

## Elements of a Public Procurement Policy for India

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## **Abstract**

There is neither a formal public procurement policy nor law in India. There is a pressing need for both, as rules without law lack enforceability and law without policy support suffers from a lack of coherent justification or rationale for the provisions made. When one of many options has been selected to address a particular issue, the need for justification in terms of national perspective/international obligation/best practice has to be enunciated through a policy. Hence, this paper advocates for the adoption of a public procurement policy and provides for some of the major elements that the policy should espouse.

This paper suggests elements of public procurement policy in India which would reflect the current needs of the nation by examining the subject under three main headings: i) reorientation needed in the policy and legislation to bring it in tune with current preoccupations of the government; ii) enduring principles which the new policy must continue to uphold; and iii) coherence which the public procurement policy must maintain with other major macro-level policies of the country.

## **Introduction**

The practice of public procurement in India received an impetus when the UPA government introduced the Public Procurement Bill in 2012 in the lower house of Parliament. Although the Bill was largely based on General Financial Rules (GFR), 2005 and Delegation of Financial Power Rules (DFPR), 1978, in some areas it has set new paradigms. The parameters for competition and transparency were set at a higher level including provisions for the end-to-end public procurement process to be reflected through a Central Public Procurement Portal (CPPP). The probity issue featured very high, based on the norms set out by Article 9 of the UN Convention Against Corruption (UNCAC), to which India became a signatory in 2011, to the extent of including an Integrity Pact mechanism and sanctions for breach of the Pact and for other corrupt and anti-competitive practices under the Bill, such as bribe taking, bribe giving, collusion, bid rigging, non-disclosure of conflict of interest/previous transgression and so on. A new note was struck in Indian anti-corruption legislation in tackling the supply side of corruption.

The policy to fulfil social objectives through offsets was also more clearly spelt out than in the GFR. Most importantly, the Bill sought to meet the biggest lacuna noted in the system, i.e. the lack of a Grievance Redressal Mechanism, which was sought to be addressed through providing for setting up of independent tribunals composed of people of eminence and unimpeachable integrity.

The Bill lapsed with the dissolution of the 15<sup>th</sup> Lok Sabha in May 2014 and the NDA government coming to power. The new government's priorities have been more or less spelt out through the President's opening address to Parliament in its first session.

The key focus has been identified in the following words in the President's inaugural address:

“...putting the Indian economy back on track is paramount for my government.”

The instrumentalities of meeting the goal are also spelt out thus:

“My government will create a policy environment which is predictable, transparent and fair...Reforms will be undertaken to enhance the ease of doing business”

If reviving the economy and promoting ease of doing business are key concerns for the new dispensation as opposed to the model of entitlement-based public schemes coupled with inflation stoking spending beyond means of the previous government, then certainly reform in public procurement is needed more than it ever was. Any business-oriented model of government must perforce, to a large extent, be achieved through a competitive, transparent, probity-promoting public procurement policy and law. Since public procurement comprises approximately 29 per cent of gross domestic product (GDP), which is almost US\$536bn annually, this is one of the major markets where reform and its articulation through policy and law are necessary.

Moreover, the lack of an overarching law governing public procurement in India has led to the subject being administered through a morass of rules set by different authorities, having no force of law. From the GFR to the DFPR to the Central Vigilance Commission (CVC) guidelines, to the verdicts of the courts, diverse authorities have brought out directives on public procurement. The matter is so confused that different organisations remain free to follow their own interpretation of various guidelines, leading to distortion of competition, lack of transparency and probity, which have in the past given rise to major incidents of diversion of public funds. Thus a clearly enunciated public procurement policy and overarching public procurement law remain as much a priority for the present dispensation in India as it was for the past.

Moreover, Article 9 of the UNCAC to which India is a signatory, obliges that “Each State Party shall, in accordance with the fundamental principles of its legal system, take 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.” Thus, to honour its international commitments, it is incumbent on government to pass a public procurement law whose rationale, it is hoped, would be reflected through a policy document.

## **Need for Reorientation**

### ***Transparency, Probity and Competition***

The Public Procurement Bill (PPB) brought in by the last government was primarily a response to large-scale corruption in procurement reflected in scandals that tended to erode confidence in governance itself. So to some extent there are several provisions in the Bill that take transparency and probity to an extreme which threatens business logic. The Central Public Procurement Portal, for instance, to be set up under section 38 of the Bill, carries transparency to an extreme, demanding the procuring agency not only to make transparent every phase of the bidding process but also to give the “list of bidders excluded or debarred...with reasons thereof”. This is likely to give rise to avoidable litigation, which may hold up the entire contracting procedure. The portal is supposed to carry not only the details of successful bids and bidders but also their prices. Such a level of transparency for public sector enterprises, which is not applicable to the private sector, may well result in the public sector having to reveal too much information, which may make it uncompetitive *vis-à-vis* the private sector.

The sections dealing with offences under the PPB also go overboard on probity issues by making punishable not only interference or influence of procurement process with the intention of securing wrongful gain for any prospective bidder but also making engaging in any action of “lobbying directly or indirectly” illegal on par with bribing, collusive bid rigging and other marked instances of anti-competitive behaviour. As is well known, lobbying is a form of advocacy whereby businesses showcase their products and services to buyers/procurers. Without lobbying, a procuring agency is not likely to gain knowledge about new products and services coming into the market. Hence a business-like model of governance would have to calibrate the public procurement policy and legislation to make it more reflective of market realities than is the case through the dispensation of the PPB.

### ***Market Access Issues***

The second major issue to be considered by the present government in the public procurement sphere is how far the public procurement market in India needs to be opened up to foreign participation. Section 11 (1) of the Bill introduced by the last government had provided that “the procuring entity shall not establish any requirement aimed at limiting participation of bidders in the procurement process that discriminates against or amongst bidders or against any category thereof, except when so authorised or required...”

This effectively means that the Bill makes no distinction on the basis of nationality regarding access to India’s large procurement market. This is opposite to the practice in most countries where government procurement, being out of the purview of the general rules applicable under the WTO, is closed to non-domestic bidders. Section 11(2) of the PPB gives exceptional circumstances in which domestic players have preferential market access. This is when the central government provides for “mandatory procurement of any subject matter of procurement

from any category of bidders or purchase preference in procurement from any category of bidders” on the grounds of “promotion of domestic industry, socio-economic policy of central government, any other consideration in public interest in furtherance of a duly notified policy of the central government”. Thus the preference to domestic industry is given in exceptional circumstances only.

A debate arises on the issue as domestic manufacturing in India, which contributes only 16 per cent of the GDP, needs to be bolstered through every possible policy instrument. The National Manufacturing Policy, 2011, therefore speaks of leveraging domestic content in public procurement as a part of the strategy to raise the share of manufacturing in GDP to 25 per cent in 10 years’ time, with the objective, inter alia, of creating a hundred million jobs. Therefore there is a case for restricting the domestic market in India to domestic players to give a boost to domestic manufacturing. On the other hand, the advocates of maintaining open procurement markets argue that since Indian manufacturing is deficient in high tech areas, closing the GP market to foreign players may throw India back into a pre-liberalisation situation, where Indian goods and services had become uncompetitive due to closed markets.

The Bill has to resolve these contradictions. It would have to ensure that the market is thrown open to foreign players only when the required quality is not available or not available at reasonable prices locally. However, the FDI policy would continue to remain very open, so that to access the Indian GP market, foreign players would need to set up manufacturing units in India, thereby leading to transfer of technology and spread of good international manufacturing practises.

The case of the current regulation of the electronics industry in India is illustrative of this point. The new Preferential Market Access (PMA) policy of the Department of Electronics and Information Technology notified through their circular no. 339(3)/2013 –IPHW of Dec 23, 2012, is applicable to procurement by central ministries/departments (except Ministry of Defence) and their agencies for electronic products or procurement through centrally sponsored schemes/grants. The percentage of procurement to be made from domestically manufactured electronic products would not be less than 30 per cent of the total procurement value of that electronic product/total procurement of electronics by the concerned ministry/department. The electronics products to be notified would need graded domestic value addition, commencing from 25 per cent in Year 1 and reaching 45 per cent in Year 5.

This preferential market access policy would be supported by schemes to promote the growth of domestic manufacturing capacity in electronics, notably the setting up of semi-conductor wafer fabrication in India and approving an attractive incentive package for these FABs.

However, there are other opinions about regulating market access to the Indian public procurement market. Some critics feel that as in the 2012 Bill, access to the GP market should not discriminate on the basis of nationality so as to preserve the free market ethos of the Indian

public procurement market. At the same time, flooding of the market by cheap sub-standard imports could be prevented by effective use of trade instruments like anti-dumping and anti-subsidies measures allowable under the WTO or through use of higher mandated standards for goods and services.

In any case, whatever be the mode espoused, the question of the extent of market access to the Indian GP market to be allowed would need to be carefully deliberated on by the government.

### *Addressing Structural Weaknesses*

A third set of issues which may need a relook are the PPB's structural weaknesses. The grievance redressal mechanism has power only to recommend action to the procuring agency, including the corrective measures to be taken. Since the procuring agency is itself a party to the dispute, its objectivity and willingness to act on recommendations of the grievance redressal tribunal is debatable. As commentators on the subject have observed, "the question of the forum's (independent review body's) political environment may be critical in terms of whether the recommendations are usually followed."<sup>1</sup>

The position of the review body is much weaker than that under the WTO's Government Procurement Agreement (Article XVIII), for example, where the authority determines "that there has been a breach or failure" and thereafter asks that each party "shall adopt and maintain procedures that provide for...corrective action or compensation for the loss or damage suffered..." The redressal mechanism under the UNCITRAL Model Law of Public Procurement also has similar powers as in the WTO GPA.

The other major structural weakness from which the PPB suffers is that the grievance redressal mechanism is restricted only to reviewing grievances arising at the stage of bidding or tendering, whereas the maximum disputes arise in the contract management stage, i.e., post signing of the contract.

Here if there is no tribunal-like mechanism to which both parties can have easy recourse for adjudication/settlement of disputes, the only alternative left would be the usual time- and cost-consuming procedures of the courts and arbitration.

Yet another structural weakness of the Bill emerges, perhaps, in the Integrity Pact mechanism it promotes. The Integrity Pact becomes a meaningful mechanism when it is monitored effectively by Independent External Monitors (IEMs) who are appointed by the CVC, whose names are notified along with the specific tenders they are monitoring and who can be appealed to if the bidder is aggrieved. The Bill of 2012, though it provides for the IP mechanism and sanctions for its breach in tendering, yet does not make any provision for the IEM to effectively monitor whether the Integrity Pact is being honoured by both sides. Without the mechanism of IEM being

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<sup>1</sup>Gordon, D (2006) 'Constructing a Bid Protest Process' Public Law and Legal Theory Paper No. 2000, The George Washington University School, Washington DC.

specifically provided for through the policy and the legislation, the Integrity Pact proposed under the Bill of 2012 remains, to a large extent, a mere formality.

These are structural defects in the Bill of 2012 which need to be addressed by the present government in designing a policy or legislation on public procurement.

### ***Sustainability Issues***

When sustainable development has become a model which countries are trying to promote, and where the UN Conference on Sustainable Development held in 2012 has categorised Sustainable Public Procurement (SPP) as one of the five initial sustainable consumption and production programmes for development in the next 10 years, the SPP issue in Indian procurement deserves a serious look by the present government. SPP is specially a necessity as a sustainable initiative in view of the resource-intensive manufacturing practises followed in India and the fact that Indian industry is dominated by MSMEs which have poor capacity for adopting sustainability promoting technology. The Public Procurement Bill, 2012 has made a beginning in the direction of SPP by including in the Criteria for Evaluation of tendered items under section 21 not only the “functional characteristics” but also the “environmental characteristics” of the subject matter.

However, this alone is not sufficient to give a substantial push to SPP in India. A certain degree of push has to be given through the procurement policy itself for government procurers to opt for products and services which impact on sustainability, such as recycled paper for use of government stationery as done in Brazil, energy-efficient electrical fittings and fuel-efficient vehicles for use by government offices. Also, in mandating value for money, i.e. in mandating purchase of goods of specified quality at the most competitive rates, the emphasis has to shift from cost per se to life cycle cost concept, where there is explicit provision for considering the financial gains of environmental alternatives through improved durability and lower operating costs over the lifetime of a product or service and its less harmful environmental impact.

The above are certain recommendations on the possible areas the new government may consider for reorientation while designing a more effective public procurement policy and law.

### ***Enduring Principles the New Policy Must Uphold***

It is felt that for a sound procurement policy, the core principles of promoting competition, probity, transparency, disincentives for anti-competitive behaviour and professionalisation of procurement activities and effective grievance redressal which characterise the Bill of 2012 should continue to prevail subject to the reservations mentioned in the first part of this brief.

**Competition:** Provisions ensuring broad-basing of bidders, objective pre-qualifying criteria for bidders, objective specifications for items of supply, evaluation of bids based on pre-disclosed criteria, promoting open competitive bidding as the norm, compulsory publishing of tender

results, which are norms enshrined both in the GFR and the Public Procurement Bill, 2012, are some of the important means for promoting competition, which should continue to prevail.

**Transparency:** As introduced through the Bill of 2012, the CPP should continue to exhibit all matters relating to specific public procurements (including pre-qualification document, bidder registration and bidding document, list of bidders that presented bids and so on) in an end-to-end manner, subject to a few reservation mentioned in the first part of this brief. Requirement for a procuring entity to maintain a record of procurement proceedings and electronic reverse auctions as a mode of procurement are welcome measures in transparency which should continue to prevail.

**Probity:** The sharper focus on probity issues compared to the GFR brought in by PPB through code of integrity binding on both the procuring entity and bidder and introduction of penalties and debarment for criminal offences within the procurement code itself are again measures which need to be preserved. Unless there are punitive measures for breach of the public procurement norms prescribed through the policy and the legislation, they would cease to lack enforceability. Punitive action for breach of the norms under the Bill of 2012, including excluding bidders from the procurement process, forfeitures, recoveries, debarment in participation from future procurement should continue to prevail as also punishment for taking or offering gratification in respect of public procurement/abetment of such offences. The emphasis on tackling the supply side of corruption that till now did not feature under any legislation in India, including the Prevention of Corruption Act, should continue as a welcome feature of the public procurement code.

This would also harmonise the Code with the amendment proposed to the Prevention of Corruption Act in 2014, pending in the upper house of Parliament, and which is likely to be passed.

**Independent Grievance Redressal Mechanism:** The lack of effective grievance redressal under the GFR, which has been one of the main lacuna in Indian public procurement, was sought to be resolved through the introduction of independent Grievance Redressal Tribunals to be set up by the central government under the Bill of 2012. This mechanism needs to be continued with and strengthened by giving it not merely recommendatory but also decision-making powers to give rulings on disputes. Its scope may also be extended to disputes in contract management post the awarding of tender.

**Professionalisation:** The Bill of 2012 is one of the few pieces of legislation in India to actually empower central government to prescribe professional standards to be achieved by officials in a particular field, in this case, public procurement and also provide for government to specify suitable training and certification requirements for the same. This is in line with the provisions under UNCAC, to which India became a signatory in 2011. In view of the fact that public



procurement suffers from neglect very often due to lack of domain knowledge by the administering officials, this new note struck in the Bill of 2012 deserves to be carried forward.

### **Policy Coherence with other Major Macroeconomic National Policies**

Policy coherence is a sine qua non for any country if the policies have to be implemented on the ground without counter-pulls and pressures diluting their effectiveness. With reference to policy discernible through the Public Procurement Bill of 2012, it has been the comment of some that the tenor of the policy runs counter to some other national level policies. For example, it has been pointed out that the National Manufacturing Policy 2011 takes a policy decision to the effect that “the government will also consider use of public procurement in specified sectors with stipulation of local value addition in areas of critical technologies and wherever necessary...”

The non-discrimination clause in the Bill of 2012 that makes no distinction between domestic and foreign suppliers is therefore said to be at cross purposes with the National Manufacturing Policy (NMP). “The revised draft Public Procurement Bill thus converts a mandatory policy requirement into an optional and an exceptional one, with the obvious implication that the NMP itself may become at its best, inoperative, and at its worst invalid ab initio, being contrary to an act of the government.”<sup>2</sup>

The policy incoherence in this regard would definitely need to be addressed by the new government. It may take the route of making national competitive bidding the norm rather than the exception, as is the global practice, vide the examples of China, the EU, the US and Canada, to name a few. But since it has also been observed by some others<sup>3</sup> that making market access discriminatory on the basis of nationality may be a regressive measure, restricting competition and taking India back to the pre-liberalisation era, one may also resort to maintaining non-discrimination in the policy but in practice keeping the market access regulated against cheap and sub-standard imports through effective use of trade instruments, like anti-dumping, anti-subsidy action and through strict implementation of national standards.

One other area where better policy coherence seems to be the need of the hour is in terms of India’s environment policy, whose objective is to promote sustainable development in every way. The tenor of public procurement policy enunciated through the GFR 2005 and the Public Procurement Bill, 2012 are lacking in this respect, as the first of these has no sustainable perspective whatsoever and the latter, the Bill of 2012, pays only lip service to sustainability. In view of the public procurement market encompassing as much as 29 per cent of the GDP, it could very effectively be leveraged to bring sustainability into the manufacturing of goods and services which form the subject matter of procurement. India could well follow the purchasing policy of countries as diverse as Japan, Denmark, Hong Kong China, Brazil and other countries that have adopted green public procurement in some form. Some have joined the Marrakesh

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<sup>2</sup>Sandeep Verma, ‘No “buy India” clauses for us, thank you’, *Financial Express*, May 5, 2012.

<sup>3</sup> CUTS International, ‘Public Procurement in India: Domestic Regulation and Trade Prospects’, 2012

Initiative on SPP sponsored through the 2012 UN Conference on Sustainable Development. In a country that is fast industrialising and has a high population, procurement based on norms of low environment impact is the need of the hour.

That SPP is doable in Indian conditions in a graduated manner would be highlighted through a case study of Indian Railways. They have integrated environmental concerns into decision making through some environmentally sustainable procurement actions, such as the phasing out of incandescent lamps in 2000, the insistence on purchase of only Bureau of Energy Efficiency (BEE) three-star or higher rated products from 2007, development of green toilet technology in 2010, transit from CFC refrigeration to HFC by 2008, thus reducing greenhouse gas emission, etc.<sup>4</sup>

Agencies promoting sustainable procurement are the BEE and Bureau of Indian Standards (BIS), which are promoting green procurement in crucial areas. The BEE's role of branding products for energy efficiency provides an easy guide for public procurement agencies/private consumers to choose sustainable products.

The BEE sent Life Cycle Cost (LCC) analyses of various star ratings on important office equipment to the Department of Expenditure in 2013, which resulted in the first ever OM based on SPP principles by the said department vide its O.M no. 26/6/12/PPD dated January 21, 2013 which directs all ministries/departments to ensure that while procuring appliances they carry the threshold star rating indicated against each item in the OM or higher standards. Thus the practicability of achieving policy coherence between sustainability policies and public procurement policy is demonstrably possible. At least a graduated approach in the direction of sustainability should be evident in the public procurement policy ushered in by the government.

Another important area where public procurement policy needs to achieve coherence is in the area of international trade policy. As has been observed in chapter 5 of CUTS research titled Government Procurement in India: Domestic Regulation and Trade Prospects, the Preferential Market Access (PMA) schemes in India for public procurement cover electronics, IT and ITeS, telecom sectors and also the solar equipment sector. However, these PMAs need to be designed carefully, keeping in view factors like India's WTO obligations. For example, the PMA policy notified in the electronics sector through Notification No. 8(78)/2010-IPHW dated February 10, 2012 of the Department of Electronics & IT, which cited security reasons for giving preference to domestically manufactured electronic products, had to be replaced by the new Notification No. 33(3)/2013/IPHW dated December 23, 2013. The first notification, by invoking security reasons, was probably imposing restrictions on procurement even by private sector, whereas they do not come under the coverage of government procurement and therefore, GATT rules on national treatment would have been violated. The new circular has been carefully designed so as

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<sup>4</sup>Sanjay Kumar, 'Sustainable Procurement in Indian Railways – The Track Ahead', available on [www.gpnindia.org/images/stories/spp\\_in\\_indian\\_railways.pdf](http://www.gpnindia.org/images/stories/spp_in_indian_railways.pdf)

to cover procurement only by central ministries and departments (except Ministry of Defence) and for electronic products procured under centrally sponsored schemes and grants made by the central government.

Another example of a PMA measure that lies in a grey area in the context of India's WTO obligations is that mandating domestic content requirements under the Jawaharlal Nehru National Solar Mission (JNNSM) for solar cells and solar modules. The US claims that the measures appeared to nullify or impair the benefits accruing to them under Article III.4 of GATT 1994 (guaranteeing that the products of the territory of any WTO member imported into the territory of any other member shall be accorded treatment no less favourable than that accorded to products of national origin) and Article 2.1 of the TRIMS Agreement of WTO (guaranteeing that a WTO member shall not apply any measures that discriminate against foreign products).<sup>5</sup>

These arguments are based on the premise that the developers of solar power are private developers, not covered by the scope of the Government Procurement Agreement of WTO and hence are covered by the usual GATT and WTO regime guaranteeing National and Most Favoured Nation Treatment. The US has been joined by Brazil, Canada, China, the EU, Japan, Korea, Malaysia, Norway, the Russian Federation and Turkey as third parties to the dispute in WTO. India insists that its policy is WTO-compliant: the import restrictions on solar equipment are justified as Phase II of the JNNSM programme includes major government subsidies and public money should not be used to pay for imports.<sup>6</sup> Thus the PMA for solar equipment appears to be in a grey area with reference to India's commitments under WTO.

It would be in India's interest if the design of PMAs by any line Ministry/Department was done in consultation with the Ministry of Commerce, in order to ensure that the WTO compatibility of a policy could be checked out before roll out of the policy.

## **Conclusion**

It is hoped that the new government gives adequate priority to public procurement policy not only for improving transparency and probity in government processes but also for improving India's competitiveness in industry. Some of these recommendations, it is hoped, would find resonance as and when they focus on public procurement as an area for fresh deliberation and action.

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<sup>5</sup> Summary of the disputes as available on [www.wto.org](http://www.wto.org)

<sup>6</sup> Ankit Panda in *The Diplomat*, February 12, 2014