happen that collusion between the bidders and the procurers results in a bid getting rigged, although bid rigging is not the only example of the rampant corruption in the bidding process.”9 The danger of corruption is present in every stage of the procurement process. Sometimes the bidders themselves co-ordinate and collude with each other in order to affect the outcome of the bidding process and accomplish the desired result and achieve ulterior motives.

“It is not the case that the bidding process for public procurement does not have the required checks and balances in place.” There are General Financial Rules and Delegation of Financial Power Rules as mentioned above. It is just that that there has been no institutional framework or one agency that would exclusively govern and regulate the public procurements. Bodies like the Comptroller and Auditor General of India and the Central Vigilance Commissioner do have a significant role to play in regulating the public procuations.

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8 Organization for Economic Co-operation and Development (OECD), “Collusion and Corruption in Public Procurement”
9 Harsh Sinha; India Law Journal; “Effective Public Policy: Need of the hour”; Vol.4 Issue 4
procurements, but they are required to step in and audit only after the malpractice, corruption or delay in the bidding process as taken place. Hence, there was no body to stop corruption and delay while the Government procured goods and services.

In 2005, the importance of enabling anti-corruption measures was recognized and United Nations Convention against Corruption (UNCAC) came into force. India became a signatory to the UNCAC in May 2011. Article 9 of the UNCAC specifically talks about Public Procurement and corruption in public procurement. According to Article 9, “Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision making, that are effective inter alia, in preventing corruption.”

Owing to its obligation under the UNCAC and rampant corrupt and malpractices in public procurement, the Government of India tabled the Public Procurement Bill in the Parliament in 2012. The Government felt the need to ensure efficient and transparent public procurement process and hence came up with the Public Procurement Bill, 2012 with an aim to achieve transparency, efficiency and establish accountability in the public procurement process. The Bill has been passed by the Lok Sabha, but not by the Rajya Sabha.

PUBLIC PROCUREMENT BILL, 2012

The Public Procurement Bill, 2012 attempts to provide an umbrella framework for all the procurements of the Government. It seeks to induce “transparency and accountability in the public procurement process.” According to the Public Procurement Bill, 2012, every purchase made by the Government from the private sector would be subject to scrutiny. The Public Procurement Bill, 2012 tries to deter cartelization, collusion of bidding process and corruption in the bidding process. As per The Public Procurement Bill, 2012, all the

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10 Article 9 of the United Nations Convention Against Corruption
11 Clause 5(1) of the Public Procurement Bill, 2012
Government Departments would act as procuring entities\textsuperscript{12}. Any Company in which the Government holds more than 50% of the paid up share capital\textsuperscript{13} and any Central Public Sector Undertaking owned or controlled by the Government\textsuperscript{14} can also act as the procuring entity. The Bill has extended the scope of its applicability and has a wider ambit as earlier the procurement rules were applicable only to the Government of India. The Public Procurement Bill, 2012 makes the procuring entity responsible to ensure efficiency and transparency in procurement process. The Public Procurement Bill, 2012 states that equitable treatment of bidders\textsuperscript{15} must be provided by the procuring entity and the procuring entity must establish a level playing field. The Public Procurement Bill, 2012 seeks to promote competition\textsuperscript{16} and ensures reasonable bid price for the quality of the product.\textsuperscript{17} The Public Procurement Bill, 2012 only applies to high valued Government purchases that exceeds or amounts to Rs. 50,00,000 (Fifty Lakh)\textsuperscript{18}

**BILL PROMOTING TRANSPARENCY, EFFICIENCY AND ACCOUNTABILITY**

The Public Procurement Bill, 2012 tries to promote transparency in bidding by adding the Code of Integrity\textsuperscript{19} to the Bill. “The Code of Integrity includes the prohibition of making offer or accepting a bribe in an exchange of an unfair advantage in the bidding process.”\textsuperscript{20} It also includes prohibition “against any kind of misrepresentation that may lead to any kind of financial or any other benefit.”\textsuperscript{21} The Bill also prohibits “any collusion; anti-competitive or bid-rigging process that may impair the fair bidding process”\textsuperscript{22} and it also bars any kind of transaction between the bidder and the procurer before the award is made\textsuperscript{23}.

\textsuperscript{12} Clause 3 of the Public Procurement Bill, 2012
\textsuperscript{13} Clause 3(2)(c) of the Public Procurement Bill, 2012
\textsuperscript{14} Clause 3(2)(b) of the Public Procurement Bill, 2012
\textsuperscript{15} Clause 5(1)(b) of the Public Procurement Bill, 2012
\textsuperscript{16} Clause 5(1)(c) of the Public Procurement Bill, 2012
\textsuperscript{17} Clause 5(1)(d) of the Public Procurement Bill, 2012
\textsuperscript{18} Clause 4(1)(a) of the Public Procurement Bill, 2012
\textsuperscript{19} Clause 6 of the Public Procurement Bill, 2012
\textsuperscript{20} Clause 6(2)(i) of the Public Procurement Bill, 2012
\textsuperscript{21} Clause 6(2)(ii) of the Public Procurement Bill, 2012
\textsuperscript{22} Clause 6(2)(iii) of the Public Procurement Bill, 2012
\textsuperscript{23} Clause 6(2)(v) of the Public Procurement Bill, 2012
As far as Transparency is concerned, the Bill entails a Transparency Mechanism in Chapter III, which talks about the Institutional Mechanisms. According to the Bill, “The Central Government shall set up and maintain a Central Public Procurement Portal that would be accessible to the public for posting matters relating to the public procurement”\(^{24}\). The Government or any procuring entity shall source the Portal and exhibit the procurement information. The Central Public Procurement Portal shall provide access to the information relating to the procurement, especially “the pre-qualification document, bidding document”\(^{25}\), “list of bidders that presented the bids including the bids for pre-qualification”\(^{26}\), “list of bidders that have been excluded from the bidding process”\(^{27}\), “details of the successful bids, their prices and bidders.”\(^{28}\) The procuring entity is required to “maintain a record of the public procurement proceedings” \(^{29}\) that shall include “documents pertaining to determination of need for procurement”\(^{30}\), “description of the subject matter of the public procurement”\(^{31}\), “particulars of participating bidders at each stage”\(^{32}\), “bids evaluated and the documents related to the evaluation.”\(^{33}\) The procuring entities are also required to maintain documents that would explain the need for procurement and bidding process and catalogue of the bidding process with the specified quality and quantity mentioned under Clause 7 of the Bill. “The procuring entity will not package or divide the procurement so as to limit competition among bidders.”\(^{34}\) But, this has exceptions. The procuring entity “in the interest of efficiency, economy and timely completion may divide the procurement into packages.”\(^{35}\)

The Bill also entails the provisions of Grievance Redressal. Clause 40 of the Bill states “any bidder or prospective bidder who is aggrieved by any decision by the procuring entity may

\(^{24}\) Clause 38(1) of the Public Procurement Bill, 2012
\(^{25}\) Clause 38(3)(a) of the Public Procurement Bill, 2012
\(^{26}\) Clause 38(3)(b) of the Public Procurement Bill, 2012
\(^{27}\) Clause 38(3)(c) of the Public Procurement Bill, 2012
\(^{28}\) Clause 38(3)(e) of the Public Procurement Bill, 2012
\(^{29}\) Clause 39(1) of the Public Procurement Bill, 2012
\(^{30}\) Clause 39(1)(a) of the Public Procurement Bill, 2012
\(^{31}\) Clause 39(1)(b) of the Public Procurement Bill, 2012
\(^{32}\) Clause 39(1)(c) of the Public Procurement Bill, 2012
\(^{33}\) Clause 39(1)(e) of the Public Procurement Bill, 2012
\(^{34}\) Clause 8 of the Public Procurement Bill, 2012
\(^{35}\) Clause 8 of the Public Procurement Bill, 2012
make an application for the review of such decision within ten days from the date of the
decision to the procuring entity specifying the grounds of such application.” But only the
bidder can file such application if the application is filed after the results of the biding
process have been declared. The Bills also states, that “the procuring entity shall try to
dispose off the matter within thirty days from the date of receipt of the application.”36 If the
bidder is still aggrieved by the decision of the procuring entity or the procuring entity has
not disposed off the application within thirty days,“37 then the bidder or the prospective
bidder may file an application to Redressal to the Concerned Procurement Redressal
Committee within a period of fifteen days from the date of the decision of the procuring
entity.” According to the Bill, the Committee must have at least three members and its
chairperson shall be a retired Judge of a High Court. Along with this, the members must
have the required experience in public procurement. The term of the Committee would be
for a period of three years.

According to the Bill, the most encouraged and efficient method of procuring goods and
services from the bidder is by engaging in Open Competitive Bidding. Open Competitive
Bidding is a type of biding process where the opening of the bids by various bidders is
conducted in a public venue and all the people who may wish to witness it could do.
Although, the Bill also provides for Limited Competitive Biding where the number of
bidders are limited. The procuring entity needs to provide reasons as to why it engaged in
Limited Competitive bidding and not Open Competitive Bidding. According to the Bill,
once the procuring entity receives the bids, it not only has to see the lowest bid but also
needs to look at the most technically suitable bid. The parameters of the most technically
sound bid is that the bidder must have the technical capacity and the financial capability to
undertake this responsibility. Apart from this, the bidder must also have experience. Hence,
buying from the lowest bidder does not mean that the prescriptions of the quality of the
product or the actual requirement would be done away with.

36 Clause 40(5) of the Public Procurement Bill, 2012
37 Clause 41(1) of the Public Procurement Bill, 2012
PUNISHMENT FOR GRATIFICATION

The Bill also lays down the punishment of a public servant for taking gratification or valuable thing in respect of public procurement. Any person caught engaging in activities such as lobbying, accepting gratification shall be punished with imprisonment for a minimum period of six months and the punishment may extend to imprisonment for a period of five years. The Bill enables exclusion of any person from the bidding process and cancellation of contract if he/she is found guilty indulging in unfair activity to influence bid rigging by improper use of information provided by the procuring entity or by engaging in bid rigging and thereby violating the Code of Integrity. Clause 49 of the Public Procurement Bill, 2012 provides that the Bidder would be debarred if he/she were found guilty under the Prevention of Corruption Act, 1988 or under the Indian Penal Code for causing loss or life or property for a maximum period of two years.

SHORTCOMINGS OF THE PUBLIC PROCUREMENT BILL, 2012

Even though the Bill has introduced some kind of institutional framework for regulating and governing the public procurement and the Bill has sought to tackle the problem surrounding lobbying and corruption in public procurement by making the procurement process transparent and effective, the Public Procurement Bill, 2012 is not devoid of its limitations and restrictions.

Firstly, the Public Procurement Bill, 2012 will not be apply to any public procurements which are made for less than Rs. 50,00,000. In my opinion this is a significant value and the Bill does not provide any basis for categorization and discretion of this amount. This essentially means that any public procurements worth less than Fifty lakh will not have to go through any public scrutiny, thereby, there would not be any transparency when it comes to public procurements which are less than fifty lakh rupees. The state of public procurements worth less than fifty lakh would remain as it was earlier and the problems of lobbying and corruption would continue to prevail in public procurement. Further, The
Public Procurement Bill, 2012 also allows the Government to limit competition in certain exceptional cases and “it also permits exemption from the transparency and accountability requirements in ‘public interest’.” However according to the Organization for Economic Co-operation and Development (OECD), “limited competitions must not lead to limited requirements when it comes to transparency.” According to the OECD, “countries must use measures in order to enhance the transparency requirements and integrity while at the same time balance the limited competition in public procurement.” Hence, the Bill fails to take note of this aspect even if it is required during the time of limited competition. This also provides a lot of discretion on the administration to qualify what falls under public interest and what does not.

Secondly, it seems that the Bill seeks to achieve far too many objectives ranging “from ensuring transparency, accountability and probity in the public procurement process, to enhancing efficiency and economy, to maintain the confidence of the public, to promote competition, maintain integrity in the public procurement process.” This seems way too wide and difficult to achieve all at once. “There are too many multiple objectives stated in the Bill and the main question then arises is whether can these multiple objectives be actually materialized and operationalized into practice.” In my opinion it is important to refine and polish the aims and the objectives of the Bill to a simpler and achievable set of objectives. Incase this is done; it would also help in improving the efficiency and accountability of the procuring entities. The UNCITRAL Model Law on Public Procurement, on the other hand, has much more simpler objectives and emphasis is primarily on the transparency and competition problems. Also, under the Public Procurement Bill, 2012, exemption can be made under foreign aid agreements or below specified value or for the purposes of national security; whereas the UNCITRAL Model Law only the procurements made under foreign aid agreements can be exemplified. The
UNCITRAL Model Law is extremely limited and narrow when it comes to exemptions as compared to Public Procurement Bill, 2012.

Thirdly, The Public Procurement Bill 2012 fails to define the meaning of Open Competitive Bidding. In the Bill, there is only a provision for Open Competitive Bidding, but essentially the rules governing it and how is Open Competitive Bidding to be conducted has not been specified in the Bill. Further, the Bill also allows for Limited Competitive Bidding in certain exceptional emergency situations as mentioned above. “The Bill specifies if there is not enough time or the subject matter of the procurement is such that only limited bidders could supply it or if there is an occurrence of some unforeseen event”, then the procuring entity may not engage in Open Competitive Bidding but undertake Limited Competitive Bidding.” In my opinion, the parameters mentioned for Limited Competitive Bidding to be conducted are extremely wide, which leaves a large room for discretion and interpretation by the procuring authorities. The parameters mentioned for Limited Competitive Bidding must be very specific, précised, detailed and unambiguous, which does not seem to be the present case. The Bill also allows for single source procurement even though in exceptional circumstances. This again leaves a wide scope of discretion with the procuring entity.

Further, the Public Procurement Bill, 2012, “proposes to set up a grievance Redressal mechanism by setting up a Independent Procurement Redressal Committee.”41 This is definitely an improvement from the previous policy where no such scheme was included. But, one of the issues of the Committee is that the bidder cannot directly make an application to the Committee under the Bill. The bidder first has to file an application to the procuring entity. There is a very high chance that the procuring entity might try to exercise its power and authority over the bidder and the bidder actually might never file an application in the Committee even though the bidder is aggrieved. “Even if the bidder does file an application with the Committee, the Committee can only make recommendations
according to The Public Procurement Bill, 2012 and cannot enforce them.” The procuring entity has the right to reject the recommendations. On the other hand the UNCITRAL Model Law on Public Procurement “empowers the independent body for grievance redressal to take well-specified actions ranging from prohibiting the procurement entity to taking a decision and this independent body is recognized as a Judicial Entity” as opposed to the recognition of the Committee as a judicial entity in the Bill. Even though the Committee might be participating in the day-to-day functioning of the administration and might be adjudicating on political questions as well, which is the role of the administration and executive, I opine that the Procurement Redressal Committee must have the power to enforce the recommendations. This is required especially in public procurement there have been instances of rampant corruption and lobbying by the Government. There needs to be some sort of check on the functioning of the Government, even if the Committee engages itself to answer those questions that should essentially be answered by the Executive. Enforcement of the recommendations should not be left to the will of the procuring agency as if it is left to them, it is highly doubtful that the recommendations would ever be enforced.

Fifth, the Public Procurement Bill, 2012 does not provide for any expert to over look the bidding process and the even though the Bill does lay emphasis on transparency, the objective of transparency may not be achieved if there is no expert heading the public procurement process. There has to be some mechanism to be able to stop the practice of corruption and lobbying. “The Bill only provides for redressal once the act of lobbying has been committed.” A lot of emphasis has been laid on keeping a check on the implementation of the bid rather than ensuring that the bid has been structured in a proper and transparent manner. It is the structuring of the Bid that is weak and the Bill does not provide any sort of recourse in this regard. The Bill, unfortunately, does not provide any mechanism to prevent the malpractices from proceeding and this can only be done when there is some expert/Committee of experts in public procurement handling the bidding

42 Mukul G. Asher, Tarun Sharma and Shahana Sheikh; Public Procurement Legislation Essential for Improving Public Financial Management in India; In response to input sought by the Ministry of Finance on the 2012 Public Procurement Bill; April 2015
43 UNCITRAL MODEL LAW ON PUBLIC PROCUREMENT
process and have no connection with either the procuring entity or the bidder. There is still no body that keeps a check on the malpractices while the bidding process is in effect.

Finally, the Bill unfortunately fails to set aside any reservation quota policy for the Scheduled Caste/Scheduled Tribe and Other Backward Classes (OBC’s). India has a historical background of caste discrimination and caste discrimination is still very much prevalent in India. Hence, the Bill ought to have provided for some kind of reservation policy, which it does not. Another problem is that the management of the data is a key issue. “It would be incumbent on any forthcoming legislation to ensure that the procurement system is accompanied by a streamlined data and information management system as well” so that the goal of ensuring transparency that the Bill proposes to achieve is actually crystallized.

CONCLUSION

Although the Public Procurement Bill 2012 has its own share limitations, but the fact that some institutional and legal framework for governing and regulating the public procurement in India was recognized showed that the Ministry of Finance, Government of India acknowledged the need for something like this. This was definitely a much-welcomed proposal in 2012, but the Bill has now lapsed since the dissolution of Lok Sabha in 2014 and the Modi Government needs to revive the Bill if it desires to convert the Bill into an Act. It is high time that Central Legislation on governing and regulating public procurement in India is enacted, if the rampant practice of corruption in procurement needs to come to a halt. It also needs to be realized that “while the existence of a strong legislation is a necessary means to ensure probity in public procurement, legislation alone cannot address the deviations that occur at a practical and grass root level.” Although the laws and policies are important, but there is a need for “an ethical mind set and greater liabilities without which the laws could always be manipulated and there cannot be full proof laws and procedures established.” It is granted that the need for strong legislative and policy

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44 Mukul G. Asher, Tarun Sharma and Shahana Sheikh; Public Procurement Legislation Essential for Improving Public Financial Management in India; In response to input sought by the Ministry of Finance on the 2012 Public Procurement Bill; April 2015
45 United Nations Office on Drugs and Crime (UNODC); India: Probity in Public Procurement
46 United Nations Office on Drugs and Crime (UNODC); India: Probity in Public Procurement
framework cannot be undermined, but what is also essential is the need for consistent and unfailing implementation of the legislation. “Many practices followed on the ground may be divergent from what is legally prescribed, due to limited governance and accountability and process and monitoring inefficiencies.”47

47 United Nations Office on Drugs and Crime (UNODC); India: Probity in Public Procurement