



Government Procurement in India

Domestic Regulations & Trade Prospects

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Abbreviations

ACASH:	Apex Societies of Handlooms
ANDAs:	Abbreviated New Drug Applications
APEC:	Asia Pacific Economic Cooperation
APIs:	Active Product Ingredients
BHEL:	Bharat Heavy Electrical Ltd
BIS:	Bureau of Indian Standards
CAG:	Comptroller and Auditor General
CAGR:	Compound Annual Growth Rate
CAT:	Cyber Appellate Tribunal
CCAs:	Controller of Certifying Authorities
CCI:	Competition Commission of India
C-DAC:	Centre for Development of Advanced Computing
C-MET:	Centre for Materials for Electronics Technology
CPC:	Central Purchase Committee
CPPA:	Central Public Procurement Portal
CPSEs:	Central Public Sector Enterprises
CPSU:	Central Public Sector Undertaking
CPWD:	Central Public Works Department
CSC:	Common Service Centre
CVC:	Central Vigilance Commission

DFPR:	Delegation of Financial Powers Rules
DGCIS:	Directorate General of Commercial Intelligence and Statistics
DGS&D:	Director General, Supplies and Disposal
DIPP:	Department of Industrial Policy and Promotion
DIT:	Department of Information Technology
DoP:	Department of Post
DPCO:	Drug & Price Control Order
EDI:	Electronic Data Interchange
EMD:	Electro Motive Diesel
EPS:	E-Procurement System
EPW:	Empowered Procurement Wing
ERNET:	Education & Research in Computer Networking
ESC:	Electronics and Computer Software Export Promotion Council
EU:	European Union
FDI:	Foreign Direct Investment
FIPB:	Foreign Investment Promotion Board
FISME:	Federation of Indian Small Enterprises
GATS:	General Agreement on Trade in Services
GATT:	General Agreement on Tariffs and Trade
GDP:	Gross Domestic Product
GFR:	General Financial Rules
GMP:	Good Manufacturing Practices
GPA:	Government Procurement Agreement
GPL:	Government Procurement Law
HSCC:	Hospital Services Consultancy Corporation

ICB:	International Competitive Bidding
ICERT:	Indian Computer Emergency Response Team
IPC:	Indian Penal Code
IRSS:	Indian Railways Stores Service
IT:	Information Technology
ITA:	Information Technology Agreement
ITC:	International Trade Classification
ITeS:	Information Technology-enabled Services
KB:	Kendriya Bhandar
KVIC:	Khadi & Village Industries Commission
LTE:	Limited Tender Enquiry
MoHFW:	Ministry of Health and Family Welfare
MSEs:	Micro & Small Enterprises
MSME:	Micro, Small and Medium Enterprises
MSMED:	Micro, Small and Medium Enterprises Development
NAFTA:	North American Free Trade Agreement
NASSCOM:	National Association of Software and Services Companies
NCCF:	National Consumer Cooperative Federation
NeGP:	National e-Governance Programme
NHPs:	National Health Programmes
NIC:	National Informatics Centre
NICSI:	National Informatics Centre Services Inc.
NIELIT:	National Institute of Electronics and Information Technology
NIT:	Notice Inviting Tender
NIXI:	National Internet Exchange of India
NMP:	National Manufacturing Policy

NPPA:	National Pharmaceuticals Pricing Authority
NRHM:	National Rural Health Mission
OECD:	Organisation for Economic Cooperation and Development
OTE:	Open Tender Enquiry
PASA:	Purchasing and Supply Agency
PCTs:	Primary Care Trusts
PPB:	Public Procurement Bill
PSEs:	Public Sector Enterprises
PSUs:	Public Sector Undertakings
PWD:	Public Works Department
RCH:	Reproductive and Child Health
RDSO:	Research, Development and Standardisation Organisations
RFP:	Request for Proposal
RPUs:	Railway Production Units
S&DT:	Special & Differential Treatment
SAMEER:	Society for Applied Microwave Electronics Engineering and Research
SDRs:	Special Drawing Rights
SHA:	Strategic Health Authorities
SICLDR:	Semiconductor Integrated Circuits Layout Design Registry
SoEs:	State-owned Enterprises
STPI:	Software Technology Parks of India
STQC:	Standardisation Testing and Quality Certification
SWOT:	Strengths-Weaknesses-Opportunities and Threats

TAA:	Tender Accepting Authorities
TC:	Tender Committee
TERI:	The Energy and Resources Institute
TNMSC:	Tamil Nadu Medical Service Corporation
UNCAC:	United Nations Convention against Corruption
UNCITRAL:	United Nations Commission on International Trade Law
WDO:	Women's Development Organisation
WTO:	World Trade Organisation

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Besides, he has authored/contributed in several publications, covering consumer rights, agriculture, trade issues, and participated and presented papers in conferences and seminars.

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The idea of this study was germinated during a conference on government procurement in New Delhi in March 2011, organised by premier industry associations of India and the interactions held therein with a cross-section of interested stakeholders. It was followed by a series of discussion with some of them and the project was launched in July 2011.

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- Andrew Jackson, Counsellor (Knowledge Economy), British High Commission, New Delhi
- Anil Bhardwaj, Secretary General, Federation of Indian Micro and Small & Medium Enterprises
- Bernard Hoekman, Director, International Trade Department, The World Bank
- Dilip G Shah, Secretary General, Indian Pharmaceutical Alliance and Chief Executive Officer, Vision Consulting Group

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- Sangeeta Khorana, Lecturer in Economics, Aberswyth University, United Kingdom

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Many other names deserve special mention, but could not be referred here for want of anonymity and space. A large number of stakeholders participated in the questionnaire survey and gave valuable suggestions on this evolving subject of India's government procurement regime and its implications thereof. We thank all of them.

Finally, any error that may have remained is solely ours.

**CUTS Centre for International Trade,
Economics & Environment**

Preface

Procurement of goods, services and technologies is an indispensable part of government operations for smooth functioning of an economy. The nature and intensity of procurement, however, varies in accordance with the type of economy and as per the stage of development of a country. Owing to the quantum of procurement undertaken by a government, countries are required to ensure that the procurement undertaken by them is cost-effective- however, welfare states like India, have an additional fiduciary duty to promote local producers and balance developmental objectives apart from focussing on ensuring that procurement is pragmatic.

Government procurement is an important element of the Indian economy. It is not only for smooth operations of governmental agencies and departments but also utilised as a tool for promoting and sustaining economic growth and socio-economic development. This is owing to various local conditions – inadequate infrastructure, low level of industrialisation leading to low employment, under-developed small and medium enterprises, and a large proportion of population grappling with poverty. The issues involving government procurement in India, thus, become very complex, as it requires addressing both economic and social concerns. The need for tackling these issues, therefore, calls for a *sui generis* approach and a coherent policy on government procurement.

Government procurement comprises of about 25 to 30 percent of its gross domestic product (GDP). Given current initiatives for its strengthening and with sufficient consideration to economic and social concerns, it can foster positive changes in several respects – it can sharpen the evolving competition regime of India; enhance producer and consumer welfare through more trade and competition; buttress the mainstreaming of the SME sector into its increasingly market-based economy and ensure better access to essential facilities for its people.

Alas, the Indian public procurement system is plagued with a number of issues such as lack of transparency and accountability, which impede its effective and efficient functioning. In addition, there are gaps and lack of awareness that leads to under-utilisation and/or poor performance in the system. These issues need to be addressed on an urgent basis. In this context, the Public Procurement Bill is likely to bring in much sought after efficiency, transparency and accountability in the system to achieve the greater objective of value for money to the people of the country.

While local issues are critical and needs to be addressed at the national and sub-national level, evolving global government procurement market, more particularly the Plurilateral Agreement on Government Procurement as agreed by some members of the World Trade Organisation, intends to harmonise and integrate domestic government procurement procedures with the global ones. As a positive outcome, such integration at the global level is likely to expand the procurement market. Additionally, it seeks to facilitate greater transparency and predictability in the global procurement market.

India evinced an interest in playing a greater role in the foreign public procurement market by negotiating the subject in the Japan-India free trade agreement and it is also a part of

negotiations in the EU-India free trade agreement. Furthermore, in 2010, India attained an observer's status in the WTO Agreement on Government Procurement. This has raised considerable interest and debate among various stakeholders as to India's potential gains and losses in case of its possible accession to the WTO GPA.

This report throws some light on the evolving nature of the Indian government procurement market. Some of these include: size of this market, procurement policy at the national and sectoral levels, impact of procurement policy on small and medium enterprises, types of inefficiencies and what could be done to make the system better equipped to meet emerging challenges, and preparedness of Indian companies to exploit the global procurement market.

It also analyses the Public Procurement Bill, 2012, which has been tabled in the Indian Parliament and analysed various provisions of this Bill *vis-à-vis* the WTO GPA and the UNCITRAL Model Law on Public Procurement. It has provided a set of suggestions and recommendations to make the system more efficient and underlined the need for capacity building at various levels.

It argues that though India is liberalising its public procurement market there may not be an immediate need to undertake international commitments for improving India's public procurement regime. Prior to that there is the need to do a thorough assessment of competitiveness of different sectors of the Indian economy and future policy goals. In other words, broad as well as sector-specific cost-benefit analyses are needed before India starts negotiating its possible accession to the WTO GPA.

The report presents an integrated view of various stakeholders including business representatives. It is an on-going work and the next phase of the project is focusing on gathering inputs from a cross-section of stakeholders on

possible costs and benefits of further liberalisation of public procurement.

Stakeholder consultations are expected to provide necessary inputs to India's negotiating strategy in future if in case of it decides to join the WTO GPA. We are also assessing the size of the public procurement markets in India's major trading partners, barriers therein and what benefits that Indian companies would get if those markets are further liberalised.

Given this background and context, this project has been undertaken with support from the British High Commission in New Delhi under the Prosperity Fund of the UK's Foreign and Commonwealth Office. I thank them for the support and look forward to strengthen our partnership.

Last but not the least I would also like to thank my colleagues who have made this study possible. I hope this study will be read widely, and will generate more interest on this subject and finally it will lead to well-informed policy choices – free of cynicism.

Pradeep S Mehta
Secretary General
CUTS International

Executive Summary

The Project

“Government Procurement – An emerging area of global integration and good governance in India” is supported by the British High Commission, New Delhi under the Prosperity Fund of the UK’s Foreign and Commonwealth Office.

Beneficiaries

- Indian government (including public sector undertakings): policy makers and officials
- Indian industry associations and businesses, policy makers and entrepreneurs
- Foreign stakeholders: those interested in the Indian government procurement market

Background

Government Procurement is the process of purchase of goods, services and technologies by a government and public entities to fulfill the needs of the public authority to carry out its responsibilities towards citizens. It, along with the modes of procurement, is of significance to any country owing to the amount (often 20-30 percent of GDP of a country) expended on it, and the welfare objectives it seeks to attain, particularly in a developing country, such as India.

In India, public procurement is an activity “not merely for meeting day to day functional requirement, but also for underpinning various services that are expected from the government, e.g. infrastructure, national defence and security, utilities, economic development, employment generation, social services and so on.”¹

Furthermore, government procurement activities and operations have a direct effect on market behaviour. Governments around the world utilise procurement and distribution activities to:

- stimulate and promote local manufacturing and production capacities
- set benchmark prices in essential goods and services
- prevent artificial scarcities arising through hoarding and black-marketing
- subserve socio-economic policies of governments through extension of preferences to disadvantaged sectors of the economy;
- sometimes even provide support to priority sectors for becoming more competitive and export oriented

The importance of the subject is becoming increasingly vital as these measures are undertaken not only to serve the purpose of immediate interests but also are initiated keeping the long-term objectives of boosting a country’s economy.

Ideally, government procurement policy must obtain best ‘value for money’ by promoting effective competition among suppliers and provide incentives for integrity in the procurement process. However, in the past few years, India has been marked by mega scams in a variety of sectors, laying bare the lacunae in the regulatory framework and, therefore,

1. Report of the Committee on Public Procurement, appointed by the Government of India, submitted in 2011

underlining the urgent need for reform in this area of public activity.

India's response was that highest levels in the government contemplated measures for tackling corruption and the Group of Ministers on Corruption was set up in 2010-2011. The GOM, *inter alia*, recommended the establishment of a Committee on Public Procurement and the same was set up having representatives from major procuring departments of the Central Government. The Committee submitted its Report in June, 2011, which, *inter alia*, analysed the short-comings in the system and recommended the enactment of an overarching Public Procurement law. It is important (and surprising) to note that there is no central law on a subject which accounts for 25 to 30 percent of GDP of the Indian economy.

This study has focused on several shortcomings of the existing system, the efficacy of the reform measures and the possibilities of further streamlining.

In India, the research on this subject becomes further relevant in the context of international trade. In 2010, India attained the status of 'Observer' of the Plurilateral Agreement on Government Procurement of the World Trade Organisation. Not all members of the WTO are part of it but it includes almost all major trading partners of India. Furthermore, India has included obligations on government procurement, albeit only restricted to information sharing, in its free trade agreement with Japan. Also, it is in the process of negotiating a free trade agreement with the European Union, which may have transparency as well as market access provisions on government procurement.

Thus, the study has also analysed the potential of India further enlarging its international role in government procurement by considering India's prospects in acceding to the WTO Government Procurement Agreement (GPA).

Goal

The primary goal is to explore the means for bringing into existence a better, more efficient public procurement system for India, built on the principles of transparency and fair competition, not vitiated by malpractices and anticompetitive behaviour on the part of either the procuring entity or the bidders, so as to assure value for money for citizens. A secondary goal is to examine what, if any, are the advantages for India to progress from ‘Observer’ status in the WTO GPA to becoming its member.

Intermediate Objectives

To achieve the above-stated goals, in the medium term, the study aims to create awareness among the relevant Indian stakeholders (government policy makers and officials, business, academia, civil society and the media) on the major issues regarding government procurement legislation and policy in India through:

- Analysis of the weaknesses of the present system of government procurement;
- Examination of choices before India for reforming its system: whether through unilateral/autonomous reform or through bilateral/regional trade agreements or through accession to the WTO GPA or a combination thereof;
- Analysis of the effectiveness of the reform proposed through the Public Procurement Bill, 2012;
- Sectoral analysis of the competitiveness of three sectors which may be considered for coverage if India contemplates its accession to the WTO GPA;
- Possible pros and cons for India if it considers accession to the WTO-GPA.

Major Issues

The study assesses the government procurement scenario in India and gauges its level of readiness for undertaking international commitments in the area of government procurement. The first phase of this study was undertaken from July 2011 and has continued till date.

This duration witnessed two significant developments:

- The formulation of the Public Procurement Bill, 2012 – the display of the draft Bill on the website of the Department of Expenditure, Ministry of Finance, Government of India for public consultation and finally the tabling of the Bill, strengthened through such public consultation, in the Lower House of the Indian Parliament on May 14, 2012
- The revision of the text of the WTO Agreement on Government Procurement in March, 2012, watering down a number of flexibilities available to developing countries under the GPA 1994 by making Special & Differential Treatment (S&DT) to developing countries which was already a subject matter of negotiations in the GPA 1994, subject to more conditionalities and available only as transitional measures

Some major issues examined are as follows:

- What is the importance of government procurement in India?
- What is the structure and size of the Indian government procurement market in general and in the select three sectors of health (including pharmaceutical and medical equipments), IT and ITeS, and railways?
- How effective are the reforms proposed through the Public Procurement Bill, 2012? (involves qualitative analysis of the Public Procurement Bill *vis-a-vis* global

best practices: comparison of the main provisions of the Bill against the templates provided by the WTO GPA (its latest version of 2012) and the UNCTIRAL Model Law on Public Procurement (2011 version)

- What are the offsets proposed under the reformed public procurement system, such as for small scale industry, whether maintenance of such offsets vitiates competition in the procurement market?
- How open is the Indian procurement market to foreign participation and whether non-discrimination to foreign participants is in conflict with the National Manufacturing Policy and the global practice of leveraging public procurement for promotion of domestic industry?
- What is the competitiveness of key sectors of the Indian economy if considered for opening up in case of India's contemplating accession to the WTO GPA?
- What are the opportunities and threats in India's possible accession to the WTO GPA examined in the light of:
 - ◆ The effectiveness of the membership of WTO GPA in gaining actual access to the government procurement market of other members/ whether WTO GPA membership is sufficient to address some of the present protectionist policies of the WTO GPA members;
 - ◆ Actual market access made available by India and whether any reciprocity is gained therefrom;
 - ◆ The competitiveness of key sectors of the Indian economy if considered for opening up, in case accession to the WTO GPA is contemplated;
 - ◆ The favourableness or otherwise of the legal framework of the WTO GPA to the special needs of developing countries like India;

- ◆ How far membership of the WTO GPA would allow India to maintain offsets for promotion of domestic industry/socio-economic policy imperatives; and
- ◆ Whether membership of the WTO GPA can be considered as a long term perspective option.

Key Findings

This study is a result of comprehensive analyses of legal and regulatory frameworks, policies and practices applicable to government procurement nationally and internationally, through desk and field research. The formulation of the Public Procurement Bill, 2012 and the amended version of the WTO GPA (also in 2012), have been key factors influencing the scope of the study, as also the other comparable frameworks available at the international level.

The comparative analysis of this Bill, procurement-related preference policies, the National Manufacturing Policy of India and other legal frameworks such as the WTO GPA, UNCTRAL Model Law on Public Procurement, the United Nations Convention against Corruption, 2005, and recommendations from such analyses are the value additions to the existing literature on government procurement in India.

Also unique to the literature on this subject is an in-depth analysis of the advantages and drawbacks of India's possible accession to the WTO GPA, carried out by factoring in the current global trend of protectionism, the actual levels of market access available to Indian industry in global government procurement markets, the current level of competitiveness of the Indian economy, the efficacy of India's regulatory framework, as also the worsening of asymmetries in the legal framework of the WTO GPA after its amendment in 2011 and the adoption of the amended version in 2012.

One of the main recommendations made in the study – and that needs to be flagged – is the need to bring out a strategic

document by the Government of India on its policy on government procurement, which would provide guidance to the current work programme and the future roadmap of government procurement policy in India and would strengthen the process as well as the content of implementation of the proposed Public Procurement law.

This policy will encourage the growth of a coherent and cohesive plan of action for all procuring departments of the government and will help in achieving more and better competitiveness of the Indian economy.

Framework and Systems Governing Public Procurement in India

Public procurement in India is a system-wide activity across the Central and state governments, their autonomous and statutory bodies and public sector undertakings, with a wide variety of sector/institution specific requirements. The Indian government procurement market is estimated to be more than US\$300bn – 25 to 30 percent of its GDP.

India does not have a single public procurement law. General Financial Rules and Delegation of Financial Powers Rules, although embodying some internationally accepted best principles, have no force of law. Marked differences in practices are followed across ministries and organisations. Only the states of Tamil Nadu and Karnataka have adopted transparency laws for public procurement.

Besides seeking best “value for money”, public procurement policy in India is further complicated as it also seeks to fulfil several social and developmental objectives such as the policy of preferences/offsets to favour certain sectors. Price preference, reservation of products for exclusive purchase from small scale industries and price preference for Central Public Sector Enterprises of up to 10 percent over large scale private units mark the offset policy. The complicated

policy allows ample loopholes for unscrupulous elements to interpret the rules to suit their convenience and that often goes against public interest.

The institutional framework fails to provide sufficient transparency, accountability, efficiency, competition, professionalism, and economy in public procurement. The system is vitiated by:

- the absence of standard contracts and tender documents
- lack of publicity of tender inquiries
- restrictive pre-qualifying criteria
- absence of stipulation of adequate timelines to participate in bidding
- no rules for compulsory publishing of tender results
- delays in procurement decisions
- failure to utilise open tender route
- weak oversight due to authorities like the Comptroller & Auditor General of India having the role of making only *ex-post facto* comments
- lack of powers of the Competition Commission of India to investigate the public officials involved when firms indulge in anticompetitive conduct in collusion with public officials
- insufficient regulations to check conflict of interest
- lack of an independent grievance redressal mechanism.

A comparative analysis of the Public Procurement Bill, 2012 with international best practices, as embodied in the UNCTRAL Model Law on Public Procurement (2011 version), the WTO GPA (2012 version), the UN Convention against Corruption (2003 version) and other relevant frameworks highlights the following above-mentioned findings.

The Agenda for Reforms

The Public Procurement Bill, 2012, introduced in the lower House of the Indian Parliament on May 14, 2012, seeks to regulate the award of government contracts above ₹5 million (approximately US\$100,000) in order to ensure “transparency, accountability and probity” in public purchases, codifies basic norms governing public procurement and places statutory obligations on procuring entities and bidders to comply with these norms. In an area characterised by a disparate/fragmented regulatory framework, this codification under a single overarching law is itself highly significant.

The main objective of the Bill is to serve the twin goals of “ensuring transparency, accountability and probity...” on the one hand, and promoting “fair and equitable treatment of bidders, promoting competition, enhancing efficiency and economy” on the other. The concern with both competition and probity issues makes the Bill unique.

The international legal instruments on the subject mainly comprehend only one perspective or the other. The UNCTIRAL Model Law on Public Procurement and the WTO GPA are solely focused on competition and transparency issues, as ensuring the free movement of goods and services. The UN Convention against Corruption and the 2008 Guidelines on Public Procurement of the Organisation for Economic Cooperation and Development are more concerned with enhancing integrity in public procurement.

The Bill’s focus on probity in the procurement process owes its origins to a domestic felt need of the government to put in place a multi-pronged strategy to tackle corruption as also to its becoming a party to the UN Convention against Corruption in December 2005 and its ratification of the said Convention in May 2011. To this effect, the Bill puts forth a code of integrity binding on both parties to a procurement contract, makes non-adherence to this code of conduct result in

damaging consequences and defines offences and lays down penalties for malpractices.

The WTO GPA, after its amendment in 2011, added certain exhortations to probity in its Preamble, which recognises “the importance of ... carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices in accordance with applicable international instruments, such as the UN Convention against Corruption” and its Article IV, Para 4, *inter alia*, exhorts that the conduct of procurement shall be “in a transparent and impartial manner that ... avoids conflict of interest and prevents corrupt practices...”.

However, the emphasis on probity and integrity aspects remains restricted to exhortations, as there are no operative clauses which enforce adherence to probity principles. The Bill, in contrast, does not merely intend to pay lip service to integrity issues. It proposes probity principles by incorporating provisions for a Code of Integrity binding on the procuring entity and bidders, covering bribe-taking and bribe-giving, collusion and bid-rigging, disclosure of conflict of interest/previous transgressions.

Breach of the Code excludes bidders from the procurement process, involves forfeitures, recoveries, and debarment from participation in future procurements.

Stiff punishment can be invoked for taking or offering gratification in respect of public procurement/abetment of such offences; debarment from bidding can take place in certain circumstances.

The Bill also strikes new notes in Indian anti-corruption law, as, unlike the Prevention of Corruption Act, India’s main anti-corruption legislation, it addresses both the supply and the demand side of corruption, making both acceptance and offer of inducement for wrongful advantage in procurement an offense. In this respect, it follows the lead of the UN

Convention against Corruption, which seeks to address corruption in both the public and the private sector.

The competition concerns in the Bill are well served by provisions which ensure broad-basing of bidders through:

- adequate publicity on procurement opportunities/objective pre-qualifying criteria for bidders;
- framing of objective specifications for the items of supply
- evaluation of bids based on pre-disclosed criteria;
- enshrining open competitive bidding as the norm and allowing restricted bidding only in exceptional circumstances;
- fixing time lines for processing the bids to obviate interference in the procurement process;
- compulsory publishing of tender results;
- promoting e-procurement;
- restricting cartelisation in public procurement; and
- provision of an independent review/grievance redressal mechanism.

In this regard, the Bill incorporates the best international practices as reflected in the WTO GPA and the UNCTRAL Model Law on Public Procurement, and sometimes even improves on them – for example, by empowering the government to make electronic procurement mandatory/providing for the setting up of a central e-procurement portal, which takes the standards of transparency to a higher level than that prescribed in the WTO GPA.

The jewel-in-the-crown of any system of rules is its ability to address perceived transgressions. That is where it is tested whether the rules have ‘bite’ i.e. enforceability, or are simply ‘best endeavour’ clauses. It is in this critical area that the Bill falters.

The Bill proposes to set up an independent grievance redressal mechanism but its powers are restricted to making

recommendations to the procuring entity and hence it falls short in ensuring fair play. The procuring entity may reject the recommendation, the only saving grace being that reasons for non-acceptance would have to be communicated. This is unlike the binding force of the bid challenge/review mechanism under both the WTO GPA and the UNCTRAL Model Law on Public Procurement.

Moreover, the WTO GPA provides for judicial review in case the review body is a non-judicial entity, like the Procurement Redressal Tribunal under the Bill. However, in the Bill, there is no provision for judicial review from the decisions of this proposed tribunal. Thus, the grievance redressal mechanism is still weak in the Bill and it may need to be adapted on the lines of the WTO GPA and the UNCTRAL Model Law on Public Procurement in order to be more effective.

India's public procurement regime, except for a limited degree of preference for micro and small enterprises/public sector enterprises, maintains non-discrimination between domestic and foreign suppliers. This basic feature of the regime has not undergone any change in the proposed Bill. There is a criticism by some commentators that, since under a WTO compatible regime, non-discrimination between domestic and foreign suppliers is a rule, with provisions for preference to domestic sectors an exception to be invoked in special circumstances, there may be strategic disadvantage for India and the Bill may be running against the trend of current government policy, like the National Manufacturing Policy, 2011.

The National Manufacturing Policy, *inter alia*, leverages public procurement to stimulate manufacturing in India – to raise its present share of about 18 percent of the GDP to 25 percent by 2025. Moreover, the present international practice, particularly in developing countries, is to limit the participation

in public procurement to domestic players, except to the extent necessitated by bilateral/plurilateral agreements.

A criticism of the Bill is that it may unconditionally provide national treatment to foreign bidders. That will take away the negotiating space necessary for a government to cater to its domestic requirements without taking recourse to exceptions under law. It may also leave India without any leverage with which it can squeeze out concessions from its trading partners in exchange for providing reciprocal market access in case of its possible accession to the WTO GPA.

There are two arguments against this approach. First, the concern for India is not merely one of securing protection for its domestic industry. It is also that of securing best quality at best prices for its domestic consumers who are, to a large extent, dependent on public supply of goods and services. Fostering open competition in the Indian market, including from foreign players, is important for this purpose. A protected market in government procurement, as in the pre-liberalised era of the Indian economy, will have dangers of regression for the entire economy, given the considerable size of the Indian government procurement market.

Secondly, the Bill provides the necessary flexibility to safeguard domestic preference in those sectors where there is a perceived need. It empowers the Central Government to provide, by notification, for “mandatory procurement of any subject of procurement from any category of bidders or purchase preference in procurement from any category of bidders” on the ground of:

- promotion of domestic industry
- socio-economic policy of the Central Government
- any other consideration in public interest in furtherance of a duly notified policy of the Central Government

The further deepening of the special preference accorded to the micro, small and medium enterprises sector by reserving

20 percent of all Central Government procurement with effect from April 01, 2012, with this policy becoming binding from April 01, 2015, is one example of the government's ability to prioritise domestic preference as and when needed, utilising the flexibilities within the procurement system.

Thus, another unique feature of the Bill is that it can create the necessary policy space for the government to keep the public procurement system non-discriminatory and open and yet provide for offsets (purchase and price preference) to any category of bidders to promote domestic industry, reflect its socio-economic concerns or give effect to any other policy in consideration of public interest as and when the necessity arises.

In contrast to this position as in the proposed Bill, the WTO GPA promotes non-discrimination between domestic and foreign suppliers as a general rule, and permits domestic preferences to new entrants to the WTO GPA only as a favour, in case they are developing countries, and that, too, subject to negotiations and only as a transitional measure. The inequity lies in that original members of the WTO GPA, like the US, maintain offsets, such as the well-known US preference policy for small businesses, without falling into the category of developing countries.

As regards concerns on transparency, the Bill provides for a Central Public Procurement Portal for posting and exhibiting matters relating to public procurement. It empowers the Central Government to declare adoption of electronic procurement as compulsory for any stage of procurement. It requires a procuring entity to maintain a record of procurement proceedings. Electronic reverse auction is also prescribed as one of the modes of procurement.

In the context of ensuring greater transparency, competition, non-discrimination and fairness of procedures in the procurement process, both the Bill and the WTO GPA are more or less compatible. Nevertheless, objectivity of the

procedures, as proposed in the Bill, would need to be complemented by the Rules to be formulated once the Bill becomes an Act. This is to be tested in practice.

Sectoral Analysis

Three sectors of socio-economic and commercial importance to India are analysed with regard to their size of procurement, capacity to produce, and barriers to entry they face in other markets. The thresholds represented by the current participants in the WTO GPA and the market access opportunities present in those markets have to be assessed against trade barriers operating in those countries. Many trade barriers are capable of significantly eroding market access opportunities for Indian participants.

The overall size of the government procurement market in India is crucial in this context and is estimated to be more than US\$300bn, which includes central and state level procurements. The sector-wise estimation of the market size is detailed in respective chapters.

The procurement scenario in the health sector is complex and fragmented. There is no single, dedicated Central Government procurement office, although almost a quarter of the total volume of drug procurement in India is carried out by the Central Government for the Central Government Health Services, Armed Forces Medical Services, and for public sector units.

Currently the public health system in India spends about Rs 6 billion for procuring drugs, which is likely to increase if a Universal Health Coverage system is adopted in India. An additional medicine purchase of about ₹2.4 billion would be required by the public health system which, in turn, indicates an additional spending of 0.5 percent of GDP on procuring medicines alone in the event of a Universal Health Coverage, given that total spending on healthcare at present is 1.2 percent

of GDP. This presents an enormous space for both domestic and foreign players.

A few sectors where India displays a certain degree of competitiveness are the health sector, where, according to the WTO estimates, the size of major export markets available to India is US\$96bn approximately. Computer and related services are other potential sectors. The estimated government procurement market, as per WTO estimates in this sector, is US\$50bn in major export markets.

Nevertheless, there exist many sub-sectors in health and information technology where India is still to attain global competitiveness. For instance, although India has a remarkable market share in branded generics, it still needs to build its strength in the Over-the-Counter segment, non-branded generics, patented products and vaccines before it can be considered a key global player. Various studies including this, shows that a critical mass in pharmaceutical sector is expected to be reached by the year 2020.

While in the health sector, foreign direct investment as brownfield investments (that is through mergers and acquisitions) in India seems to be the predominant mode of global players to gain access to widespread distribution networks of the existing markets, this may have future implications for accessibility to affordable medicines at a reasonable price in the domestic market in India.

With regard to market penetration in government procurement markets abroad in the health sector, there are several roadblocks. For instance, pre-qualification criteria such as market experience of five years, price preference in several WTO GPA member countries (for example, 15 percent for Belgian companies in Belgium), the EU's 'Falsified Medicines' Directive are some roadblocks that may result in eroding market-entry opportunities for Indian companies.

The study shows that the IT and ITeS sector is relatively more open in regard to the government procurement. In IT and ITeS sector, software and IT services are most certainly the strongholds of Indian companies. A study by NASSCOM, India's apex association of the software industries, indicates that out of the total IT/BPO spend by the governments of the US and West Europe, the addressable market for the Indian IT/BPO industry is approximately US\$20bn which is likely to grow to US\$70bn to US\$80bn by 2020. However and so far, India has been able to harness only two percent of this total addressable market and that is mainly due to the existence of regulatory barriers such as visa restrictions, language barriers, lack of experience of Indian companies in lobbying with the US and European governments, discouraging effect of proveness clause, etc.

As highlighted in the study, though India may be able to avail of at least 10 percent of the addressable market by 2020, it will still not be substantial for it to emerge as a major player in this market.

Another sector is railways. The current procurement system is ridden with various deficiencies, especially with regard to transparency. Moreover, the implementation stage of the procurement process is a major area of concern. Malpractices and lack of accountability in the procurement process are found to be the main areas which are to be addressed.

From the perspective of market accessibility, the possibility of gaining such access via the WTO GPA is limited due to the fact that in general the WTO GPA members have not offered this sector for market access in their commitment schedules. However, GPA principles, as also reflected in the Public Procurement Bill, 2012, may provide an opportunity for an open vendor system to develop transparency in railway

procurement, leading to efficiency, competition and lessening of malpractices.

Opportunities and Challenges in India's Possible Accession to the WTO GPA

In India there is a general consensus that the public procurement system needs revamping. The question is whether it should revamp it unilaterally, or, as some say, it should go into international obligations which would force it to improve the system.

Some characteristics of good governance are embodied in the WTO GPA. Therefore, it is argued by many experts that countries should this Agreement so as to internalise these characteristics in their public procurement system. The 2012 revised text of the WTO GPA, embodying new obligations to eschew conflict of interest, corruption, etc in the procurement process, offers new dimensions which would be attractive to the government procurement systems across the world, including India, it is believed by these commentators.

There is no doubt that India's Public Procurement Bill, 2012 also embraces these good governance principles, embodying the basic norms of public procurement. There is a further argument urged by these commentators that by India's joining the WTO GPA it will be sending a credible signal to the international community regarding the seriousness of its commitment in addressing good governance issues. Accession to the WTO GPA would help India in benchmarking its laws and procedures against global good practices in procurement. It would provide predictability to international and domestic suppliers and a measure against protectionism and thereby help India to get market access in other countries.

It is also argued that the WTO GPA membership would provide India the possibility to influence developments within its membership. Since the WTO GPA is to engage in future

work programmes on increasing access to government procurement by small scale industry and ways to make public procurement environment-friendly but without posing environment issues as trade barriers and since these are concerns which India also shares, it would be beneficial for India to influence such work programmes from the inside.

Furthermore, the risk of protectionism is growing around the world. In the recent past, many countries have adopted protectionist measures on public procurement. For instance, the 'Buy American' provisions are part of the US stimulus legislation (the American Recovery and Reinvestment Act, 2009). Similarly, the proposed 'Reciprocity Initiative' of the European Commission, involves assuming of new authority by the European Commission to limit access to government procurement markets in the European Union countries by suppliers whose home countries do not provide access to EU suppliers. It is argued that despite the desire to further close their markets through such protectionist measures, these jurisdictions would have to respect the overriding rights of WTO GPA members of access to their markets.

In response it may be argued that while India wholeheartedly subscribes to the principles of good governance in public procurement embodied to a large extent in the WTO GPA, the question arises as to whether these impulses towards good governance should come because India has taken on certain international obligations or should they spring from an internal need of the country? Unilateral/autonomous reforms are likely to give India greater policy space and flexibility within the parameters laid down for good procurement principles.

The GPA is supposedly based on reciprocity and one would gain market access only to the extent that one gives. It is important to mention that although the Indian government procurement market is sufficiently open, it has never really got reciprocity from other countries. In all high value

procurement, such as power, telecom, civil aviation, defence, global tendering is the norm in India.

It is important to remember that given its level of development, India has certain obligations, such as to promote micro, small and medium enterprises, which have to be assured a preference in public procurement, in view of the disadvantages they suffer in terms of access to capital, credit, technology, infrastructure, etc and in view of huge employment generation on their part. Such socio-economic concerns could be reflected adequately through an autonomous public procurement policy.

Recent studies show that the market access available to foreign suppliers is only three percent of the total market of WTO GPA members. In the US, only as much as 6.77 percent of the government procurement market is contestable and in the EU it is only about one percent. Should India spend its negotiating capital on such available market size?

The bulk of foreign participation is in the services sector in so far as government procurement markets are concerned. The reason for India's low participation in the services market is more attributable to the fact that India faces problems in movement of natural persons, including its skilled professionals, under the WTO regime rather than the fact that it is not a member of the WTO GPA.

Coming to India's capacity to avail of market access, the few sectors where India displays a certain degree of competitiveness are the health sector where the estimated government procurement market as per the WTO estimate is US\$96bn, and computer and related services in which the estimated market size is US\$50bn. However, in order to access these markets, Indian companies will have to attain global competitiveness in these sectors. It is felt by many experts that for India to make commitments under the WTO GPA, it should have adequate global competitiveness in that sector

and a benchmark in this regard is having at least 2.5 percent global market share in a particular sector.

A consultation held by CUTS with Indian stakeholders reveals that most of the Indian industries derive their major government procurement contracts from non WTO GPA member countries. According to a wide cross-section of the Indian industry, it will be more useful to deepen their exports to these countries rather than to pursue the (so far) elusive markets of WTO GPA members.

Furthermore, the increasing asymmetry in the legal text of the WTO GPA is another disincentive to India. The revised GPA text of 2012 dilutes the S&DT clauses originally available in the 1994 version of the WTO GPA to such an extent that virtually no concession is available to a developing country like India. The benefits of S&DT provisions, allowing offsets for domestic content requirement, etc., are available subject to negotiations and that, too, only as a transitional measure for just three years.

The claim of keeping public procurement markets open through the membership of the WTO GPA, which supposedly guarantees Most-Favoured-Nation and National Treatment to its members, is belied by the fact that these legal guarantees have not been able to curtail the onslaught of protectionist measures in government procurement put in place by specially the developing countries in the face of the economic crisis arising since 2008. Even WTO GPA members, in their respective internal reports, like the Trade and Investment Barriers Report, 2011 of the EU, appear to acknowledge helplessness against the growing tide of protectionist measures in the markets of WTO GPA countries and potential member countries. This current scenario hardly inspires confidence in non WTO GPA members, like India, that accession to the WTO GPA is likely to assure them market access in the member countries. Thus, no case appears to be tenable as

regards opportunity costs arising out of not joining the WTO GPA at this stage.

Therefore, it appears that unilateral reforms to streamline and rationalise India's public procurement system are a more desirable alternative than bringing about reforms in the sector through the undertaking of international obligations.

In other words, the WTO GPA does not have much to offer to India at this point of time, either in terms of an encouraging legal framework or market access prospects, given the current play of market forces in the global economy, which are so clouded by protectionist impulses that even the Doha Round of negotiations by the WTO members is at a standstill.

Moreover, India's own competence and competitiveness in manufacturing, services and trade have to grow for it to become a sufficiently influential player in the global government procurement markets. Only when such a level of competitiveness is reached, will India be able to effectively negotiate its own offensive and defensive interests to achieve benefits out of its accession to the WTO GPA.

However and in the long term, as an emerging economy with global potential, India would need to continue to assess, in a dynamic context, taking due account of its own ongoing internal initiatives to improve governance of the public procurement system, its growing market competitiveness and related factors, the costs and benefits of its accession to the WTO GPA. India's decision to become an 'Observer' in the WTO GPA in 2010 appears to indicate that intention.

Active Involvement of Stakeholders

Finally, awareness generation and sensitisation of relevant stakeholders on major issues regarding government procurement legislation and policy in India are vital steps in order to avail of the benefits of an efficient, transparent and

competitive public procurement system, which delivers “value for money”.

Advocacy is crucial for the benefits of consumers and businesses, and for efficient functioning of the government as it will be the stakeholders who have to be act as watchdogs of the system.

Expected implementation concerns of the Public Procurement Bill, 2012 will provide an opportunity to the relevant stakeholders to get actively involved with the governance of the public procurement system of India. The immediate task for stakeholders is to urge that the Bill is passed very early with relevant modifications including those suggested in this study and, thereafter, to remain vigilant to ensure that the good practices as embodied in the Bill are complied with and to alert policy makers whenever any course correction is necessary.

1

Introduction

Archana Jatkari

Given that government procurement constitutes a significant proportion of gross domestic product (GDP), it is of considerable importance at both domestic and international level. Estimates have indicated that overall government procurement spending accounts for as much as 20 to 30 percent of a country's GDP, on an average, worldwide.¹ At the domestic level, the procurement of goods, services and technologies by government agencies provides essential inputs that enable governments to deliver public services and fulfil other tasks and catalyse economic growth. At the international level, the opening up of cross-border trade in this market is gaining increasing importance.

Government procurement can be defined as the procurement activities undertaken by a public authority using public funds to obtain goods, services and technologies essential for it to carry out its business. The amount of expenditure by a government on procurement differs depending on the extent to which the government involves itself in providing goods, etc. This expenditure is significantly more in developing and transitional economies.

Besides the significant economic implications of government procurement, activities of the government are laden with

political, social and development goals. Especially in the developing countries, they have a far deeper impact, as the government is involved in these countries in everyday lives of its citizen especially in the development of infrastructure and promotion of industrial sector which are important catalysts for development.

The general guiding principles of procurement activity are to:

- maximise economic efficiency and effectiveness
- encourage competition between the suppliers in order to provide them at best value
- carry out the procurement procedures and processes with utmost transparency

Background and Context

In India, government procurement constitutes 25 to 30 percent of its gross domestic product. At present, it is governed by rules and instructions contained in the General Financial Rules (GFR) and the Delegation of Financial Powers Rules (DFPR), apart from ministry/department specific purchase procedures for the Ministries of Defence, Railways, Public Works and the Directorate General of Supplies and Disposal (DGS&D).² The presence of multiple procurement rules, guidelines and procedures issued by multiple agencies results in confusion, non-transparency in procedures and deleteriously impacts the efficiency of the system.

Since government procurement is dealt by administrative rules and procedures which may be inadequate and sometimes even lack the force of law, malpractices often go without deterrent punishment. Lack of accountability encourages corrupt practises. Departmental action in case of any violation, penal consequences for misrepresentation, fraud in government procurement and action against concerned official are procedurally difficult. Consequently, the aggrieved

suppliers affected by malpractices are constrained to move to the civil courts and submit themselves to the hierarchy of judicial process which is a hugely time-consuming process in India.

However, in recent years a few changes have occurred in the government procurement landscape of India and they are:

- industrial development and opening up of the economy
- the development of consumer protection law
- projects funded by international financial agencies such as the World Bank, the Asian Development Bank, stipulating certain procurement practices to be followed
- international consensus brought in by international instruments like the UNCITRAL Model Law of Public Procurement³, the World Bank's procurement guidelines, 'the OECD Integrity in Public Procurement, Good Practices A to Z' 2007, and ratification of the Plurilateral Agreement on Government Procurement (GPA)⁴ by some WTO members and also ratification of the UN Convention Against Corruption (UNCAC) 2005 by some countries, including India

All these developments alongside the inadequacy in government procurement system to address issues of transparency, fair play and efficiency, have constrained India to reassess the extant legal and regulatory framework and procurement policies and practises. This is further augmented by the need to have good governance in the procurement system which will cater to the economic growth of the country, in general, which is growing at an average GDP of 7-8 percent per year in last five years, when some major economic powers are grappling with an economic slowdown.

Furthermore, it becomes an imperative to view government procurement from the global integration perspective given that procurement activity of the governments forms an important aspect of international trade. It would, therefore, be seminal to understand the capacities of the country to undertake

obligations which would further the cause of good governance and enhanced business opportunities leading up to increase in competitiveness of domestic products and services and provide value of money to its taxpayers, and result in opening up of market opportunities worldwide in return for opening up of domestic markets for products and services which are provided worldwide.

This is evidenced from the trend of inclusion of government procurement in various free trade agreements and from the increasing importance of WTO's GPA.

India's intention to become an active player in the government procurement market became clear when it obtained 'Observer' status in the Plurilateral Agreement on Government Procurement at the WTO and also when it agreed to negotiate this subject as part of the EU-India free trade agreement and India-Japan free trade agreement (in latter case, it is a part of the signed agreement).

Since then India's possible accession to the WTO GPA has become a subject of increasing interest. Such an accession may require legislative changes and simplification in procurement procedures, which may enhance benefits of and may reduce costs for public administration.

Although these are some significant developments, the lack of data and literature on Indian government procurement market makes it difficult to assess the gains and challenges for India if it accedes to the WTO GPA or into any free trade agreement. While foreign players are eager to gain better access to the Indian government procurement market, it is not known if Indian private/public sector will be equally benefited in case India gains access to other markets. It is pertinent to note that the WTO GPA is the only overarching agreement on government procurement from the perspective of international trade and generally guides its member countries on this subject.

Furthermore, there is little information available in the public domain so as to provide more scientific and knowledge-based feedback on potential costs and benefits to India in case of India's possible entry to the WTO GPA regime.

This study examines various features of the existing government procurement processes, procedures and policies, its legal and regulatory framework in general as well as for three select sectors (health including pharmaceuticals/medical equipment, information technology and IT-enabled services, and railways).

It explores the procurement market available in India and for India in general and in mentioned three sectors. An attempt is made to explore implications of India's possible accession to the WTO GPA on the overall/sectoral government procurement market. The long term objective is to establish a more efficient government procurement system in India with greater transparency, efficiency and good governance for the benefit of domestic as well as foreign enterprises, and consumers at large.

Integrating the subject of government procurement at international/regional level requires a country like India to answer some key questions keeping in mind the enforcement capacities of the institutions therein:

- Whether the extant procurement regime and legislative framework is sufficient, functional and efficient to address major issues?
- Does the present legal and policy framework on government procurement require reforms?
- Are different sectors in India competitive enough to sustain pressure from increased competition in the domestic procurement market?
- Is the procurement regime and framework vulnerable to challenges under the WTO dispute settlement framework and international investment agreements?

- Do certain sectors envision that they can successfully capture market access opportunities presented in international government procurement markets?
- What is the level of domestic preparedness in India in case it seeks to undertake international obligations such as in the WTO GPA?

This study probes the above-mentioned queries and looks at them from the perspective of integration of the Indian government procurement regime at two levels: good governance and market accessibility. It is also about understanding the effectiveness of the extant procurement policies/practices, and whether the current system needs revamping of its structure, institutions, procedures, and processes so as to suit the purpose of good governance and to cater to the needs of the growing Indian economy. Secondly and from a long term perspective, it attempts to assess the capability of Indian industries to withstand competition from international participants capture market segments abroad in the event India accedes to the WTO GPA and/or enters into free trade agreements having this component, and examines if enough market opportunities are available to Indian companies.

It provides a comprehensive analysis of existing rules and regulations, comparative analyses of the Public Procurement Bill, 2012,⁵ with the UNCTRAL Model Law on Public Procurement, the WTO Agreement on Government Procurement and also takes into consideration the impact of other relevant legislation like the UNCAC, 2005. It seeks to understand the market potential of government procurement in India and whether the Indian government procurement market is prepared to deal with the impending competition after it absorbs the enhanced entry of foreign companies and whether it possesses the competence to exploit government procurement market opportunities in foreign markets.

The next section provides some fundamentals on the subject of government procurement in India which are necessary before a comprehensive analysis of processes, policies and practises is carried out. This section also provides some theoretical insights so as to shed light on the formulation of procurement legislation and policies of a country.

Government Procurement: The Theoretical Basis

The core objectives of government procurement are:

- value for money
- retaining and enhancing integrity in procurement practices
- infusing accountability into the system
- affording equal opportunities to participate in the procurement process to all participants
- providing fair treatment to suppliers
- allowing efficient implementation of horizontal policies in procurement.

These objectives reinforce each other when duly implemented and allow for the creation and maintenance of an efficient government procurement system. Box 1.1 explains some of the key objectives of government procurement system further:

Box 1.1: Some Key Objectives of Government Procurement System
<p><i>Value for money (efficiency) in procuring goods, services and technologies</i></p> <p>Is referred to as economic efficiency and is characterised by three aspects: a) acquisition of required goods/services/technologies on best possible terms, b) without any over specification, and c) to be able to identify a provider who can supply.</p>

Contd...

Integrity – avoiding conflict of interest and corruption

Administering a contract without having to use influences or red tape or corruption is a pre-eminent objective of procurement. Corruption is an imminent possibility in the execution as well as in award of contracts.

Accountability

Given the fiduciary position of the government in procurement, accountability becomes vital because interested parties including the general public need to know if the objective of procurement is fulfilled or not and, if yes, in which ways and manner.

Equal opportunities and equal treatment of suppliers

It is a means to limit discretionary behaviour by the procuring authority and to inculcate the sense of competition leading up to the attainment of value for money. It does not distinguish between two firms unless there is an exception for justified reasons. The literature also points out that this objective has potential of conflicting with other objectives and, therefore, it is crucial to give appropriate credence to the intrinsic value it has in conducting government procurement.

Fair treatment of suppliers

This refers to procedural fairness and is based on principles of natural justice. It generally involves the concept of 'rights' and the adherence to due process of justice in case of any dispute. Given that invoking fair treatment principles in a dispute may create delays in the procurement process, this objective is under scanner and is debatable in several jurisdictions.

Efficient implementation of horizontal policies in procurement

Government procurement may be used to attain various socio-economic developmental objectives of a country. It seeks to aid job creation and may support economic development by supporting disadvantaged groups/regions by setting aside some public contracts. It is important to train and disseminate information, thereby increasing the participation of micro, small and medium enterprises and enhancing value for money. This

Contd...

improves their accessibility to the procurement process though it is often touted to involve trade-off with other objectives.

Opening up of markets for international trade

The raison d'être of free trade, which has gained momentum in the past three decades, is that opening of markets to foreign competition increases economic welfare of a country. The Ricardian theory of comparative advantage argues that countries need to specialise in those areas in which they have comparative advantage. This will result in most efficient use of resources and appropriate utilisation of wealth.

Source: Adopted from Arrowsmith, Sue, Steene Trumer, Jens Fajo and Lili Jiang (2010), Public Procurement Regulation: An Introduction, The EU Asia Inter university Network for Research and Training, University of Nottingham, UK

Apart from the objectives of government procurement which inclusively result in improving the procurement framework of a country, it is essential to consider the base or the principles of procurement activity as a whole. The two principles of transparency and competition form the backbone of the procurement system from the perspective of governance and international trade.

The following section addresses transparency as an essential principle to be followed in the procurement process, the reasons for lack of transparency, and presents an analysis of incentives to promote transparency in the procurement process. On the other hand, the principle of competition has to be actively reconciled with the social objectives of a government so as to encourage innovation and to support domestic industries. This is analysed from the perspectives of international trade. Furthermore, there is a review of the relationship between innovation and government procurement.

Transparency

The UNCITRAL Model Law on Public Procurement and the WTO GPA broadly outline the scope and ingredients of transparency. The principles may be conceptualised against five core mechanisms in the procurement process:

- publication of legal framework
- publication of procurement opportunities
- procedural transparency
- transparency of contract awards
- transparent dispute settlement mechanism

Arrowsmith, Linarelli and Wallace (2000) have further suggested four discrete aspects which constitutes the term 'transparency'. They are:

- publicity of contract opportunities
- publicity of rules governing each procedure
- principles of rule based decision making that limits the discretion of procuring authority
- verification possibility of enforcement of rules as per law

Reasons for lack of transparency

In general, the following factors are responsible for lack of transparency in procurement process:

- lack of information or asymmetry in information on procurement activities undertaken by an implementing authority
- absence of concern about the quality of procurement by an implementing authority
- potential for encouraging bribery owing to the possibility of gaining extra rents from the participants

An important concept, as proposed by Vagstad (1995), is useful to understand transparency in the Indian context of government procurement – *where the principal is the party which wants a project to be carried out (usually the central government) and the government plays the role of a supervisor hired by the principal to report its quality information (the implementing body), the implementing body has no interest in high quality or low costs per se, owing to which favouritism arises from the possibility of the local firm bribing its government.* There is no asymmetry in the utility functions, but the potential bribes work in exactly the same way: more rent to the local firm implies higher stakes in bribing the government. Therefore, the government implicitly prefers local profit to foreign profit, although Laffont and Tirole (1991) considered an endogenous case of favouritism, while Vagstad (1995) deal with a case where favouritism is determined exogenously.

Furthermore, the reasons for lackadaisical manner in which procurement is conducted could be attributed to non-transferable nature of the benefits which may accrue to state-owned or public sector firms, coupled with the stability aspects of the careers of public sector employees. These could be resolved by creating incentives to disclose information and to engage in co-alignment of interests through public-private partnerships etc. (Picot & Wolff, 1994). Public-private-partnership is one amongst many examples of cooperation between the government and private suppliers. A market-based approach is more efficient because it creates an incentive for suppliers to reveal information as compared to traditional procurement practices.

Certain incentives could resolve the inherent issues pertaining to transparency and bribery considering that the central government body does not have as much access to information on potential bidders, the quality of the work

undertaken and so on. Vagstad (1995) further indicates that if the local government is allowed to decide the auction rules, the local government which is in this case the implementing authority will engage in explicit discrimination in the *process* of procurement. The solution to the problem of asymmetric information lies in centralised procurement which is based on optimal access to information.

In the Indian context, the current measures which have been taken to introduce a system of predictability and transparency include the mandatory requirement to publish all tender enquiries, corrigenda, and details of the contracts awarded on the Central Public Procurement Portal. Amongst the prominent provisions envisaged in the Public Procurement Bill, 2012 is the Code of Integrity binding on both parties unlike the extant legislation which is only the demand side of corruption.

Competition

Competition is another important principle which plays a pivotal role in achievement of the objectives of a procurement system. The purpose of introducing competition into the procurement process is that the government as a procurer gets the best product/service at the best terms and of best quality, on one hand, and on the other, ensures fulfilment of the objectives laid down by horizontal policies. It is also argued that competition motivates suppliers to put forward the best possible offer to win the contract which, in turn, benefits the procuring authority by facilitating the procurement of a cost-effective option.

Hence, from the international trade perspective, competition can be said to induce efficient functioning of markets. Competition perspectives can be discerned both in the domestic process of conducting procurement, and in

allowing international participation in procurement activity by the government.

Though open tendering has been advanced as being the most transparent mechanism, some theories present the pros and cons of resorting to alternative methods of procurement. Non-market procurements are justifiable according to the theory propounded by Rhodd *et al* (2006) under the following circumstances:

- When a government wishes to exercise caution by not immediately extending open competitive procurement methods to all of the goods/works/services before it has the necessary structures and personnel in place and when repair jobs and upgrades happen on existing capital goods, it is economical to go back to the initial supplier.
- Similarly, when dealing with issues/assets of national importance like defence, railways, it is likely that these are produced by very few firms and with some markets there is always the possibility of shortages. If supplies are not forthcoming in a timely way, there could be serious national consequences. This element also has direct impacts on the availability of opportunities to compete which should be provided for other candidates in the procurement process.

In instances as mentioned above it is best for the public sector to use non-market transaction in the form of long-term contracts in which delivery time and quality are specified. Long term contracts could also ensure compliance with the terms of a bid and reduce transaction costs. It is noteworthy that certain countries like Canada do not allow the participation of foreign participants in the railways sector. It is common to pre-register vendors while undertaking government procurement.

It is further argued that the law of comparative advantage specifies that international specialisation and trade reduce the price of tradable goods and increase world output and economic welfare. This conclusion theoretically follows from the Heckscher-Ohlin analysis⁶ of the impact of difference in endowment of resources on their specialisation so to maximise the gains from trade. The theory implies that nations would specialise in the goods for which they have abundance resources. This will result in increased cost savings in public sector procurement as lower priced goods are often available on the world market. This theory would apply to GP markets as well.

Trionfetti (2000) explored the impact of discriminatory public procurement policy on international trade by deploying empirical means covering nine countries of the European Union, the US, Japan and Korea for the period 1983-1990. Import data was categorised on the basis of it being imports into households and firms (which were named 'unbiased shares') and procurement activity by the government. The results indicated that in 77 percent of the cases, the ratio was less than 1:1. In 50 percent of the cases, the government was involved in less than two-third as many import transactions as the unbiased (that is the households and firms).

Though *prima facie*, it does seem that non-discrimination in procurement encourages competition, some theorists propound an alternative concept – that non-discriminatory award of public contract is not the appropriate way to induce domestic firms to be more efficient when the government is able to observe some *ex-post* costs (Mougeot and Naegelen, 1998).

Naegelen and Mougeot (1998) incorporated the two different aspects of McAfee and McMillan (1989) and Branco (1994) analysis. They pointed out that McAfee and McMillan (1989) demonstrated the efficiency aspect brought out by competition, i.e. if there is cost advantages for foreign firms,

governments should discriminate in favour of domestic firms to stimulate competition and minimise the expected procurement costs; while Branco (1994) demonstrates the distributional aspect, if governments prefer domestic to foreign profits, they have incentives to discriminate against foreign suppliers.

Mougeot and Naegelen (1998) considered a model which considers both the efficiency and the distributional arguments and show that the awarding rule amounts to adding to the domestic firm's cost a term whose sign varies with comparative advantages, the social cost of public funds and the weight attached to the domestic profits. They obtained a benchmark model that allows for an analysis of the trade-off between the protectionist discriminatory policy and the competition stimulation procurement policy. The second problem which Mougeot and Naegelen have considered is after defining the optimal policy, which is the implementation of the optimal mechanism, i.e. method of procurement, open tender, limited tender etc.

Mougeot and Naegelen further take into account explicitly the government preferences via a social welfare function (a weighted average of consumer surplus and domestic profits), the social cost of public funds and production cost differentials between the domestic and foreign firms in a single model and draw conclusions. They found that the extent of discrimination varies according to the importance attached to domestic profit arising out of discrimination in favour of the domestic firm and in favour of the cost disadvantaged firm. Awarding rule remains exactly the same when the firms can exert a non-observable effort to reduce costs, thus discriminatory practices should not be eliminated from considerations of incentives to reduce production costs.

Furthermore, the Optimal Auction Theory⁷ examined government procurement in an optimal auction set-up with

finite number of bidders, and showed that if there are cost advantages for foreign firms, the governments should discriminate in favour of the domestic firms to stimulate competition and minimise expected procurement costs.

Protection not only increases the firms' expected rents, but also their gross benefits from the adoption of a more efficient technology. Branco (1994) further considered a case in which an inefficient firm must decide whether or not to adopt cost reducing technology. Prolonged preference for inefficient firms promotes the adoption of efficient technology. These allow the firms to internalise the cost of technology adoption because of the available protection. Therefore, unless the cost of adopting the efficient technology is low, the optimal procurement policy discriminates in favour of the (initially) inefficient firms. This point is useful when analysing expected gains from India's possible accession to WTO GPA.

The study also demonstrated that the bias of the government towards the domestic suppliers greatly influenced trade flows and specialisations in the manufacturing sector. Trionfetti (2000) also pondered over the reasons for developing countries to have remained outside the purview of the WTO GPA. This is based on the idea espoused by the Heckscher-Ohlin model – that developing countries produce a lot of the goods (agriculture and primary sector produce) which their governments buy the least, and produce limited quantities of the goods on which the government procurement is based on (manufactured goods and services). One of the expectations the study makes is that in a small developing country, if the government purchases only from the domestic sector, the domestic sector may produce more thereby creating enhanced opportunities for the political interplay between the government and domestic producers.

Moreover, Trionfetti (2000) pointed out that closing the market to foreign competitors would further the cause of

developing the domestic markets. Developed markets, on the other hand, had producers who produced a surplus of goods popularly purchased by the governments, and very little of the goods which the governments purchased in limited quantities (such as agricultural goods) owing to which there is less scope for interplay between the government and the local suppliers resulting in less resistance to remove any provisions which may result in a positive discrimination towards the foreign players.

A report presented by Rhodd et al (2006) highlighted the importance of market-based procurement over auctioning of contracts from efficiency aspect of procurement brought out by competition.⁸ It argues that a microeconomic analysis of public policy involves addressing the problem of how to efficiently allocate resources. The variable leading to efficiency of allocation of resources is considered to be its price. Price has a signalling function; it provides information, incentives and helps with the efficient allocation of resources. When price increases because of stronger demand, it is a signal to producers to increase output.

This may be increasingly prevalent in some developing countries which do not have the capacity to produce certain goods, and countries which have no or less manufacturing capacity, typically for high end products or to carry out technologically complex projects. It is further pointed out that if a country wants to benefit from international best practices, it is advisable to provide equal opportunity to foreign suppliers to compete so as to avail those requirements on best terms. This is termed as international competition. This deals with the concept of comparative advantage and should not be confused with the concept of market access.

In short, the theory on public procurement suggests that in the absence of domestic suppliers or bidders, governments may benefit from opening their procurement markets to foreign

bidders/suppliers. The extant rules on Indian government procurement, General Financial Rules, allow foreign bids when those goods are not available in the country and consistent with the theoretical aspects of public procurement.

These measures may result in the creation of roadblocks which inhibit the flow of free trade into the country. The National Manufacturing Policy of India, on the other hand, prescribes that local value addition should occur in areas of critical technologies. There are similar provisions in the National Solar Energy Mission and the National Electronics Policy. International agreements seek to evolve mechanisms which would eradicate these barriers to provide equal opportunities/treatment and an environment of non-discrimination.

This calls for reconciliation between the objective of promoting international competition and the government providing preferential support to local producers. However, in the cases where the commodities produced by domestic and foreign producers are identical, if private demand is large enough then the preferential treatment meted out by the government would have no impact in decreasing the participation of foreign firms to supply to the government for public consumption (Baldwin and Richardson, 1972). This is referred to as ‘ineffectiveness proposition’ – that discriminatory government procurement policies would be ineffective in warding off foreign players and it states that any discrimination by the government would be balanced out by private demand in the same country.

Furthermore, if the government pays the domestic supplier a premium proportional to the import price, discriminatory procurement policy always increases imports. This is because if the government shifts purchases from a foreign to a domestic firm, the foreign firm will sell more to the private market. Because the foreign goods are cheaper, the private market

receives the cheaper foreign product better (Miyagiwa, 1991). If in a state of non-discriminatory equilibrium, if the government demand is larger than the quantity which is supplied domestically, shifting the domestic demand towards the domestic producers can result in a significant improvement in production (Mattoo, 1996).

Given this literature and considering India's development context, three cases can guide the formulation of a domestic preference policy depending on whether marginal costs are increasing, constant or decreasing:

- When marginal costs are increasing, shifting government purchases from foreign to domestic firms weakens the latter's competitive position in meeting private demand, resulting in increased purchases by the private sector from foreign firms.
- If marginal costs are declining, shifting government purchases towards domestic firms enhances the latter's competitive position in the private sector, resulting in a decline of imports by both the government and the private sector.
- If marginal costs are constant, shifting government purchases does not affect the private sector equilibrium, and the decline in imports is equal to the shift in government purchases.

However, there is a possibility that discrimination in favour of the domestic industry may increase the costs of procurement (Breton and Salmon, 1996). But this is balanced out by the advantage that a domestic contract is likely to be more enforceable in the country where the delivery or performance obligation is meant to be fulfilled.

Finally, according to Evenett and Hoekman (1999), an important element influencing market access and effectiveness of liberalisation is the entry and exit conditions which are

determined by ancillary policies of a country. These include a country's foreign direct investment regime. The point which is of utmost importance for developing countries, especially India where the share of government demand constitutes a large part of domestic demand, is that the government must create incentives for entry, which in the long run will eliminate the distortion created by the procurement policy.

Procurement distortions are binding only if foreign firms cannot contest the market through FDI or if the government is able to differentiate across firms on the basis of their 'nationality'. An analysis on FDI regimes is, thus, undertaken in the sectoral chapters so as to understand the potential of those sectors *vis-a-vis* government procurement market in India and in other markets.

Innovation and Government Procurement

Encouraging innovation is critical to a developing country like India, especially in sectors like information technology. Notably, the government is currently including obligations to ensure that there is local value addition in areas of critical technologies. This is especially important in the areas of defence procurement and renewable energy owing to the critical interest of the country. Some of the domestic policies noted in the National Manufacturing Policy, the New Electronics Policy, etc. indicate a procurement preference for domestically manufactured goods and allow for further preferences for manufacturers in the micro, small and medium enterprises sector.

Apart from the significant expenditure on part of the government, the quality of the procurement may sometimes set the standard for the product/service/works (construction) in the country. More importantly, it (quality) has ramifications for the infrastructure and the systems it builds.

Additionally, government procurement, owing to the amount of purchasing power possessed by the government, has the potential to influence the growth of a market in a particular direction. At the same time, it is also used as a tool to attain social outcomes.

Government procurement is generally organised such that innovation is an essential criterion in tendering and assessment of tender documents. As a rule, central procurement offices are responsible for procurement. Strategic procurement occurs when the demand for certain technologies, products or services is encouraged in order to stimulate the market. Being one of the largest possible buyers in the market, the government may provide direction to innovation in a country, encouraging economies of scale in industries where there is little private sector interest and influence the trade flows into a country.

Dalpé (1994) argues that government makes substantial investments in innovation especially in priority sectors like aeronautics, telecom, pharmaceutical and scientific instrumentation.

He argues that procurement by the government is quintessential in the early stage of product cycles as the government can provide technical support and also bear the risk of standardisation of a product. Edler and Georghiou (2007) justify the reasons as to why procurement policy should evolve as a policy which promotes innovation: “Public procurement is a major part of ‘local’ demand.⁹ Public procurement can effectively resolve a range of failures related to information problems. The purchase of innovative solutions offers a strong potential for improving public infrastructure and public services in general.” It discusses the ‘Innovation Systems Perspective’ and states that having a large and differentiated group of innovation actors and an enabling framework for learning-oriented interactions between them will result in interaction between the various components of the system.

Strategic procurement is also associated with sectoral policy and, therefore, to a large extent, is neither initiated nor co-ordinated by the ministries responsible for innovation. A systematic utilisation of both forms of government procurement calls for co-ordinated action – that is co-ordination between various ministries and authorities and their admittedly widely different targets and incentive structures.

Some state purchases are made in order to support private purchases, and not only to fulfil their own original targets. Co-operative procurement occurs when government agencies buy jointly with private purchasers and both utilise the purchased innovations.

Catalytic procurement occurs when the state is involved in the procurement or even initiates it, but the purchased innovations are ultimately used exclusively by the private end-user. The crucial feature of catalytic procurement is that while the state often itself appears as buyer, the real market penetration effect is achieved by subsequent private demand.

Another means of encouraging innovation through procurement is efficient allocation of risks. The basic idea behind public pre-commercial procurement is that it targets innovative products and services which require further R&D. Thus, the technological risk is shared between producers and potential suppliers. This means that potential producers are still in the pre-commercial phase, the products and services delivered are not ‘off the shelf’. In practical terms, the procurement in fact is an R&D service contract given to a future supplier in a multi-stage process encompassing the exploration and feasibility.

Rolfstam (2009) analyses the role of the Institution in the implementation of government procurement as an innovation policy tool. He argues that innovation can take several forms: a public agency may procure innovation directly as a response to an intrinsic need, or, as a proxy customer or as a linkage

creator between suppliers. Conceptually, government procurement innovation originates from public ‘problem’ and the solution is attained by the suppliers. The existence of a ‘problem’ needs to be communicated to suppliers and alternative solutions need to be communicated to the procurer. This two-way communication imbues transparency which is essential for innovation and provides relevance to the progress of the pertinent industry to occur.

Methodology

Given the vastness of the subject, the project is divided into two phases. This report is an outcome of the first year’s research on the above mentioned issues. The methodology involves desk research of existing literature and analysis of secondary data in regard to the overall Indian procurement scenario and three specified sectors – health (including pharmaceuticals and medical equipments), information technology and IT enabled services, and railways at the central government level.

It has examined issues both at the regulatory and institutional level, as well as from the perspective of trade/business. It has attempted to look at future market access opportunities (both of India in markets abroad and of other GPA members in India) i.e. India’s potential offensive and defensive interests.

The field research was conducted by administering a set of qualitative questionnaires to a cross section of domestic stakeholders, such as procurement officials in various line ministries of the Government of India, policymakers in these ministries/departments who deal with public procurement, premier industry and sectoral associations of India, some well known companies participating in public procurement in India and abroad, and academicians who deal with the subject.

The field research was also carried out in a few major capitals abroad like Washington DC, Brussels, London, through interviews and discussions with government officials and business representatives involved in public procurement, keeping in view that these countries are major trading partners of India and also members of the WTO GPA. Discussions were also held with officials of the WTO Secretariat and the European Commission.

Given this methodology, several constraints were faced. One of them was that of scarce data as well as absence of literature on this subject. This has been tackled through stakeholder interviews, secondary data analysis by making assumptions and using proxies. Obtaining information on actual amount expended by the government on procurement activities overall and sector-wise suggest that better maintenance and reporting of data and other information is necessary for the government and the public sector for improved transparency, more evidence-based analysis and course-correction.

Furthermore, and for better understanding of outward-looking aspects of public procurement, it is critical to gather knowledge about procedural barriers which inhibit Indian suppliers from accessing markets abroad. Information about barriers at the customs level, issues in visa procedures, etc play a pivotal role, though they are difficult to obtain as no systematic study has been done of the same or is not available in public domain.

Structure of the Study

Some of the pertinent principles, objectives and theoretical framework on government procurement relevant to the study have been dealt within this introductory chapter.

The second chapter examines the extant policy framework and practices in government procurement in India.

The next chapter conducts an analysis of some of the most important provisions of the Public Procurement Bill, 2012, which is expected to take the form of legislation soon. It makes a comparative analysis with global best practices to understand the effectiveness of the Bill in the context of its ability to address the principles of transparency, competition and fair play, which are the cornerstones of good governance in public procurement. The comparison is with the existing international legal frameworks, such as the WTO GPA and the UNCITRAL Model Law on Public Procurement as they are the most widely accepted templates on the subject.

While comparing with the provisions of this Bill with the GPA, it has been considered that the WTO GPA is a plurilateral agreement at the global level, catering to the requirements of its member countries, whereas the Public Procurement Bill, 2012 is a national level legislative framework intended to regulate the domestic procurement regime in India and for that reason, the two enactments are not comparable in all respects. Taking this into account, the comparison has been restricted to comparable features of the two.

The Bill has also been compared with the provisions of the UNCITRAL Model Law on Public Procurement (2011 version) given that this model law has been the basis of procurement legislation of many countries.

The chapter further evaluates as to whether the purpose for which the Group of Ministers on Corruption in 2010-11 mandated the setting up of a Committee to recommend measures for probity and integrity in public procurement has been served through the anti-corruption provisions of the Bill. Furthermore, there is an overall assessment of the Public Procurement Bill, 2012, and whether the Bill lives up to expectations in terms of good governance and international best practices.

It is followed by chapters on sector-wise analysis of public procurement in health, IT and ITeS and railways – of the

framework governing procurement (at the Central Level) in these fields, followed by an estimation of the size of government procurement in these sectors, the capabilities of the domestic market and a look at the opportunities available in the international government procurements markets in these sectors.

On the basis of discussions with policy makers in public procurement, the concluding chapter analyses the opportunities or otherwise of joining the WTO GPA. It balances possible advantages of the WTO GPA membership as seen through the eyes of officials of the WTO Secretariat with the drawbacks in the proposition, which is a part of an in-house analysis, coupled with discussions with Indian policy makers. Despite the drawbacks outweighing the advantages in the short run, the chapter suggests a way forward, balancing short term with long term perspectives.

Endnotes

- 1 Arrowsmith, S. and R. Anderson (2011), *The WTO Regime on Government Procurement : Challenges*, Cambridge Press, New York, USA
- 2 The General Financial Rules (GFR), 1963 as (amended in 2005) are a compendium of general provisions to be followed by all offices of Government of India while dealing with matters of a financial nature. It is available at http://finmin.nic.in/the_ministry/dept_expenditure/gfrs/GFR2005.pdf; DFPR, 1978, issued by the Department of Expenditure in the Ministry of Finance while the DGS&D has its own manual of procurement and prescribes guidelines to be followed by all central entities
- 3 UNCITRAL Model Law on Procurement of Goods, Construction and Services was adopted by the UNCITRAL at its 27th session. Also refer <http://www.uncitral.org/pdf/english/texts/procurem/ml-procurement/ml-procure.pdf>, accessed on April 04, 2012.

- 4 The GPA is till date the only legally binding agreement in the WTO focusing on the subject of government procurement. It is a plurilateral treaty administered by a Committee on Government Procurement, which includes the WTO Members that are Parties to the GPA. Its present version was negotiated in parallel with the Uruguay Round in 1994, and entered into force on January 01, 1996. On 15 December 2011, negotiators reached a historic agreement on the outcomes of the re-negotiation of the Agreement. This political decision was confirmed, on March 30, 2012, by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA/113).
- 5 The Public Procurement Bill, 2012, which seeks to regulate the award of government contracts at the central government level above ₹50 lakh was introduced by the Ministry of Finance in the lower house of Parliament in India on May 14, 2012. This Bill seeks to ensure transparency accountability and probity in the state purchases. It can be accessed on the website Ministry of Finance at http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/58_2012_LS_EN.pdf
- 6 The Heckscher–Ohlin analysis is a general equilibrium mathematical model of international trade, developed by Eli Heckscher and Bertil Ohlin at the Stockholm School of Economics. It builds on David Ricardo's theory of comparative advantage by predicting patterns of commerce and production based on the factor endowments of a trading region.
- 7 Auction theory researches auction markets and deals with the study of the behaviour of the participants in such a market. The Optimal Auction Theory which creates tools and provides information on the cost advantages/disadvantages of granting preferences to domestic suppliers and the accrual of welfare gains is significant in international trade.
- 8 Although Rhodd *et al* (2006) did not follow the optimal auction theory.
- 9 Elder and Georghiou (2007) defines demand-side innovation policies as '*all public measures to induce innovations and/or speed up diffusion of innovations through increasing the demand for innovations, defining new functional requirement for products and services or better articulating demand.*'

2

The Government Procurement Scenario in India

*Bulbul Sen & Suresh P Singh**

Introduction

Public procurement in India is both a complex and an important subject. It is a system-wide activity across the Central and state governments and their autonomous and statutory bodies and public sector enterprises, with a wide variety of sector/institution specific requirements. Local governments, at the Municipal and *Panchayat* levels also follow their individual procurement practices. Diversity in procurement practices is an integral feature of the vast governmental system in the country.

The subject is further made complex as India does not have a single public procurement policy or public procurement law. There is no separate department in the Central Government to guide public procurement authorities. In the absence of a comprehensive public procurement law, procurement is governed by and large by the General Financial Rules (GFR), 1963 as (amended in 2005) and the Delegation of Financial

* *Data analysis in the chapter was carried by Suresh P Singh.*

Powers Rules (DFPR), 1978, issued by the Department of Expenditure in the Ministry of Finance. The Directorate General of Supplies & Disposals (DGS&D) has its own manual of procurement, and the Central Vigilance Commission (CVC) prescribes guidelines to be followed by all central entities.

Additionally, the States of Tamil Nadu and Karnataka have made an attempt to adopt transparency laws for public procurement though these attempts have resulted in legislations which lack enforceability. Under the broad framework of the GFR, the various departments and other public organisations have developed their own procurement manuals and procedures which they adhere to in conducting procurement activity. Although, the GFR was considerably improved through its revision in 2005, significant lacunae still remained, especially in the field of works and services. Marked differences in the practices being followed across ministries and organisations persist and some of these practices are not in compliance with the GFR.

Further, the DGS&D has its own manual of procurement and the CVC prescribes guidelines to be followed by all central entities.

The complexity is further compounded in that besides seeking best “value for money”, India uses its procurement policy to fulfil certain social and developmental objectives, as expressed through its policy of preferences or offsets to favour certain sectors.

The subject is important as public procurement in India is an activity “not merely for meeting day to day functional requirement, but also for underpinning various services that are expected from the government, e.g. infrastructure, national defence and security, utilities, economic development, employment generation, social services and so on” (vide Report of the Committee on Public Procurement, 2011, Chairman Vinod Dhall or ‘Dhall Committee Report’).

Moreover, the size of public procurement is to the extent of as much as 20 to 30 percent of the country's GDP, which is another reason for making it an important economic activity in the country.

This chapter attempts to estimate the size of the public procurement market in India. It elucidates on the existing legal and regulatory framework under which government procurement is dealt with in India and delineates the norms under which preferential purchase policies are in practice by the procuring authorities. The chapter focusses on some of the pertinent issues and practices prevalent in procurement which is further exacerbated by the lack of a distinct regulatory framework and enforceable laws. It concludes with expostulating the roadblocks encountered in procurement of goods, services and works in the current framework.

The Size of the Public Procurement Market in India

Procurement Data Normalisation

Owing to the absence of specific published data on public procurement, the data on public procurement in India is limited to estimates. Estimates made by different organisations and experts place the expenditure on public procurements in the range of 20 to 30 percent of GDP.

According to a World Bank (2003) report,¹ the total value of public procurement represents 13 percent of the national budgets and over 20 percent of the GDP, which are valued at US\$100bn. Consistent with the World Bank estimate, the Planning Commission of India in its draft Public Procurement Bill, 2011, had indicated total public procurement in India in the range of ₹12 to 15 lakh crores.²

According to a Government of India agency, public procurement in India constitutes about 30 percent of the GDP, a figure which is 10 percent higher than the World Bank estimate and also of the Planning Commission.³ Another source

estimates public procurement at approximately 15 percent of the budget.⁴

The annual expenditure on public procurement for the Union Government is in the range of ₹2.5-3 lakh crores. This includes procurement by all Central Government agencies, including defence procurements. It also indicates that while departments like Defence, Railways and Telecom, devote about 50 percent of their budget to procurement, which happens to be higher than the expenditure of most of the state governments, about 26 percent of the health budget is spent on procurement.

The World Bank report also highlights the expansion of public procurement activity over the last six decades from being limited to maintenance of law and order and collection of revenues to currently encompassing procurement of every type of goods and services as is carried out by a myriad of agencies all over the country. Initially, procurements dealt with the purchase of office equipment and the construction of office buildings and roads. After the first five year plan, government activity diversified and resulted in the setting up of public sector undertakings (PSUs) in every sector of the economy in pursuance of social democracy, planned development and to effectively implement the command economy. The launch of the economic liberalisation programme (since the 90s) prompted the government to alter course further as it embarked upon gradual disinvestment in the public undertakings.

Owing to an absence of a consolidated estimate at the disaggregated level, an estimate which relies on capital expenditure data by the ministries may be required. For example, in the case of defence, defence expenditure constitutes about 15 percent of the total Central Government expenditure, or 2.5 percent of the GDP.⁵ This expenditure is composed of multiple items of which capital expenditure is

relied upon as the most probable figure for procurement. Out of the total defence expenditure, capital expenditures (used for procurement) constitute 25 percent (2000) to 46 percent (2009) of the total expenditure from 2000 to 2010.

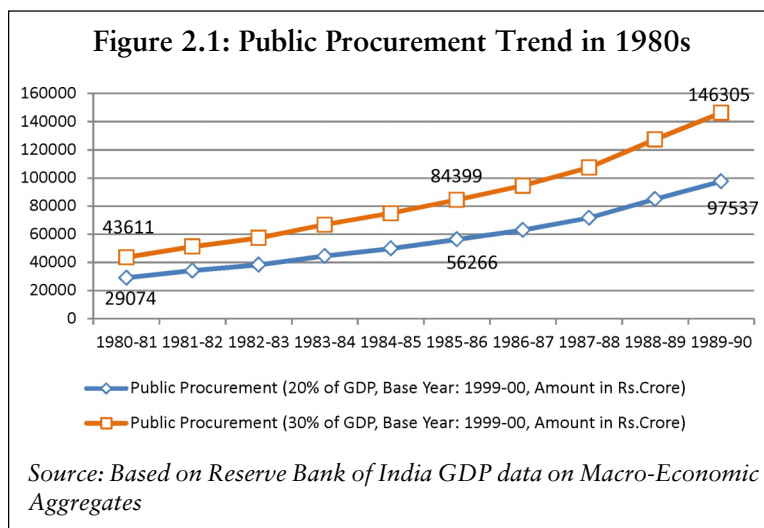
Since there is no official data for estimating public procurement, there are a few options present: using either 20 percent of GDP (as per the World Bank); or 30 percent of GDP (as per CVC, government of India). Considering that there is no specific guideline the present study uses the criteria of 20 and 30 percent of GDP for estimating government procurement market size, although 20 percent appears reasonable and consistent with international estimates. The estimate of procurement is presented in the following (sub) section.

Procurement Market Size and Trend

In order to provide an overall market size of procurement in India, the study applies both 20 percent and 30 percent of GDP criteria as indicated by the World Bank and the Planning Commission of India on the one hand, and the CVC on the other. This criterion has been applied to all the years (1980-81 to 2010-11) in order to generate a range of public procurement data. At the outset, it needs to be iterated that as the estimation is based on GDP, the indicative government procurement figure includes procurements of the Central Government, including defence, state governments, local bodies and Central and state public sector units including utilities. To account for inflation, GDP at constant price with base year 1999-2000 has been used.

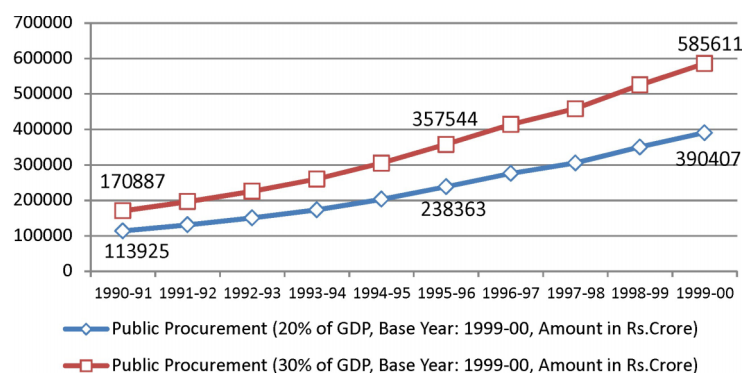
Total public procurement at constant prices during the beginning of the eighties was in the range of ₹29000 to ₹43600 crores. It was recorded in the range of ₹56000 to ₹84000 crores in 1985-86 and further to ₹97000 to ₹147000 crores range in 1989-90. During the period, it realised a –compound

annual growth rate (CAGR) of 14 percent, and multiplied by 3.4 times (Figure 2.1).

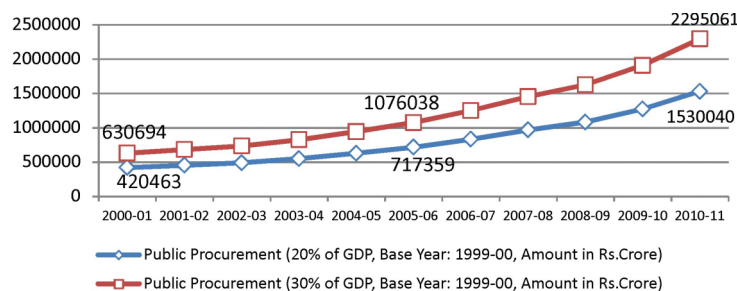


The increasing trend consistent with the increase in GDP realised in the eighties continued in the next decade. Total public procurement estimated in the range of ₹113,900 to Rs 170,800 crores in 1990-91, increased in the range of Rs 390,000 to 585,600 crores by the end of the decade (1999-00). In all these years, the procurement grew at a CAGR of about 14 percent.

During the period 2000-01 to 2010-11, public procurement multiplied by about 3.6 times, increasing from ₹420,400 to over 1,530,000 crores in 2010-11. The annual growth was recorded at about 14 percent. Interestingly, this figure is consistent with the Planning Commission estimate of public procurement at ₹15 lakh crores.

Figure 2.2: Public Procurement Trend in 1990s

Source: Based on Reserve Bank of India GDP data on Macro-Economic Aggregates

Figure 2.3: Public Procurement Trend (2000-01 to 2010-11)

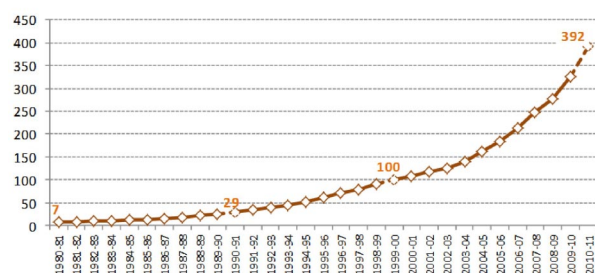
Source: Based on Reserve Bank of India GDP data on Macro Economic Aggregates

The above analysis, however, does not truly reflect the real picture as in all the decades, it is observed that the public procurement increased by a CAGR of approximately 14

percent. It is important to note that the base has increased in each of the decades.

An index (with base year 1990-00=100) prepared for the purpose provides a more realistic understanding of the public procurement in India. It is observed that over the last three decades, total public procurement has increased by 58 times. It is important to note that there is a definite shift in the trend in the last decade, with the curve becoming sharper than in the preceding decades. This reflects the new emerging situation, i.e. greater diversification in procurement.

Figure 2.4: Trend in Public Procurement
(1999-00=100)



Source: Based on Reserve Bank of India GDP data on Macro-Economic Aggregates

Market Fragmentation

The public procurement market in India is highly fragmented. Procurement of goods and services is carried out by ministries, departments, municipal and other local bodies, statutory corporations and PSUs both in the Centre and in states.

Besides the central ministries and departments, public sector enterprises also form a major share in the overall public procurements. According to a paper by the Competition

Commission of India (CCI), out of the total public procurement, public sector enterprises (PSEs) alone procure to the extent of ₹8 lakh crore annually (the figure relates to 2008-09).⁶ Further, it is assumed that procurement by the public sector enterprises is increasing in the range of 10 to 15 percent annually. This takes procurement figure by the public sector currently to about ₹10 lakh crores.

Box 2.1: Disaggregating Government Procurement in India

• Union Government	₹2.5 – ₹3.0 lakh crores ⁷
• Central Public Sector Enterprises	₹10.0 – ₹10.6 lakh crores
• Others (state governments, ULBs, state PSUs)	₹2.5 – ₹3.0 lakh crores

Legal Framework

Legal Authority for Government Procurement

At the apex of the legal framework governing public procurement is Article 299 of the Constitution, which stipulates that contracts legally binding on the government have to be executed in writing by officers specifically authorised to do so. Further, the Central and state governments of India derive their authority to contract for goods and services from Article 298 of the Constitution of India. But, except for a requirement on the government to protect the fundamental rights of citizens of being treated equally (while soliciting tenders), the Constitution does not provide any further guidance on public procurement policies, principles or procedures.

The Indian Contract Act, 1872 and Sale of Goods Act, 1930, the Central Vigilance Act, 2003, the Prevention of Corruption

Act 1988, the Right to Information Act, 2005 and, where competition issues are involved, the Competition Act, 2002 are other major legislations governing the contract and sale of goods in general, including goods and to some extent services procured by the government.

Under the federal system of India, the responsibility for governance is divided between the central and state governments. The legislative functions of each of the central and state governments are enumerated in the Union and the State lists of the Constitution of India. The items covered in the Concurrent list fall in the domain of both Union and State governments and both can make laws on those subjects. Public procurement is not expressly included in any of those lists. Accordingly, some argue that powers to make any laws on the subject of procurement vest with the Central government under its residuary powers, in accordance with Article 248 of Constitution of India. However, there is no law exclusively governing government procurement at federal level in India, and neither has any authority been established that is exclusively responsible for defining procurement policies and for overseeing compliance with the established procedures.

However, if procurement can be considered to be included under the heads “Acquisition and Requisition of property” and “contracts” which items are covered in entries 42 and 7 respectively, of the concurrent list, both centre and state governments can be said to be entitled to legislate on the subject. This also justifies specific legislations on the subject in certain states such as Tamil Nadu and Karnataka.

Rules Governing Central Procurement

In the absence of a central legislation, comprehensive rules and directives cover the subject of Government Procurement. These include the General Financial Rules (GFR), 2005, the Delegation of Financial Powers Rules (DFPR) and government

orders regarding price or purchase preference or other facilities to sellers in the handloom sector, cottage and small scale industries and to Central PSUs etc., and the guidelines issued by the Central Vigilance Commission to increase transparency and objectivity in public procurement.

The GFRs are a compendium of general provisions to be followed by all offices of Government of India while dealing with matters of a financial nature.”⁸ These rules were first issued by the Department of Expenditure, Ministry of Finance in 1947 and underwent an overall review in 1963. Between 1963 and 2005 various amendments were made to the 1963 rules. During this period, the validity of various policies and interpretations of various provisions also came into question before the courts. Decisions by courts, especially those by the Supreme Court, also came to guide the procurement processes in India. These decisions and subsequent amendments were incorporated into the new GFR 2005.

The GFRs 2005 provide guidelines or criteria to which the procedures adopted by the procuring agencies must conform. Ministries or departments (procuring agencies) that procure are free to set out their own procedures and the only requirement is that such procedures should conform to the GFRs. Chapter 6 of GFR, 2005 deals with procurement of goods and services. Rules 135-162 deal with the procurement of goods while Rules 163-185 deal with the procurement and outsourcing of services.

Before the liberalisation of the Indian economy, most procurement operations were centralised and all ministries and departments (except few which had substantial procurement operations) were required to obtain supplies through the DGS&D. Now, however, all ministries are authorised to procure goods for their use.

The role of DGS&D is now limited to procuring items of common use by a number of ministries (Rule.140 GFR, 2005). DGS&D identifies and maintains various lists of suppliers and consultants and finalises the rate and running contracts for items of common use. For these purposes, certain guidelines have also been issued by DGS&D, which also form part of the legal framework for procurements in India.

Rules Governing Procurement by State Governments

A major amount of public procurement is done by various State Government Departments. Most of the States have a system similar to the Central Government. The procurement is generally governed by State Financial Rules/Codes, issued by the Finance Department of each State as orders. However, two States Tamil Nadu and Karnataka have come out with specific legislations on public procurement and Himachal and Kerala are in the process of drafting bills on the subject. These legislations contain virtually the same procurement procedures as prescribed in the GFR. But by virtue of being enactments, they give certainty and stability to procedures, legal recourse of appeal to courts to aggrieved parties (whereas for contesting financial rules, the writ jurisdiction of the high courts have to be invoked) and the procurement enactments cover not merely government departments but public undertakings, local bodies, societies and universities, if so provided.

Monitoring and Vigilance

The two major bodies overseeing the probity of the procurement process are the institution of the Comptroller and Auditor General (CAG) of India and the CVC.

The CAG, appointed under Article 148 to 151 of the Constitution of India audits the Appropriation and Financial Accounts of the Centre. It undertakes financial audits to verify

if the financial statements of the government are in line with prescribed norms. Compliance audit is undertaken to ascertain whether the transactions relating to expenditure, receipts, assets and liabilities of the Government are carried out in compliance with prescribed provisions in the Constitution, laws concerned, rules and regulations. The CAG performance audit is an evaluation of government organisations, programmes, and schemes with regard to economic, efficiency and effectiveness.

The CAG is an independent statutory body and its audit reports and recommendations are presented before the Parliament and respective State Legislatures. The Public Accounts Committee of Parliament reviews the audit reports and makes recommendations to the Parliament, which, in turn, are to be acted upon by the government. Virtually the same procedure is followed in case of the States. However, the action taken on recommendations of Parliament/Legislatures, based on the CAG reports normally follow after a consideration time lag, thereby rendering virtually ineffective any critiques by the CAG.

The CVC mainly focuses on the integrity of public servants in carrying out procurement functions. It conducts investigations under the Prevention of Corruption Act 1988 and recommends action to the government against erring officials. The CVC also issues guidelines on procurement matters, but these are advisory in nature and not legally binding on government departments.

The CCI, under the Competition Act, 2002 also monitors and prohibits anticompetitive behaviour on the part of bidders, such as bid rigging and cartelisation. Bid rigging or collusive bidding may be inquired into by the Commission and is banned under sub-section 3 of Section 3 of the Act. The Commission can impose substantial penalties on firms indulging in bid rigging or collusive bidding. In case the bid rigging or collusive

bidding has been entered into by a cartel, the penalty imposable is even more severe.

Major Guidelines by the Supreme Court on Procurement

In the absence of an overarching legislation on procurement, the courts in India have often filled up the lacuna by laying down some basic principles of public procurement emanating from the fundamental rights enshrined in the Constitution and generally requiring that procurement practices are undertaken in a fair manner and are in compliance with principles pertaining to transparency. Some of the important principles laid down by the Supreme Court and High Courts are as follows:

- i. The government must act in conformity with some standard or principle which meets the tests of reasonableness and non-discrimination in awarding contracts. This follows as a necessary corollary from the principle of equality enshrined in Article 14 of the Constitution- as held by the Supreme Court in *R.D. Shetty v. International Airport Authority*.⁹
- ii. The Supreme Court in *State of UP v. Raj Narayan & Ors*¹⁰ held that government organisations are as a rule prohibited from working in secrecy in dealing with contracts, barring rare exceptions.
- iii. The Supreme Court in *G.B. Mahajan v. Jalgaon Municipal Corporation*¹¹ noted that the reasons for administrative decisions must be recorded and based on facts or opinions of experts.

- iv. Adequate publicity of procurement is essential as held by the Supreme Court in *Committee of Management of Pachaiyappas Trust v. Official Trustee of Madras*.¹²
- v. Officers engaged in public procurement have to perform a fiduciary duty. This was held in *Delhi Science Forum v. UOI*.¹³
- vi. Procurement actions have to be fair as held by the Supreme Court in *Mahesh Chandra, v. Regional Manager, U.P. Financial Corporation*.¹⁴
- vii. Bid evaluation has to be in accordance with the bid evaluation criteria communicated while inviting the bid. This was held by the Supreme Court in *M/s Prestress India Corporation v. U.P. State Electricity Board*.¹⁵

Major Guidelines on Procurement Contained in the GFR

The procedure for government procurement under the GFR Rules, envisages open tendering, effective advertisement, non-discriminatory tender conditions and technical specifications, public tender opening (bid evaluations based on a pre-disclosed criteria and methodology) and award to the most advantageous bidder without any negotiation on price or any other terms subject to certain specified exceptions.

Some of the important rules of the GFR are Rule 137, Rule 160 and Rule 161.

Rule 137 lays down the basic objective for procurement activity, which is to bring efficiency, economic and transparency; fair and equitable treatment of suppliers; and promotion of competition in public procurement. To this effect, the Rule lays down detailed procedures, such as clarity in specification of quality and quantity of goods to be procured while giving specifications in the tender; inviting of offers

through a fair and transparent procedure; and, recording the considerations taken into account for making the procurement decision.

The conditions for eliminating arbitrariness in the procurement process in the GFR are as follows: The bidding document should contain the criteria for eligibility and qualification to be met by the bidders, such as past performance, technical capability etc; eligibility criteria for goods; the procedure, date, time and place for sending bids; date, time and place of opening the bid; terms of delivery; it should provide a mechanism to enable a bidder to question the bidding process; it should contain provisions for settlement of dispute, if any, resulting from the contract to be kept in the bidding document; the specifications in the bid documents should be broad based to the extent possible and use standard specifications which are widely known to the industry; evaluation of bids should be made in terms of the conditions already incorporated in the bidding documents; bidders to be prohibited from altering or modifying their bids after the expiry of the date for receipt of bids; negotiation with the bidders is discouraged; Finally, the contract must be awarded to the lowest evaluated bidder whose bid has been found to be responsive and who is eligible to perform the contract.¹⁶

Depending upon the value of the goods, the GFR provides for specific tendering norms which have been noted herein:

- 1) **Purchase without quotation:** These can be authorised up to the value of ₹15,000 on each occasion.
- 2) **Purchase by Purchase Committee:** Purchases between ₹15,000 to ₹100,000 may be authorised on the recommendation of a local Purchase Committee. The Purchase Committee will survey the market, ascertain the reasonableness of rate, quality, and specifications while identifying the appropriate supplier.

- 3) **Purchase through tender:** For purchase of goods above ₹1,00,000 GFR prescribes procurement through bids.
- a) **Open Tender-** For procurement of goods of ₹25,00,000 and above, invitation to tenders by advertisement is required. The advertisement should be published in Indian Trade General and at least one national daily having wide circulation, as also in the website of the department. The time for submission of bids should be three weeks from publication of tender notice/availability of bidding document and four weeks where bids are to be obtained from abroad.
 - b) **Limited tender:** For procurement of goods below ₹25,00,000/-, limited tender mode, i.e. sending copies of the bid documents to at least three registered suppliers, can be adopted.
 - c) **Single tender:** Procurement from a single source may be adopted only under few select circumstances, namely
- 4) It is in the knowledge of the user department that only a particular manufacturer is manufacturing the required goods.
- 5) In case of emergency, the required goods are to be purchased necessarily from a particular source and the reason for such a decision is to be recorded and approved by the competent authority.
- 6) For standardisation of machinery or spare parts, which has to be compatible with the existing equipment, the required item, with the advice of a technical expert and on approval by the competent authority, may be purchased only from a select firm.
- 7) **Procurement of goods financed by Loans/Grants extended by International Agencies:** The Articles of Agreement with the International Agencies, like the World Bank, Asian

Development Bank etc., stipulate specific procurement procedure to be followed by the borrowers. The procurement procedures, as finalised and incorporated in the Agreement after consideration and approval of the Ministry of Finance are to be followed accordingly.

- 8) **Two bid systems:** For purchasing capital equipment, high value plant, machinery etc., of complex and technical nature, the tenderers should be asked to bifurcate their quotations in two parts. The first part, the 'Technical Bid', should contain the relevant technical specifications and allied commercial details as required in terms of Tender Inquiry Document. The second part, the 'Financial Bid' should contain only the price quotation. The technical bids are to be opened in the first instance and scrutinised and evaluated by the competent authority with reference to parameters prescribed in the tender documents. Thereafter in the second stage, the financial bids of only the technically acceptable offers to be opened for further evaluation, scrutiny, ranking and placement of contract.

These basic principles of GFR have to be broadly adhered to by departments, ministries and central PSUs in their respective procurement procedures.

Preference Policies in Public Procurement

Preferential Treatment for the MSME Sector

The Micro, Small and Medium Enterprises (MSME) sector contributes significantly to manufacturing output, employment and exports of India. It is estimated that in terms of value, the sector accounts for about 45 percent of the manufacturing output and 40 percent of total exports of the country. The sector is estimated to employ about 69 million persons in over 26 million units throughout the country. Over 6000 products

ranging from traditional to high-tech items, are being manufactured by MSMEs in the country. The MSME sector provides maximum opportunities for both self-employment and generates employment opportunities for those outside the agriculture sector – the inclusiveness of the sector is underlined by the fact that nearly 50 percent of the MSMEs are owned by disadvantaged groups of society. However, Micro & Small Enterprises (MSEs), which form an overwhelming number of this sector, are highly susceptible to volatile market conditions in the overall production/value chains.

To address these inherent problems, India, like many other countries, put in place public procurement policies to support MSEs and to ensure a fair share of market to such entities. Under the existing dispensation in India, the government guidelines provide for support in marketing of MSE products through a variety of measures such as price preference, reservation of products for exclusive purchase from MSEs, issue of tender-sets free of cost, exemption from payment of earnest money, etc.

In practice, however, most of these facilities are not being provided to the MSEs by the government departments and Public Sector Enterprises owing to the operation of entry barriers. Some of the government departments and PSUs impose mandatory eligibility clauses providing for a minimum turnover limit and the amount of purchase orders executed earlier for procurement of material floated by them. Most MSEs find it difficult to meet these criteria. The Federation of Indian Small Enterprises (FISME) has stated¹⁷ that presently, annual procurement by Central Government accounts for only 5 percent of total government procurement

In order to address this situation, the government, on November 01, 2011 approved a revised Public Procurement Policy for goods produced and services rendered by MSEs to the Central ministries/departments/PSUs to be notified under

Section 11 of the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006. The notification, made on March 23, 2012, has altered the very parameters of public procurement in India. The recommendations of the report of Prime Minister's Task Force on the MSMEs, 2010 has been taken into consideration to amend the public procurement policy of the Central government.

Commencing from April 01, 2012, every Central Ministry/PSU shall set an annual goal for procurement from the MSE sector at the beginning of the year, with the objective of achieving an overall procurement goal of minimum 20 percent of the total annual purchases of the products or services produced or rendered by MSEs from the latter in a period of three years.

Out of 20 percent target of annual procurement from MSEs, a sub-target of four percent (i.e. 20 out of 20 percent) will be earmarked for procurement from MSEs owned by Scheduled Caste/Scheduled Tribe entrepreneurs, who are the most disadvantaged sections of the population. At the end of three years, the overall procurement goal of minimum 20 percent will be made mandatory. The participating MSEs in a tender quoting price within the band of L1 + 15 percent may also be allowed to supply a portion of the requirement by bringing down their prices to the L1 price, in a situation where L1 price is from someone other than an MSE. Such MSEs may be allowed to supply up to 20 percent of the total tendered value. In case of more than one such MSE, the supply will be shared equally. The Central ministries/PSUs will continue to procure 358 items from MSEs, which have been reserved for exclusive purchase from them.

Undoubtedly, the policy seeks to redress various disadvantages historically affecting small enterprises in India, such as the lack of capital and credit facilities, infrastructure deficit in the country, higher fixed costs as compared to the

large scale sector and lack of access to global markets. The crucial socio-economic importance of the sector and the inadequacy of the earlier procurement policy may have also prompted this move.

However, as India continues to liberalise and globalise, the concern for fair play, competition and transparency is growing by the day. Concerns have been raised that a policy of a fixed quota for the SME sector in public procurement, when implemented, may lead to lowering of standards in public procurement, since the SME sector in most cases may not be able to meet the stringent production standards and delivery schedules required.

Economic literature highlights one of the identified negative impacts inherent in dealing with small firms: The high transaction cost for evaluating and monitoring many small suppliers rather than a few large suppliers and the risks/costs of the small enterprise defaulting. The literature also highlights the “premium costs” incurred in awarding a contract to an SME when it offers either a higher price than if the competition for contract award were open or when the procuring agency accepts lower quality, given a constant price due to a contract award to an SME. From the perspective of international trade, discrimination by a government in favour of domestic producers/a category is viewed as a non-tariff barrier.

However, governments the world over tend to acknowledge the higher costs in preferential treatment to this sector as a trade-off for a greater public good, though, the concept of public good varies. The US policy is based on the concept of increasing competition in the domestic economy through a policy preference arising out of historical concern to prevent industry concentration and ‘trusts.’

In South Africa, SME preferences are based on the policy of re-mediation of past discrimination and historical disadvantage. In India, given the large employment generation

by SMEs, benefiting specially the disadvantaged/informal sector, the preference to SMEs is important for achieving the stated national objectives of 'growth with equity and inclusion'. International justification for the preference also exists, since, amongst others, the WTO's Plurilateral Agreement on Government Procurement, 2011, has a special carve out for developing countries to extend domestic preferences for the development of small scale and cottage industries.

Thus, India has enough justification for the new SME policy in public procurement. One welcome aspect of the new policy is that it contains sufficient flexibility. The annual goal of procurement of 20 percent of requirement from the MSEs includes sub-contracts to micro and small enterprises by large enterprises. Further, any department having problems in implementing the 20 percent quota may approach a Review Committee for exemption from the quota. The US example of preference to small business operating as a successful model appears to arouse confidence in the policymakers on the path being embarked upon.

The capability and competitiveness of the SMEs varies from sector to sector. It may be worthwhile to consider if a better balance between equity concerns and a market-oriented strategy could be arrived at by allowing each procuring department to negotiate its own target with the Department of MSME regarding its annual procurement target to be sourced from the MSMEs.

Preferential Treatment for Central Public Enterprises

The Industrial Policy of 1956 led to a large growth in the public sectors in India. The procurement policy of the government mandated both Central government departments and public sector enterprises to apply price and purchase preference in favour of the public sector. The preference for CPEs also applies to construction and service enterprises. With

the onset of liberalisation in 1991, the list of industries reserved for the public sector has been reduced. However, as per the extant government policy, a Central Public Sector Undertaking (CPSU) gets purchase preference up to 10 percent over Large Scale Private Units (vide Department of Public Enterprises O.M. No. DPE. 13(12)/2003-Fin.Vol.II dated July 18, 2005). Under this system, a CPE whose offer is within 10 percent of that of a large private sector unit is allowed to revise its price downward and would be considered for a parallel rate contract.

The preferential purchase policy for certain medicines remains. Government has approved (vide Department of Chemicals & Petrochemicals OM No. 50013/1/2006-SO(PI-IV) dated August 07, 2006) grant of purchase preference exclusively to Pharma CPSEs and their subsidiaries in respect of 102 specified medicines manufactured by them.

Not only is the price preference extended to CPEs an anomaly, sometimes government departments resort to procuring goods, works and services through Public Sector Enterprises (PSEs) on the basis of “negotiated rates”. The PSEs in turn, procure works, goods and services without following a competitive bidding process. “The entire procurement policy of the government is thus subverted by nominating PSEs who, in turn often resort to ‘cost plus’ pricing for their supplies. This creates a potential for favouritism, inefficiency and additional costs, besides curbing competition” (Report of the Committee on Public Procurement, 2011).

Such type of procurement from PSEs is supported on the ground that the manufacturing is being done by a Public Sector Entity. However, even this argument is not sufficiently borne out by the facts. The operations of many PSEs are basically one of assembly, with very little value addition or actual manufacturing being done by them. Railways and several other ministries follow the practice of awarding contracts to their

respective PSEs on a nomination basis, these PSEs charge the government on a “cost plus basis”, thereby subverting procurement through competitive bidding. In short, the level playing field appears to be disturbed by the preferential policy towards PSEs in public procurement.

Indigenous versus Foreign Suppliers

The Indian government, responding to the WTO’s questionnaire on government procurement services, has stated that domestic bidders are treated on par with foreign bidders and the ultimate price available to the user department is the determining criteria (vide WTO Document No. S/WPGR/W/11/ADD.14 dated January 17, 1997, as cited in ‘India’s Accession to the GPA: Identifying Costs and Benefits’, NCAER Working Paper No. 74, 2001). In fact, interviews with officials in key procuring departments of the Government of India also revealed that there is no marked preference for indigenous over foreign in procurement by these departments, except for the declared policy of preference for the public sector as discussed above in case of government departments who have their own PSEs and the preference for the MSME Sector.

Despite India not being a Member of the WTO GPA, except for the sectoral preferences discussed above, the field is largely open for foreign suppliers on par with their Indian counterparts. The Government Procurement Manual, 2005 also provides that “Where the Ministry/ Department feels that the goods of the required quality, specifications etc., may not be available in the country and /or it is also necessary to look for suitable competitive offers from abroad, the Ministry/ Department may send copies of the tender notice to Indian Embassies abroad as well as to the Foreign Embassies in India requesting them to give wide publicity of the requirement in those countries”.

In fact, in certain sectors, it is understood that imported items, e.g. in the case of Information Technology, comprising

of electronics and telecommunications hardware, have flooded the market. As India became a signatory to the Information Technology Agreement (ITA)- 1 under the aegis of the WTO, electronic hardware is entering India duty free. The import figures for electronics and telecom equipment is soon likely to be on par with India's statistics for imported crude oil, the costliest item on its import statistics. This may have implications for India's balance of payments situation.

In the face of such a situation, and mainly in view of security considerations, the procurement policy in Information Technology and Electronics may undergo change through the government decision of February 02, 2012, whereby preference is to be given to domestically-produced electronic goods where there are security implications and in procurement by the department for its own use. This policy and its WTO compatibility have been elaborated on in the Chapter on procurement in Information Technology and IT-enabled services.

Weakness in the System

Though procurement is a system-wide activity in government, the institutional framework is in many respects incomplete and weak so that it fails to act as a sufficient safeguard to provide transparency, accountability, efficiency, competition, professionalism and, most importantly, economy to the government. In India, public perception about the quality, credibility and integrity in the processes of public procurement came to a new low in 2011, with the unveiling of several high level scams, including procurement for the Common Wealth Games 2011 held in Delhi.

The lacunae in the procurement system has also featured repeatedly in a number of reports of the CAG of India, the CVC, Reports of International Institutions, expert committees and academic bodies, including the World Bank, the Report

of the Committee on Public Procurement, set up by Government of India, which submitted its Report in June, 2011 etc., vide the detailed bibliography at the end of the study. Based on these, the major lacunae which emerging in the system are as follows:

A. Systemic Problems across the Public Procurement Regime

- i) The absence of a Public Procurement Law makes the ministries and departments of the Government of India prone to treat the GFR as mere guidelines which can be overridden in the name of public interest. Each department freely devises its own variation of procurement manuals, procedures and practices. Even the GFR 2005 contains 293 rules 16 appendices and a number of forms for different purposes. The Ministry of Finance has also issued 'Manual on Policy and Procedures on Purchase of Goods'. To counter corruption in public procurement the CVC, India's apex anti-corruption agency, has issued numerous guidelines and instructions on model procurement practices in the form of circulars.

Departments and ministries, like the Indian Railways, Defence, the Ministry of Health and Family Welfare (MoHFW), the Central Public Works Department (CPWD) have also issued their own manuals of rules and guidelines. The jungle of procedures and practices confuses honest officials and gives leeway to others for the use of 'discretion'. While dealing with government procurement, the GFR, only regulates the conduct of government businesses and does not vest any rights in the public. The absence of a credible process for grievance redressal and any legal penalty to prevent officials of the procuring department from committing malafide actions exacerbates the situation.

In the absence of a dedicated law, procuring officials tend to ignore the procedures laid down in the GFR, resorting to the excuse of vague guidelines and citing principles pertaining to expediency and public interest without fear of being prosecuted. Further, recent cases of corruption in India, for example in the procurement of goods and services for the Commonwealth Games held in New Delhi in 2011, have illustrated that there is often political interference in the bidding process of large contracts, probably because of absence of a proper legal framework/ monitoring and scrutiny at the time of tendering and contracting.

Codified procurement law governs public procurement in the US, the EU, Canada, South Korea and even China, Afghanistan, Bangladesh, and Nepal. The last three countries have based their laws on the pattern of the UNCITRAL Model Law on Public Procurement. The WTO's Model Law in its GPA is also well regarded as holding aloft the principles of transparency, competition and non-discrimination between domestic and foreign players.

The Government of India, at the highest level, started considering measures for tackling corruption in all types of national activities in 2011 in the wake of several high profile scams. While presenting the Union Budget for 2011-12, the Finance Minister announced the formation of a Group of Ministers (GoM) to consider measures to tackle corruption. *Inter alia* the GoM, headed by the then Finance Minister, decided to set up a Committee to look into various issues that impact Public Procurement Policy, standards and procedures.

The Committee was set up under the Chairmanship of Vinod Dhall, formerly head of India's Competition Commission, had as its members senior level

representatives from each concerned department of the Government of India and the Planning Commission. The Report of the Committee, submitted for government's consideration in June, 2011, has *inter alia* recommended the introduction of an overarching public procurement law, setting up of an institutional framework in the shape of dedicated department within the Ministry of Finance to act as a repository of the law, rules and policy on public procurement and monitor compliance with the same.

- ii) **Absence of Standard Contracts and Tender Documents:** Absence of a single Central/State Legislation to govern public procurement gives the opportunity to procuring departments to adjust guidelines to benefit few firms. The World Bank India Procurement Report, 2003, estimates that more than 150 different contract formats are being used by the public sector. The same report has pointed out the multiplicity of tender documents used by different procuring departments and even that for similar works, different agencies issue different tender document, in terms of prequalification criteria, process of selection, financial terms and conditions etc. The absence of standard documents and contracts presents scope for manipulation and favouritism.
- iii) **Public Access to Tender Documents:** Absence of publicity of tender inquiries often prevents wide participation of vendors, both domestic and foreign and the consequent lack of competition, thereby hampering the government from obtaining best value for money. The Dhall and other expert committees have recommended the setting up of a public procurement e-portal as a first element of ensuring transparency and competition.

- iv) **Pre-qualifying Criteria:** There is present an exhortation in Rule 160 of the GFR that pre-qualifying criteria should be prudently selected so as not to stifle competition among potential bidders. However, as noted by the CVC in its report titled ‘Common Irregularities/Lapses/Observed in Stores/Purchase’, public procurers tend to incorporate stringent qualification criteria to reduce the risk of failure on counts of quality/timely delivery etc. These criteria are often based on past experience, financial strength, having suitable and sufficient resources to deliver the contracted goods or services successfully. Sometimes these criteria are prescribed unknowingly but in many cases they are manipulated to favour particular firms or restrict participation.

The report no 15 of 2010-11 of the CAG (‘Procurement of Stores and Machinery in Ordnance Factories’ as cited in the Report of the Energy and Resources Institute (TERI), New Delhi, 2011, cites instances of such competition restricting practices to favour a few select firms. For ensuring a level playing field, it is essential that no prospective bidder be denied the opportunity of tendering for reasons irrelevant to the capability and resources to perform the contract efficiently.

- v) **Inadequate Timelines to Participate:** As noted by audit agencies in India, often the response time granted for bid submission is unrealistically short, this is despite Rule 150(v) of GFR which prescribes that minimum time for submission of bids should not be less than three weeks, and four weeks in case of Global Tender Enquiry, from the date of publication of tender notice or availability of bidding documents for sale, whichever is later. This leads to entry barriers, as only a few firms which would have

been acquainted with the functioning of the department concerned would have had advance knowledge and preparation time to participate in the bid. This leads to undue advantage to a small number of suppliers who are in the know of things.

- vi) **Compulsory publishing tender results:** At present, bidders often do not get to know the result of a bidding process. Neither the winning price nor the winning bidders are publicly declared and the public is not assured as to whether the conditions of the contract or the quantities being procured have not been modified during the processing of the tender. Effective disclosure about the entire tendering process would be ensured if results of tenders etc. are made public through the e-portal.
- vii) **Delay in Procurement Decisions:** Delays in procurement decisions often mar the procurement process in India, resulting not only in over time and cost but malpractices as well. It is felt that the e-procurement portal, when set up, can be used to monitor delays. The system could be evolved to graduate from e-disclosure/e-tendering to a comprehensive e-procurement solution, comprising of receipt of bids, their technical and financial evaluation and declaration of results through the e-portal.
- viii) **Lacunae in the bid challenge procedure:** Unsuccessful bidders to a government tender are merely notified through a regret card. The competent authority does not record/disclose the reasons for failure of the bid. The details of successful bids leading to contracts awarded are not published owing to which a channel of redressal to the unsuccessful bidders to challenge the bids is absent. “Bid challenges are an important self-monitoring and self-

implementing mechanism”¹⁸ as they allow those most affected by the failure to apply national procurement laws to access redressal, thereby ensuring that problems in the procurement system are identified and addressed quickly and efficiently.

- ix) **Restrictive Tendering Practices:** Rule 137 of GFR states that every authority delegate the financial powers to procure goods to promote competition in public procurement. The emphasis on adoption of Open Tender Enquiry (OTE) in case of generic and standard items contained in Rule 151 of GFR and the use of limited tendering and single tendering in only very specific circumstances, reports of monitoring bodies like the CVC suggest that procuring agencies fail to utilise the open channel provided by OTE and tend to depend on Limited Tender Enquiry (LTE), thereby limiting competition, which in turn leads to cartel formation, higher rates and ensure success to select firms.
- x) **Registered Vendors:** The most restrictive of the tendering practices is that of maintaining a list of ‘Registered’ vendors, as pointed out by several reports of experts, including the Dhall Commission report, 2011 and the report of the Energy and Resources Institute of India, 2011. Though the original purpose of such a list, as explained in Rule 142 of GFR, was to establish “reliable sources for procurement of goods commonly required for government use”, the system is by and large being implemented to limit competition. The Railways, for example procures goods only from approved vendors registered with its Research, Development and Standardisation Organisations (RDSO) or its 9 production units. A firm that approaches the Railways is subjected

to a detailed scrutiny and inspection for it to be approved to bid up to 5 percent of the purchase of a particular item and after some time it can be upgraded to bid for up to 25 percent of the total requirement of an item and only 3 years thereafter can it become a Part 1 vendor “eligible to bid for 100 percent supply of an item.”

The combined effect of the limited number of registered vendors, the time taken in registration and the very volume of supply allowed to a newly registered vendor makes for a situation that does not lead to adequate development of new vendors so as to encourage competition, economy and effectiveness. The DGS&D also prepares an item-wise list of eligible and capable suppliers. But, as observed in the reports of the CVC, the necessary precautions of periodically updating the list of ‘Registered’ vendors, encouraging relevant new firms to get them registered to break the monopoly of existing firms prone to forming cartels, the practice of registering new suppliers at any time on fulfilment of required conditions (as exhorted in the GFR) is hardly ever done.¹⁹

- xi) **Tedious Procedure:** Accessibility tedious procedure, such as lack of easy availability of tender documents, lengthy and restrictive procedure in getting registered defects in contract management such as delays in payments also has the effect of discouraging big and efficient firms from participating in the tendering process. A switch over to e-tendering and conducting of the entire procurement process electronically within given time lines would help to obviate these types of difficulties and obtain the participation of the best qualified firms in the tendering process.

xii) Absence of an Independent Grievance Redressal

Mechanism: Under the present system, the bidder who is aggrieved has no option but to file his complaint with the procuring agency itself. Obviously, if the procuring officials are themselves responsible for causing grievance, there is little chance of the aggrieved bidder to get his due from such a redressal system. Arbitration proceedings are the other solution if the tender document itself so provides and the bidder can seek redressal under the Indian Arbitration and Conciliation Act 1996.

However, reference to the High Court under Article 226 of the Constitution of India against the decision of the procurement authority/arbitration order can prove to be a lengthy and costly process, given the huge pendency in the Indian courts. Moreover in the absence of a legal framework for procurement, determination of violation of guidelines may come within a grey area.

xiii) Weakness of the Monitoring System: The CAG and CVC are the two main monitoring bodies. Although the CAG audits the expenditure, i.e. the tendering process, these audits are conducted *ex-post facto*. The Action Taken Reports called for by the audit do not have a specific time limit for compliance by the departments and ministries in whose tendering process irregularities have been found. Consequently, the delayed response does not allow timely remedial action, since by that time the contract may have already been substantially executed. The CVC supervises investigations under the Prevention of Corruption Act, 1988 and issues various guidelines specific to public procurement to curb corruption. The limitation of both these monitoring authorities is that they cannot deal with private parties indulging in fraud. The CVC deals with public servants and excludes misdemeanour by private parties. The CAG's audit also

concerns itself with the use of public money for the purpose for which it was allocated to the concerned Ministry by the Parliament and thereby has no impact on malpractices by private bidders.

- xiv) **The Indian Competition Act, 2002 and its applicability to the demand side:** An interesting perspective has been brought out in the study ‘Competition Issues in Public Procurement (India)’ by The Energy and Resources Institute, Delhi 2011 in this regard. It has been highlighted that although sections 3 and 4 of the Competition Act, 2002 can be applied in the case of suppliers of goods if they resort to anticompetitive practices and abuse of dominant position, the recent orders of the Competition Commission indicate that it would be difficult to bring a procurement agency within the ambit of the Act, even though it may be indulging in a competition-restricting practice. Vide the finding by the OECD in its 2010 report ‘Policy Roundtables – Collusion and Corruption in Public Procurement’, under the relevant provisions of the Competition Act, when firms indulge in anti-competitive conduct in collusion with public officials, the Competition Commission lacks enforcement power to investigate the public officials involved.

This is unlike the case of Japan, where the Japanese Federal Trade Commission is authorised to take action against public officials involved, leading to better enforcement. The JFTC enforces the Antimonopoly Act against firms indulging in anti-competitive actions and simultaneously can request the head of the department concerned to investigate against the officials suspected of collusion. If the officials are implicated in misconduct, compensation against loss of public money can be imposed on the involved officials under the law. Japan enacted

the Act Concerning Elimination and Prevention of Involvement in Bid Rigging in 2002. The study by TERI of India appears to suggest that investing the Competition Commission of India with similar powers may be a welcome mechanism to discourage collusion in bid rigging by public officials.

- xv) **Records Management:** Despite a tradition of maintaining and preserving original records, not much huge is made of institutional memory and little is done in the area of performance indicators and other exception statements for management to monitor and control. In fact, such monitoring on the basis of past experience is not possible in the absence of electronic record keeping. The World Bank, in its 2003 Report on India, recommends the computerisation of the present data base and a set of performance indicators.

B. Lacunae in the Procurement of Goods

- i) 'Goods' as defined in Rule 136 of GFR do not include service or maintenance contracts necessary for maximising the life cycle cost of a product. The definition needs to be modified to include services incidental to the supply of the goods for its maintenance for a period of at least three-five years. The concept of life-cycle cost should also include energy efficiency, particularly for electronic, electrical and mechanical equipments.
- ii) Negotiations with the lowest bidder are permitted in exceptional circumstances as per the GFR. The provision leaves scope for misuse in the absence of any prescribed criteria for need of negotiation.

- iii) It is sometimes found that the bidding documents are prepared in a certain way so as to favour pre-determined bidders. To ensure against this, it is necessary to see that bidding documents follow standard procedures/best practices. It has been recommended that standard bidding documents should be made available for mandatory use by procuring departments. The procuring departments may add special conditions specific to their requirements, without changing the mandatory framework.
- iv) To ensure objectivity in the specifications of the items to be supplied, an important requirement would be to call for adherence to national/international standards.

C. Lacunae in the Procurement of Services

- i) **Lack of Guidelines:** Government offices nowadays are increasingly outsourcing services like engagement of consultants, management contracts, maintenance of civil works, collection of user charges and even routine jobs of hiring of taxis, caretaking of office premises, engaging data entry and security services etc. While the GFR lays down the basic rule that limited tenders may be issued for contract values up to ₹25 lakh and for jobs above this amount, advertisements be issued, the government departments face problems in ensuring economic and competitive procurement of services, as this is a new subject where very little guidance is provided by the GFR.
- ii) **Hiring of Consultants:** The GFR 2005 and Manual of Policy Procedure of Employment of Consultants, issued by the Department of Expenditure, provide guidance on selecting professionals for a normal assignment. But these guidelines are not adequate for complex assignments requiring professionals or experts with appropriate

domain knowledge.²⁰ The departments tend to hire a single consultancy firm to handle the multidisciplinary tasks of project preparation, leading to uneven quality of services for each of the disciplines. The model documents published by the Department of Expenditure require that legal, financial and technical consultants should be engaged separately. However, in practice, what often transpires is that a technical consultant may be asked to hire legal consultants for drafting a contract, which may result in expert legal advice being denied to the project, as a technical consultant may have preference for engaging a low cost lawyer to maximise his own profit.²¹

- iii) **Lowest Financial Bid:** The lowest financial bid should not be the sole criterion for selection of a consultant. An adviser and consultant can only be selected through a technical cum financial evaluation, where the technical competence should be attributed sufficient importance.
- iv) **Conflict of Interest:** This arises in cases where the consultant has earlier worked for the project authority and is now appointed as an expert or consultant or where the consultant has an ownership interest of a continuing business or lending interest with a potential bidder or is involved in owning or operating entities resulting from the project or bids or works arising from the project. Conflict of interest is also known to arise when conflicting assignments are given to the same person, such as asking the person who prepared the project design to do its environmental audit.²²
- v) **Ad hoc Approach by Some Government Departments:** While some departments are following the Department of Expenditure's three model documents on Model

Request for Proposal for the Selection of technical advisers, financial advisers, and legal consultants, several departments are following an *ad hoc* system of appointing consultants, resulting in wrong selection of consultants and payment of unjustified fees to them.

- vi) **Success-fee Based Payments:** In cases such as auction of national assets and disinvestment of public sector companies, where government receipts need to be maximised, a carefully formulated form of “success fee” need not be ruled out. But this form of hiring of consultants should be discouraged in general, according to experts.
- vii) **Need for Model Contracts:** The present lacunae could be addressed to an extent by development and publishing of suitable templates for different types of services which are commonly required by the government departments.

D. Lacunae in the Procurement of Works

As observed by the Committee on Public Procurement, this component often represents the largest proportion of the overall expenditure on public procurement. The major weaknesses in the system have been noted to be the following:

- i) **Outdated Procedures:** Each Public Works Department (PWD) maintains a data book, providing the rate for each standard item of work, estimated on cost of material, labour and overheads. Departmental estimates for works and the Schedule of rates for tendering are based on these rates. Though the Central PWD is reasonably up to date, the departmental estimates are generally unreliable and out-dated. The updation is merely an adjustment for inflation and does not regard reworking, use of new

materials, methods of construction, plant depreciation, overheads and reasonable profit.

- ii) **Limited Entry to Approved Registered Contractors:** Advertised tenders are opened only to approved registered contractors whose qualifications and capacity have been verified. But the registration process is ridden with political patronage resulting in the automatic qualification of a contractor once he obtains registration.
- iii) **Scope for Negotiation:** Approval of awards are based on the departmental estimates, which in turn, are based on the outdated data. This provides an opportunity for negotiations to purportedly bring the quotations closer to the departmental estimates. Such negotiations afford opportunity for subjectivity and bias.
- iv) **Sub-contracting to Unqualified Parties:** Major contractors tend to sub-contract a major portion to other contractors, who are often unqualified. This deleteriously impacts the quality of the work.
- v) **No Provision for Price Adjustment:** Contracts do not provide for adequate price adjustment mechanism and fair claim and dispute resolution mechanism. Contract supervision is uneven and subject to pervasive corruption.
- vi) **Inefficiency of Item Rate Contracts:** In the existing system of procurement of works in India, procurement on unit price or rate system is prevalent. In the system, the government provides detailed designs and estimates of quantities of different units of work to be done, prescribes the specifications, testing etc. and pays the contractor on the basis of measurement of quantity of work done in

respect of each item comprising the work. This antiquated method, abandoned in the developed countries, usually results in time and cost over-runs, as concluded by the Report of the Committee on Public Procurement. Disputes also abound in case of item-rate contracts, which lock up the funds of the construction industry, as arbitration proceedings take a long time and sometimes, even after the arbitration awards there is further contest in the courts.

- vii) **Absence of substantive provisions in GFR 2005 for procurement of works:** This responsibility of framing substantive provisions has been left to the different government departments resulting in the generation of disputes.

Need for Reform: In conclusion, the above analysis of the legal and regulatory framework and the prevalent practices reveal an urgent need for major reforms in the legal and institutional framework and policies governing Indian Public Procurement.

Appendix I

Extracts of the Manual on Policies & Procedures for Purchase of Goods, Department of Expenditure, Ministry of Finance, Government of India, August 31, 2006 (Articles 2.4-2.6 thereof prescribing mandatory or preferential purchase of specified goods from specified sectors)

<p>Box 2.2: Preferential/Mandatory Purchase from Certain Sources/Product Reservation</p>

<p>i) Khadi Goods/Handloom Textiles: The Central Government has reserved all items of hand-spun and hand-woven textiles (Khadi goods) for exclusive purchase from Khadi & Village Industries Commission (KVIC). Government has also reserved all items of handloom textiles including Barrack Blankets for exclusive purchase from KVIC or notified handloom units through the Association of Corporations and Apex Societies of Handlooms (ACASH) and Women's Development Organisation (WDO). The handloom textile items are to be purchased from KVIC to the extent they can supply. The remaining demand is to be satisfied from the handloom units of ACASH, to the extent that these units can make supplies. Left over quantity, if any, may be purchased from other sources. In the case of KVIC, the rates are fixed by certification committee, and the rates so fixed are reviewed by the Cost Accounts Branch of the Ministry of Finance.</p>

<p>In the case of ACASH, the final price will be calculated by ACASH and fixed by the Ministry of Textiles by associating a representative of the Chief Accounts Office of Department of Expenditure, Ministry of Finance. The Central Purchase Organisation (e.g. DGS&D) also enters into long term contracts</p>
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with KVIC and ACASH for items of recurrent demands and lays down terms and conditions therein. For other items, the purchase from both KVIC and ACASH should be made on single tender basis. Normal inspection and other procedures shall apply for procurement through KVIC/ ACASH. Testing arrangements will be provided by KVIC/ ACASH or by their notified units and where the same are not available testing charges for testing outside at approved laboratory should be borne by KVIC/ACASH/their units. All relevant details in this regard are available with DGS&D.

ii) Reserved Products of SSI: The government has also reserved some items for exclusive purchase from Small Scale Sector. The ministries/departments are to purchase such products from these notified agencies/suppliers only. The government reviews the lists of such reserved items and the applicable procedures for purchasing the same from time to time. The tender enquiry document should clearly indicate that the purchase will be made from the suppliers falling in the category of KVIC, ACASH, and Small Scale Units registered with National Small Industries Corporation (NSIC).

In the process of procurement, other things being equal, the purchase preference would be in favour of KVIC/ACASH/SSI in that order. (Note: KVIC and ACASH are treated on par with SSI units registered with NSIC and DGS&D). Special dispensation available to Kendriya Bhandar (KB) and National Consumer Cooperative Federation (NCCF) for procurement of stationery and consumables before the introduction of GFRs 2005, which has since been terminated, is under review. While making purchase of goods falling in these categories, the purchase organisation should check the latest directives in this regard for necessary action.

Box 2.3: Price Preference

As per the extant rules, when acceptable offers are received against an *ad-hoc* requirement of unreserved goods (i.e. goods not covered under para 2.4 above) from various categories of suppliers, including Large Scale Sector, PSUs and Small Scale Sector, the offer from the Small Scale Sector, which is registered with National Small Industries Corporation (NSIC) or with DGS&D is entitled for price preference up to 15 percent over the offer of Large Scale Sector and five percent over the offer of PSU, provided the offers under consideration are otherwise clear for acceptance in all respects.

(Example: The evaluated cost of the lowest acceptable offer, which is from a Large Scale Sector is Rs 100. The evaluated cost of an acceptable offer from a Small Scale Unit, which is registered with NSIC/DGS&D is Rs 115. This SSI is entitled to get the order at its quoted price).

However, the price preference admissible to the SSI unit is not mandatory. It is to be decided separately for each tender on merits of each case, in consultation with Finance, and a mention to that effect should be made in the Notice Inviting Tenders (NIT)/ Request for Proposal (RFP). The price preference is accorded to the deserving SSI units as an incentive to grow; but it should not promote inflation, profiteering or misuse of SSI units as conduits. In case the SSI unit in view has established itself as a supplier of the required goods on competitive terms and enjoys advantage(s) over Large Scale Sector, no price preference need be considered.

Where the NSIC / State Development Corporations themselves quote on behalf of some SSI units, such offers will be considered as offers from SSI units registered with the DGS&D/NSIC.

An SSI Unit will not get any price preference over another SSI Unit. Price preference facility to SSI Units will, however, not apply to the procurement of the under mentioned goods:

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- i) Paint items for the Railways
- ii) Drug items
- iii) Medical and Electro-medical equipment
- iv) Requirements of Defence, where inspection is to be carried out by the Defence Inspection Organisation
- v) Items where technical competence, capacity and manufacturing facilities are required to be verified before placement of order.

Before considering any price preference to Small Scale Sector, the purchase organisation should check the latest directives in this regard for necessary action.

Box 2.4: Purchase Preference to Central PSUs

As per the extant government policy, the Central Public Sector Undertaking (CPSU) gets purchase preference up to 10 percent over the Large Scale Private Units (vide Department of Public Enterprises O.M. No.DPE.13(12)/2003-Fin.Vol.II dated July 18, 2005).

Example: Against an ad-hoc requirement, the evaluated cost of the lowest acceptable offer, which is from a Large Scale Sector is ₹100. The evaluated cost of an acceptable offer from a CPSU, is ₹110. As per the extant policy, the CPSU will be offered the price of ₹100 and if it accepts the same, order will be placed on it (CPSU) at that price (₹100).

Box 2.5: Preferential Purchase Policy for Certain Medicines

- i. Government has approved (vide Department of Chemicals & Petrochemicals OM No.50013/1/2006-SO(PI-IV) dated August 07, 2006) grant purchase preference exclusively to Pharma CPSEs and their subsidiaries in respect of 102 specified medicines manufactured by them. The salient features of this Purchase Preference Policy (PPP) are as under: PPP in respect of a maximum of 102 medicines would be applicable to purchases made by ministries/departments, PSUs, Autonomous Bodies, etc. of the Central Government. It would be valid for a period of five years. This would also be applicable to purchase of 102 drugs made by state governments under health programmes which are funded by the Government of India. (e.g. purchases under National Rural Health Mission etc).
- ii. PPP will extend only to Pharma CPSEs and their subsidiaries (i.e. where Pharma CPSEs own 51 percent or above shareholding).
- iii. It would be applicable to a maximum of 102 medicines. The list of 102 medicines would be reviewed and revised by Department of Chemicals & Petrochemicals as and when required, taking care not to include any item reserved for SSI units.
- iv. The Purchasing Departments/PSUs/autonomous bodies etc. of the Central Government may invite limited tenders from Pharma CPSEs and their subsidiaries or purchase directly from them at NPPA certified/notified price with a discount up to 35 percent.
- v. The purchasing departments would purchase from Pharma CPSEs and their subsidiaries subject to their meeting Good Manufacturing Practices (GMP) norms as per Schedule 'M'

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of the Drugs & Cosmetic Rules. If no Pharma CPSE is forthcoming to supply these 102 medicines, the purchasing departments would be at liberty to purchase from other manufacturers.

- vi. If the Pharma CPSEs or their subsidiaries which have the benefit of PPP fail to perform as per the purchase order, they would be subject to payment of liquidated damages or any other penalty included in the contract.
- vii. The medicines covered under Drug & Price Control Order (DPCO) would be supplied at the rates fixed by National Pharmaceuticals Pricing Authority (NPPA) rates minus discount up to 35 percent.
- viii. In case of medicines not covered under DPCO, prices would be got certified from NPPA, only for the limited purpose of supply to Central Government departments and their PSUs, autonomous bodies etc. On the certified price, Pharma CPSEs and their subsidiaries would provide discount up to 35 percent.
- ix. The PPP as contained in Department of Public Enterprises O.M. No.DPE.13(12)/2003-Fin.Vol.II dated July 07, 2005 would not be applicable to Pharma CPSEs.

Before considering any such purchase preference, the purchase organisation should check the latest directives in this regard for necessary action. Purchase Preference provision shall invariably be part of the Notice Inviting Tender (NIT).

Annexure 2.1

MINISTRY OF COMMUNICATION AND INFORMATION TECHNOLOGY

(Department of Information Technology)

NOTIFICATION

New Delhi, the 10th February, 2012

Subject: Preference to domestically manufactured electronic goods in procurement due to security considerations and in government procurement.

No. 8(78)/2010-IPHW. – With increasing development of electronic devices and information technology (IT) application in various sectors, the critical applications are vulnerable to cyber-attacks. As use to electronics and IT becomes pervasive, the ability to use these devices or application to disrupt normal human life and threaten life and property by an inimical interest has become increasingly common. Reports show that India has also suffered attacks on its critical infrastructure from agencies proposed to India. A malicious hardware can be triggered to launch an attack. The situation is further compounded because the technology has yet to develop which can definitely detect such malicious hardware.

2.1 The government has, accordingly laid down the following policy for providing preference to domestically manufactured electronic products, in procurement of those electronic products which have security implication for the country and in government procurement for its own use and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

2.2. Scope

2.2.1 Electronic product or products having security implications and agencies deploying them will be notified by concerned Ministry/Department. The notified agencies will be required to procure the notified electronic product from a domestic manufacturer to the extent prescribed in this notification. When the electronic goods are specified by the concerned Ministry/Department, rationale of such items being covered as essential security interest may also be clearly detailed.

Listing of electronic goods as security sensitive can also be done by a designated authority notified for this purpose by the Ministry/Department concerned which may take a project wise decision on which projects or project components are sensitive from the security angle.

2.2.2 In government procurement, the policy will be applicable to all Ministries/Department (except defence) and their agencies for electronic products purchased for governmental purpose and not with the view of commercial resale or with in the view of production of good for commercial sale. Each Ministry/Department would notify the sector specific electronic product or products for which preference would be according domestically manufactured electronic product or products. However generic products, which are produced across sectors, such as, computes, communication equipment's etc., would be notified by departments of Information Technology/Telecommunications, as the case may be.

2.2.3 The notification issued by each Ministry/Department for providing preference to domestically manufactured electronic product or products, either for reasons of security or for Government Procurement, would specify the percentage of procurement to be made from domestically manufactured electronic product or products but it shall not be less than 30 percent of the total procurement value of that electronic product or products. Further, each Ministry/Department would also specify the domestic value addition requirement which the electronic product should satisfy for the product to qualify as domestically manufactured electronic product. However, such specification should not be the below generic definition of domestically manufactured electronic products provided in para 2.3 below

2.2.4 The policy is also applicable to procurement of electronic hardware as a service from Managed Service Providers (MSPs).

2.3 Domestically Manufactured Electronic Products: The Domestically Manufactured Electronic Products are manufactured by companies that are registered and established in India and engaged in manufacture in India and would include Contract Manufactures, but traders are excluded from the definition. These Electronic Products shall meet the following graded domestic value-addition in terms of Bill of

Material (BOM) from domestic manufacturers.

Percentage domestic value addition in terms of BOM from domestic manufactures	Year
25%	Year 1
30%	Year 2
35%	Year 3
40%	Year 4
45%	Year 5

The formula for Value-Addition:

- Product price (Ex-factory) :A
- Cost of Bill of Material (BOM) in 'A' :B
- BOM sourced from domestic manufactures :C
- Value-Addition in terms of BOM : $(C/B) * 100$

3. Eligibility: All companies registered in India and engaged in manufacture of electronic products in India are eligible for consideration under the policy.

4. Procurement: the procurement agencies shall follow their own procurement procedures, subject to meeting the requirement that specified percentage of procurement shall be of domestically manufactured electronic products.

4.1.2 Aggregation of annual requirements and such other procurement practices, which facilitate the implications of this policy, may be adopted by procuring agencies.

4.2 Procurement by Government Ministry/Department or agencies under their administrative control

4.2.1 Whenever the domestically manufactured electronic products are procured under this policy of a Ministry/Government or an agency thereof, such procurement shall be subjected to matching of L1 price and on satisfying technical specifications of the tender.

4.2.2 For Procurement by Government Ministry/Department and agencies under their administrative control, the tender for procuring

electronic products were normally specify that specified part of the procurement value would be awarded to the lowest technically qualified domestic manufacturer of electronic products, subject to matching with L1, if such bidders are available. The remaining will be awarded to L1, irrespective of whether he is a domestic manufacturer or not.

4.2.3 It is not necessary that each tender for procurement of electronic product is split. If a tender cannot be split, either because the unit of procurement is small or because of technical reasons, or because no domestic manufacturer is available for the product, the procuring agency may ensure that the annual requirement of procuring the specified extent of electronic products from domestically manufactured products is achieved through suitable enhancements in other tenders.

4.2.4 The tender conditions would ensure that domestically manufactured electronic products are encouraged and not subject to restrictive mandatory requirement of prior experience. However, procuring Department/agency may incorporate such stipulations as may be considered necessary to satisfy themselves of the production capability and product quality of domestic manufacturer.

5. Compliance

5.1 A suitable self-certification system would be devised to declare domestic value addition by the vendor. The system would also provide for checks by Standardizations, Testing and Quality Certifications (STQC) and other testing laboratories accredited by the Department of Information Technology. In cases of mis-declaration suitable penalties will be imposed. STQC would be strengthened for this purpose.

5.2 Each Ministry/Department shall annually obtain a declaration indicating the extent of compliance to the policy and reasons for non-compliance thereof from all procuring agencies under its administrative control.

5.3 Individual Departments/ Ministries may provide for suitable incentives/disincentives for compliance under the policy.

6. Electronic Products: In case of a question whether an item being procured is an electronic product to be covered under the proposed policy, the matter would be referred to the Department of Information Technology for clarification.

7. Time Period: The policy will be valid for 10 years from the date of its notification in official gazette.

8. Guidelines: Detailed guidelines for operationalising the proposed policy which would, *inter alia*, provide for modalities of self-certification by the vendor and the procuring agencies would be issued after the policy is notified. The relevant guidelines for procurement in respect of the Government, Government PSUs and Government controlled instructions, would be issued with the concurrence of the Finance Ministry.

9. Some examples of typical procurement scenarios are illustrated in Appendix.

Dr. Ajay Kumar, Jt secy.

Appendix

Some Examples of Typical Procurement Scenarios

Example 1

Procurement of 1 lakh Laptops

Under a Government project, it is intended to procure one lakh laptops. In order to fulfil 70:30 norm of the proposed policy, they have to procure 30,000 laptops from domestic electronic products manufacturer. The bid documents should specifically provide preference to domestically manufactured electronic products in terms of 30 percent of procurement value subject to matching of L1 price and on satisfying technical specifications of the tender. Suppose there are five bids Consider DM as Domestic Manufacturer and NDM as No Domestic Manufacturer.

Case 1: After opening of commercial bids, position is like L1: DM1, L2: NDM1, L3: NDM3 and L5: DM2, then work will be awarded to DM1 vendor.

Case 2: After opening of commercial bids, position is like L1: NDM1, L2: NDM2, L3: DM1 and L5: DM2. NDM1 qualifies as L1, and DM1 is L4, then NDM1 has to provide 30 percent of the procurement value to DM1 at L1 prices.

Case 3: After opening of commercial bids, position is like L1: NDM1, L2: NDM2, L3: NDM3, L4: NDM4 and L5: NDM5. In this case no domestic electronic product manufacture is available; hence the full order will be awarded to NDM1.

Example 2

Procurement of Super Computer

Procuring agency desires to procure Super Computer with prescribed specification for ₹5crore. Item cannot be split. The procuring agency is not able to apply 70:30 norms. Therefore, in subsequent procurement of electronic products by the said agency. It should provide an additional value of ₹1.5crore (30 percent) for domestic manufactured electronic products.

Example 3

Procurement of Switches by Telecom Licensee 'X' through a Managed Service Provider (MSP) 'A'

Telecom Service Provider may only be procuring hardware services from MSP 'A'. However, 70:30 norm is applicable vide clause 2.1 of the proposed policy. Telecom Licencee 'X' is required to ensure 30 percent of the procured value that MSP 'A' provides through domestic electronic hardware products.

Annexure 2.2

Ministry of Micro, Small and Medium Enterprises Office of Development Commissioner (MSME)

**New Delhi,
March 23, 2012**

ORDER

Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012

Whereas, the Central Government Ministries, Departments and Public Sector Undertakings shall procure minimum of 20 per cent of their annual value of goods or services from Micro and Small Enterprises;

And whereas, the Public Procurement Policy shall apply to Micro and Small Enterprises registered with District Industries Centers or Khadi and Village Industries Commission or Khadi and Village Industries Board or Coir Board or National Small Industries Corporation or Directorate of Handicrafts and Handloom or any other body specified by Ministry of Micro, Small and Medium Enterprises;

And whereas, the Public Procurement Policy rests upon core principles of competitiveness, adhering to sound procurement practices and execution of orders for supply of goods or services in accordance with a system which is fair, equitable, transparent, competitive and cost effective; and

And whereas, for facilitating promotion and development of micro and small enterprises, the Central Government or the State Government, as the case may be, by Order notify from time to time, preference policies in respect of procurement of goods and services, produced and provided by micro and small enterprises, by its Ministries or Departments, as the case may be, or its aided institutions and public sector enterprises.

Now, therefore, in exercise of the powers conferred in section 11 of the Micro, Small and Medium Enterprises Development (MSMED) Act 2006, the Central Government, by Order, notifies the Public

Procurement Policy (hereinafter referred to as the Policy) in respect of procurement of goods and services, produced and provided by micro and small enterprises, by its Ministries, Departments and Public Sector Undertakings.

2. Short title and commencement

- (1) This Order is titled as 'Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012'.
- (2) It shall come into force with effect from April 01, 2012.

3. Mandatory procurement from Micro Small and Enterprises – (1)

Every Central Ministry or Department or Public Sector Undertaking shall set an annual goal of procurement from Micro and Small Enterprises from the financial year 2012-13 and onwards, with the objective of achieving an overall procurement of minimum of 20 percent, of total annual purchases of products produced and services rendered by Micro and Small Enterprises in a period of three years.

(2) Annual goal of procurement also include sub-contracts to Micro and Small Enterprises by large enterprises and consortia of Micro and Small Enterprises formed by National Small Industries Corporation.

(3) After a period of three years, i.e. from April 01, 2015, overall procurement goal of minimum of 20 percent shall be made mandatory.

(4) The Central Ministries, Departments and Public Sector Undertakings which fail to meet the annual goal shall substantiate with reasons to the Review Committee headed by Secretary (Micro, Small and Medium Enterprises), constituted in Ministry of Micro, Small and Medium Enterprises, under this Policy.

4. Special provisions for Micro and Small Enterprises owned by Scheduled Castes or Scheduled Tribes?

Out of 20 percent target of annual procurement from Micro and Small Enterprises, a sub-target of 20 percent (i.e., 4 out of 20 percent) shall be earmarked for procurement from Micro and Small Enterprises owned by the Scheduled Caste or the Scheduled Tribe entrepreneurs. Provided that, in event of failure of such Micro and Small Enterprises

to participate in tender process or meet tender requirements and L1 price, four percent sub-target for procurement earmarked for Micro and Small Enterprises owned by Scheduled Caste or Scheduled Tribe entrepreneurs shall be met from other Micro and Small Enterprises.

5. Reporting of targets in Annual Report (1) The data on Government procurements from Micro and Small Enterprises is vital for strengthening the Policy and for this purpose, every Central Ministry or Department or Public Sector Undertaking shall report goals set with respect to procurement to be met from Micro and Small Enterprises and achievement made thereto in their respective Annual Reports.

(2) The annual reporting shall facilitate in better understanding of support being provided by different Ministries or Departments or Public Sector Undertakings to Micro and Small Enterprises.

6. Price quotation in tenders. ? (1) In tender, participating Micro and Small Enterprises quoting price within price band of L1+15 percent shall also be allowed to supply a portion of requirement by bringing down their price to L1 price in a situation where L1 price is from someone other than a Micro and Small Enterprise and such Micro and Small Enterprise shall be allowed to supply up to 20 percent of total tendered value.

(2) In case of more than one such Micro and Small Enterprise, the supply shall be shared proportionately (to tendered quantity).

7. Developing Micro and Small Enterprise vendors – The Central Ministries or Departments or Public Sector Undertakings shall take necessary steps to develop appropriate vendors by organising Vendor Development Programmes or Buyer-Seller Meets and entering into Rate Contract with Micro and Small Enterprises for a specified period in respect of periodic requirements.

8. Annual Plan for Procurement from Micro and Small Enterprises on websites – The Ministries or Departments or Public Sector Undertakings shall also prepare Annual Procurement Plan for purchases and upload the same on their official website so that Micro

and Small Enterprises may get advance information about requirement of procurement agencies.

9. Enhancing participations of Micro and Small Enterprises including those owned by Scheduled Castes or Scheduled Tribes in Government procurements.

For enhancing participation of Scheduled Castes or Scheduled Tribes in Government procurement, the Central Government Ministries, Departments and Public Sector Undertakings shall take following steps, namely:-

- (a) Special Vendor Development Programmes or Buyer-Seller Meets shall be conducted by Departments/Public Sector Undertakings for Scheduled Castes or Scheduled Tribes;
- (b) Outreach programmes shall be conducted by National Small Industries Corporation to cover more and more Micro and Small Enterprises from Scheduled Castes or Scheduled Tribes under its schemes of consortia formation; and
- (c) National Small Industries Corporation shall open a special window for Scheduled Castes or Scheduled Tribes under its Single Point Registration Scheme (SPRS).

10. Reduction in transaction cost

To reduce transaction cost of doing business, Micro and Small Enterprises shall be facilitated by providing them tender sets free of cost, exempting Micro and Small Enterprises from payment of earnest money, adopting e-procurement to bring in transparency in tendering process and setting up a Grievance Cell in the Ministry of Micro, Small and Medium Enterprises.

11. Reservation of specific items for procurement

To enable wider dispersal of enterprises in the country, particularly in rural areas, the Central Government Ministries or Departments or Public Sector Undertakings shall continue to procure 358 items (Appendix) from Micro and Small Enterprises, which have been reserved for exclusive purchase from them. This will help in promotion and growth of Micro and Small Enterprises, including

Khadi and village industries, which play a critical role in fostering inclusive growth in the country.

12. Review Committee

(1) A Review Committee has been constituted under the Chairmanship of Secretary, Ministry of Micro, Small and Medium Enterprises, for monitoring and review of Public Procurement Policy for Micro and Small Enterprises vide Order No. 21(1)/2007-MA dated the June 21, 2010 (Annexure).

(2) This Committee shall, inter alia, review list of 358 items reserved for exclusive purchase from Micro and Small Enterprises on a continuous basis, consider requests of the Central Ministries or Departments or Public Sector Undertakings for exemption from 20 percent target on a case to case basis and monitor achievements under the Policy.

13. Setting up of Grievance Cell

In addition, a 'Grievance Cell' will be set up in Ministry of Micro, Small and Medium Enterprises for redressing grievances of Micro and Small Enterprises in Government procurement. This cell shall take up issues related to Government procurement raised by Micro and Small Enterprises with Departments or agencies concerned, including imposition of unreasonable conditions in tenders floated by Government Departments or agencies that put Micro and Small Enterprises at a disadvantage.

14. Special Provisions for Defence Procurements

Given their unique nature, defence armament imports shall not be included in computing 20 percent goal for Ministry of Defence. In addition, defence equipments like weapon systems, missiles, etc. shall remain out of purview of such Policy of reservation.

15. Monitoring of Goals

The monitoring of goals set under the Policy shall be done, in so far as they relate to the Defence sector, by Ministry of Defence itself in accordance with suitable procedures to be established by them.

16. Removal of difficulty

Any difficulties experienced during the course of implementation of the above Policy shall be clarified by Ministry of Micro, Small and Medium Enterprises through suitable Press releases which would be kept on the public domain.

(AMARENDRA SINHA)

Additional Secretary and Development Commissioner (MSME)

Annexure

No. 21(1)/2007-MA
Government of India
Ministry of Micro, Small and Medium Enterprises
Office of the Development Commissioner (MSME)

‘A’ Wing, 7th Floor, Nirman Bhavan,
New Delhi-110108
Dated: 21st June, 2010

ORDER

Subject: Constitution of a Committee for monitoring and review of the Public Procurement Policy for Micro and Small Enterprises

Pending approval of the new Public Procurement Policy for Micro and Small Enterprises (MSEs), a Committee is hereby constituted for looking into the applicability of some of the provisions of the proposed Policy in respect of select Central Ministries/Departments.. The Committee will be chaired by the Secretary, Ministry of Micro, Small and Medium Enterprises.

2. The composition of the Committee will be as follows:

- | | | |
|--------|---|--------------------|
| (i) | Secretary,
Ministry of MSME | : Chairman |
| (ii) | Secretary,
Planning Commission | : Member |
| (iv) | Secretary,
Department of Public Enterprises | : Member |
| (v) | Director General (Supplies and Disposals),
Department of Commerce, | : Member |
| (vii) | Ministry of Commerce and Industry | |
| (viii) | Additional Secretary and
Development Commissioner (MSME) | : Member Secretary |

3. The Committee will undertake the following functions:
 - (i) Consider the requests of the Central Ministries/Departments/PSUs for exemption, on a case to case basis, from the 20 percent target;
 - (ii) Review the list of 358 items (as per Appendix) reserved for exclusive purchase from the MSEs based on the feedback received from the Central Ministries/Departments/PSUs;
 - (iii) Review the grievances received from MSEs regarding Government procurement, including imposition of unreasonable conditions in the tenders floated by the Government Departments/PSUs; and
 - (iv) Suggest special measures to be taken by the Central Ministries/Departments for enhancing their procurements from MSEs.
4. The Committee may co-opt any other Ministries/Departments of the Central Government as well as State Governments or invite any other expert/person associated/concerned with the MSMEs in its meetings, as and when required.
5. The Office of the Development Commissioner (MSME) will provide secretariat support to this Committee.
6. This issues with the approval of the Competent Authority.

Sd/-
(Praveen Mahto)
Additional Economic Adviser
Ph: 23062230, Fax: 23061611

To,
All Members of the Committee

Copy to:

1. Cabinet Secretariat (Shri V.P.Arora, Under Secretary), w.r.t. their O.M.No. 601/2/1/2009-Cab.III dated 24.02.2010
2. PS to Minister (MSME)
3. Sr. PPS to Secretary (MSME)

Appendix

LIST OF ITEMS RESERVED FOR PURCHASE FROM SMALL SCALE INDUSTRIAL UNITS INCLUDING HANDICRAFT SECTOR.

Sl No. Item Description

1. AAC/and ACSR Conductor upto 19 strands
2. Agricultural Implements
 - (a) Hand Operated tools and implements
 - (b) Animal driven implements
3. Air/Room Coolers
4. Aluminum builder's hardware
5. Ambulance stretcher
6. Ammeters/ohm meter/Volt meter (Electro magnetic upto Class I accuracy)
7. Anklets Web Khaki
8. Augur (Carpenters)
9. Automobile Head lights Assembly
10. Badges cloth embroidered and metals
11. Bags of all types i.e. made of leather, cotton, canvas and jute etc. including kit bags, mail bags, sleeping bags and water-proof bag.
12. Bandage cloth
13. Barbed Wire
14. Basket cane (Procurement can also be made from State Forest Corpn. and State Handicrafts Corporation)
15. Bath tubs
16. Battery Charger
17. Battery Eliminator
18. Beam Scales (upto 1.5 tons)
19. Belt leather and straps
20. Bench Vices
21. Bituminous Paints
22. Blotting Paper
23. Bolts and Nuts
24. Bolts Sliding
25. Bone Meal
26. Boot Polish

27. Boots and Shoes of all types including canvas shoes
28. Bowls
29. Boxes Leather
30. Boxes made of metal
31. Braces
32. Brackets other than those used in Railways
33. Brass Wire
34. Brief Cases (other than moulded luggage)
35. Brooms
36. Brushes of all types
37. Buckets of all types
38. Button of all types
39. Candle Wax Carriage
40. Cane Valves/stock valves (for water fittings only)
41. Cans metallic (for milk and measuring)
42. Canvas Products :
 - (a) Water Proof Deliver, Bags to spec. No. IS - 1422/70
 - (b) Bonnet Covers and Radiators Muff. to spec. Drg. Lv 7/NSN/IA/130295
43. Capes Cotton and Woollen
44. Capes Waterproof
45. Castor Oil
46. Ceiling roses upto 15 amps
47. Centrifugal steel plate blowers
48. Centrifugal Pumps suction and delivery 150 mm. x 150 mm
49. Chaff Cutter Blade
50. Chains lashing
51. Chappals and sandals
52. Chamois Leather
53. Chokes for light fitting
54. Chrome Tanned leather (Semi-finished Buffalo and Cow)
55. Circlips
56. Claw Bars and Wires
57. Cleaning Powder
58. Clinical Thermometers
59. Cloth Covers
60. Cloth Jaconet
61. Cloth Sponge
62. Coir fibre and Coir yarn
63. Coir mattress cushions and matting
64. Coir Rope hawserlaid
65. Community Radio Receivers

66. Conduit pipes
67. Copper nail
68. Copper Napthenate
69. Copper sulphate
70. Cord Twine Maker
71. Cordage Others
72. Corrugated Paper Board and Boxes
73. Cotton Absorbent
74. Cotton Belts
75. Cotton Carriers
76. Cotton Cases
77. Cotton Cord Twine
78. Cotton Hosiery
79. Cotton Packs
80. Cotton Pouches
81. Cotton Ropes
82. Cotton Singlets
83. Cotton Sling
84. Cotton Straps
85. Cotton tapes and laces
86. Cotton Wool (Non absorbent)
87. Crates Wooden and plastic
88. (a) Crucibles upto No. 200
(b) Crucibles Graphite upto No. 500
(c) Other Crucibles upto 30 kgs.
89. Cumblies and blankets
90. Curtains mosquito
91. Cutters
92. Dibutyl phthalate
93. Diesel engines upto 15 H.P
94. Dimethyl Phthalate
95. Disinfectant Fluids
96. Distribution Board upto 15 amps
97. Domestic Electric appliances as per BIS Specifications:-
- Toaster Electric, Elect. Iron, Hot Plates, Elect. Mixer,
Grinders, Room heaters and convectors and ovens
98. Domestic (House Wiring) P.V.C. Cables and Wires (Aluminum)
Conforming to the prescribed BIS Specifications and upto 10.00
mm sq. nominal cross section
99. Drawing and Mathematical Instruments
100. Drums and Barrels

101. Dust Bins
102. Dust Shield leather
103. Dusters Cotton all types except the items required in Khadi
104. Dyes :
 - (a) Azo Dyes (Direct and Acid)
 - (b) Basic Dyes
105. Electric Call bells/buzzers/door bells
106. Electric Soldering Iron
107. Electric Transmission Line Hardware items like steel cross bars, cross arms clamps arching horn, brackets, etc
108. Electronic door bell
109. Emergency Light (Rechargeable type)
110. Enamel Wares and Enamel Utensils
111. Equipment camouflage Bamboo support
112. Exhaust Muffler
113. Expanded Metal
114. Eyelets
115. Film Polythene - including wide width film
116. Film spools and cans
117. Fire Extinguishers (wall type)
118. Foot Powder
119. French polish
120. Funnels
121. Fuse Cut outs
122. Fuse Unit
123. Garments (excluding supply from Indian Ordnance Factories)
124. Gas mantels
125. Gauze cloth
126. Gauze surgical all types
127. Ghamellas (Tasllas)
128. Glass Ampules
129. Glass and Pressed Wares
130. Glue
131. Grease Nipples and Grease guns
132. Gun cases
133. Gun Metal Bushes
134. Gومتape
135. Hand drawn carts of all types
136. Hand gloves of all types
137. Hand Lamps Railways
138. Hand numbering machine
139. Hand pounded Rice (polished and unpolished)

140. Hand presses
141. Hand Pump
142. Hand Tools of all types
143. Handles wooden and bamboo (Procurement can also be made from State Forest Corpn. and State Handicrafts Corporation)
144. Harness Leather
145. Hasps and Staples
146. Haver Sacks
147. Helmet Non-Metallic
148. Hide and country leather of all types
149. Hinges
150. Hob nails
151. Holdall
152. Honey
153. Horse and Mule Shoes
154. Hydraulic Jacks below 30 ton capacity
155. Insecticides Dust and Sprayers (Manual only)
156. Invalid wheeled chairs.
157. Invertor domestic type upto 5 KVA
158. Iron (dhobi)
159. Key board wooden
160. Kit Boxes
161. Kodali
162. Lace leather
163. Lamp holders
164. Lamp signal
165. Lanterns Posts and bodies
166. Lanyard
167. Latex foam sponge
168. Lathies
169. Letter Boxes
170. Lighting Arresters - upto 22 kv
171. Link Clip
172. Linseed Oil
173. Lint Plain
174. Lockers
175. Lubricators
176. L.T. Porcelain KITKAT and Fuse Grips
177. Machine Screws
178. Magnesium Sulphate
179. Mallet Wooden

180. Manhole covers
181. Measuring Tapes and Sticks
182. Metal clad switches (upto 30 Amps)
183. Metal Polish
184. Metallic containers and drums other than N.E.C.
(Not elsewhere classified)
185. Metric weights
186. Microscope for normal medical use
187. Miniature bulbs (for torches only)
188. M.S. Tie Bars
189. Nail Cutters
190. Naphthalene Balls
191. Newar
192. Nickel Sulphate
193. Nylon Stocking
194. Nylon Tapes and Laces
195. Oil Bound Distemper
196. Oil Stoves (Wick stoves only)
197. Pad locks of all types
198. Paint remover
199. Palma Rosa Oil
200. Palmgur
201. Pans Lavatory Flush
202. Paper conversion products- paper bags, envelops, Ice-cream
cup, paper cup and saucers and paper Plates
203. Paper Tapes (Gummed)
204. Pappads
205. Pickles and Chutney
206. Piles fabric
207. Pillows
208. Plaster of Paris
209. Plastic Blow Moulded Containers upto 20 litre excluding
Poly Ethylene Terphthalate (PET) Containers
210. Plastic cane
211. Playing Cards
212. Plugs and Sockets electric upto 15 Amp
213. Polythene bags
214. Polythene Pipes
215. Post Picket (Wooden)
216. Postal Lead seals
217. Potassium Nitrate
218. Pouches

- 219. Pressure Die Casting upto 0.75 kg
- 220. Privy Pans
- 221. Pulley Wire
- 222. PVC footwears
- 223. PVC pipes upto 110 mm
- 224. PVC Insulated Aluminium Cables (upto 120 sq. mm) (ISS:694)
- 225. Quilts, Razais
- 226. Rags
- 227. Railway Carriage light fittings
- 228. Rakes Ballast
- 229. Razors
- 230. RCC Pipes upto 1200 mm. dia
- 231. RCC Poles Prestressed
- 232. Rivets of all types
- 233. Rolling Shutters
- 234. Roof light Fittings
- 235. Rubber Balloons
- 236. Rubber Cord
- 237. Rubber Hoses (Unbranded)
- 238. Rubber Tubing (Excluding braided tubing)
- 239. Rubberised Garments Cap and Caps etc
- 240. Rust/Scale Removing composition
- 241. Safe meat and milk
- 242. Safety matches
- 243. Safety Pins (and other similar products like paper pins, staples pins etc.)
- 244. Sanitary Plumbing fittings
- 245. Sanitary Towels

- 246. Scientific Laboratory glass wares (Barring sophisticated items)
- 247. Scissors cutting (ordinary)
- 248. Screws of all types including High Tensile
- 249. Sheep skin all types
- 250. Shellac
- 251. Shoe laces
- 252. Shovels
- 253. Sign Boards painted
- 254. Silk ribbon
- 255. Silk Webbing
- 256. Skiboats and shoes
- 257. Sluice Valves
- 258. Snapfastner (Excluding 4 pcs. ones)

259. Soap Carbolic
260. Soap Curd
261. Soap Liquid
262. Soap Soft
263. Soap washing or laundry soap
264. Soap Yellow
265. Socket/pipes
266. Sodium Nitrate
267. Sodium Silicate
268. Sole leather
269. Spectacle frames
270. Spiked boot
271. Sports shoes made out of leather (for all Sports games)
272. Squirrel Cage Induction Motors upto and including 100 KW440 volts 3 phase
273. Stapling machine
274. Steel Almirah
275. Steel bedsstead
276. Steel Chair
277. Steel desks
278. Steel racks/shelf
279. Steel stools
280. Steel trunks
281. Steel wool
282. Steel and aluminium windows and ventilators
283. Stockinet
284. Stone and stone quarry rollers
285. Stoneware jars
286. Stranded Wire
287. Street light fittings
288. Student Microscope
289. Studs (excluding high tensile)
290. Surgical Gloves (Except Plastic)
291. Table knives (Excluding Cutlery)
292. Tack Metallic
293. Taps
294. Tarpaulins
295. Teak fabricated round blocks
296. Tent Poles
297. Tentage Civil/Military and Salitah Jute for Tentage
298. Textiles manufactures other than N.E.C. (not elsewhere classified)

299. Tiles
300. Tin Boxes for postage stamp
301. Tin can unprinted upto 4 gallons capacity (other than can O.T.S.)
302. Tin Mess
303. Tip Boots
304. Toggle Switches
305. Toilet Rolls
306. Transformer type welding sets conforming to IS:1291/75 (upto 600 amps)
307. Transistor Radio upto 3 band
308. Transistorised Insulation - Testers
309. Trays
310. Trays for postal use
311. Trolley
312. Trollies - drinking water
313. Tubular Poles
314. Tyres and Tubes (Cycles)
315. Umbrellas
316. Utensils all types
317. Valves Metallic
318. Varnish Black Japan
319. Voltage Stabilisers including C.V.T's
320. Washers all types
321. Water Proof Covers
322. Water Proof paper
323. Water tanks upto 15,000 litres capacity
324. Wax sealing
325. Waxed paper
326. Weighing Scale
327. Welded Wire mash
328. Wheel barrows
329. Whistle
330. Wicks cotton
331. Wing Shield Wipers (Arms and Blades only)
332. Wire brushes and Fibre Brushes
333. Wire Fencing and Fittings
334. Wire nails and Horse shoe nails
335. Wire nettings of gauze thicker than 100 mesh size
336. Wood Wool
337. Wooden ammunition boxes

- 338. Wooden Boards
- 339. Wooden Box for Stamps
- 340. Wooden Boxes and Cases N.E.C. (Not elsewhere classified)
- 341. Wooden Chairs
- 342. Wooden Flush Door Shutters
- 343. Wooden packing cases all sizes
- 344. Wooden pins
- 345. Wooden plugs
- 346. Wooden shelves
- 347. Wooden veneers
- 348. Woolen hosiery
- 349. Zinc Sulphate
- 350. Zip Fasteners

HANDICRAFT ITEMS

Sl.No.	Item Description	Source of Supply
351	Cane furniture Handlooms	North Eastern Handicrafts and Development Corporation Assam Govt. Marketing Corpn. Craft Society of Manipur Nagaland Handicrafts and Handlooms Development Corpn.
352.	Bamboo file tray, Baskets, Pencil stand, side racks etc.	-do-
353.	Artistic Wooden Furniture	Rajasthan Small Industries Corpn., U.P. Export Corporation.
354.	Wooden paper weight, racks etc.	-do-
355.	Glass covers made of wood and grass jute	-do-
356.	Jute furniture	West Bengal Handicrafts Dev. Corpn. Jute Mfg. Development Corporation Orissa State Handicrafts Dev. Corpn.
357.	Jute bags, file cover	-do-
358.	Woolen and silk carpets	U.P. Export Corporation J and K Sale and Export Corporation

Annexure 2.3

CUTS Comments on The Public Procurement Bill 2012

Public procurement is one of the core elements of government operation and that of its agencies. Having some significant impact on key stakeholders in society, it attains a place of importance in public life. Furthermore, public procurement is an important aspect of international trade, given the considerable size of the procurement market (often 20-25 percent of a country's national income) and the benefits for domestic and foreign stakeholders in terms of increased competition.

Public procurement has assumed greater importance in the current political economic scenario in India. A Bill "The Public Procurement Bill, 2012" has been drafted by the Department of Expenditure, Ministry of Finance, Government of India. The objectives of the Bill are to ensure transparency, fair and equitable treatment of bidders, promote competition and enhance efficiency and economy in the procurement process. The Bill contains broad principles and will be supplemented by rules.

Keeping this development in mind, CUTS International is implementing a project entitled "Government Procurement – An emerging tool of global integration and good governance in India" with an objective of exploring opportunities and challenges of a more efficient government procurement system in India with greater transparency, efficiency and good governance for both domestic as well as foreign enterprises.

The stakeholders in India and in major economies would like to see a transparent and efficient public procurement system and is rather more conscious on how procurement system needs to be working today's world. As part of this initiative, the following is a set of comments on The Public Procurement Bill, 2012.

1. In India, there is no overarching legislation governing public procurement by the central government and central public sector undertakings. The same is true at the sub-national level. The General Financial Rules, 2005 govern procurements made by the

central government. Some ministries/departments have specific procedures/manuals to supplement these Rules. Procurements by public sector undertakings are governed by their own procedures/manuals. CUTS welcomes the new Bill as a progressive step and hopes that it will bring greater efficiency, transparency and value for money to the stakeholders in India and in other countries.

2. Section 18 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.
3. 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.
4. 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.

5. Section 6 provides well considered grounds (like promotion of domestic industry, considerations of public interest and other socio-economic considerations) on which the central government may base its preference policy, it is felt that even in this context the quality criteria should be in-built. The selected bidders in this 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. 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.
7. While successful bidders are expected to perform as per targets/specifications in terms of cost, quality and timeline for execution, additional financial incentives for better performance *vis-a-vis* timeline, cost, etc. are awarded by some countries under their government procurement rules. Such provisions may be considered for incentivising efficiency and enhancing consumer welfare.

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The Choices before India

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Choices before India and the Option Exercised

Despite attempts to reform the system, beginning in 1991, the Indian procurement framework is still lacking in the key elements of transparency and the components necessary to ensure fair competition and a level playing ground, which are essential to ensure economic and social development. This is evidenced *inter alia* by a number of high profile scams, symptomatic of the weaknesses in the system, which have continued to haunt the procurement process, both in the Centre and States.

There are several strategic options before India for arriving at the necessary solutions. The country can opt between implementing unilateral reforms in the shape, *inter alia*, of enacting comprehensive modern law, drawing on national and international best practices. It can also choose to accede to the WTO's Government Procurement Agreement (GPA), an important internationally recognised legal framework promoting competition, transparency and integrity in the procurement process. India may even opt for bilateral and regional trade agreements on government procurement. It is already seen that the India-Japan Free Trade Agreement (FTA), 2011 provides a rudimentary accord for information-sharing

on rules and regulations in government procurement of the respective governments. It is learnt that the India-EU FTA currently under negotiation is likely to have a more detailed framework on GP.

The proponents of India joining the WTO GPA stress on two major advantages, viz (a) the excellent regulatory framework it offers and (b) the flexibilities it offers to developing countries to maintain their domestic preferences. Chakarvorty and Dawar¹ laud the WTO GPA by attributing to it the incorporation of best international practices. "... while the GPA offers a stronger and more comprehensive instrument to regulate procurement, its guiding principles are similar to those promulgated by international organisations, such as the UN, Asia Pacific Economic Cooperation (APEC), the Organisation for Economic Cooperation and Development (OECD) and the World Bank, as well as NGOs, like the Transparency International, i.e. fairness, integrity and efficiency".

Later, commenting on the flexibility it offers to developing countries, they comment, "...the WTO GPA does not preclude positive discrimination in any country, but particularly for developing countries. The challenge for India or any acceding country, lies in identifying legitimate stakeholders and sectors of the economy that require protection through preferential procurement, either temporarily or for the foreseeable future. Once the negotiators have a coherent strategy on which sectors and elements of the economy and society they wish to protect, they may negotiate offsets, providing preferences or higher thresholds, as set out in Article IV of the Revised GPA".

However, the proponents of India joining the WTO GPA of 2012 have not pointed out the costs involved, mainly in the shape of market access, in a situation, where India is neither a major manufacturing power, nor, as yet, a powerhouse in the services sector. Therefore, while India's offensive and defensive

interests in market access are being worked out, the present strategy of the government appears to be to follow the path of autonomous reforms, including the putting in place a strong regulatory framework, drawing on best international practices and national experience.

To this end, the PPB, 2012 has been formulated with extensive public and stakeholder consultation and submitted for approval to the Group of Ministers (GoM) on Corruption. The GoM had appointed the Committee on Public Procurement (Dhall Committee) which, in its report to government submitted in 2011, had recommended the preparation of such a Bill as one of the major thrust areas in government's anti-corruption agenda, which suggestion was accepted by the GoM. The Bill attained the approval of the GoM on February 22, 2012 and of the Prime Minister and the Cabinet thereafter. On May 14, 2012, this Bill, which seeks to regulate the award of government contracts above Rs 50 lakhs (US\$1,00,000 at the exchange rate of approximately Rs 50/\$) to ensure "transparency, accountability and probity" in state purchases, was introduced in the Lok Sabha, the lower house of India's Parliament.

Comparison of the Public Procurement Bill, 2012 with the WTO GPA 2011

As stated, at the outset, this study focuses on the WTO's GPA as a template against which to compare the effectiveness of the proposed Indian procurement legislation, in terms of its capacity to nurture transparency, competition and fair play in public procurement; to find out as to wherever there are broad departures from the principles and procedures of the GPA, how well they are suited to serve India's own specific needs; to discover, through this comparison, as to what

opportunities and difficulties would accrue to India in case it were to consider accession to the GPA.

To this end, the objects, reasons and main provisions of the Public Procurement Bill (PPB) 2012 have been compared with the corresponding provisions of the latest version of the WTO GPA, i.e. after its amendment in 2011 December. While making the comparison, it has been kept in mind that the WTO GPA is a plurilateral agreement, catering to the needs of all its member nations, whereas the PPB 2012, is meant for a much more restricted purpose – that of regulating the domestic procurement regime and therefore, the two enactments are not comparable in all respects. Therefore, the comparison has been restricted to comparable features of the two enactments. A comparison with the provisions of the UNCITRAL model law on Public Procurement (2011 version) has also been made on to some extent major points, as this model law has been the basis of the procurement legislation of many countries.

In this connection, it is important to understand that multiple strands of thinking on public procurement have influenced the formulation of the PPB. On the one hand, the Bill seeks to incorporate and systematise as law that which was already available as good procurement principles in the General Financial Rules. These, till date, govern government procurement in India. On the other hand, the draft legislation has been influenced by the pro-competition, non-discriminatory trade-promoting provisions of the WTO GPA and the UNCITRAL model law on Public Procurement. A third influence has been the probity-enhancing principles incorporated in the United Nations Convention against Corruption (UNCAC) which entered into force on 14.12.2005 and is the first global anti-corruption instrument that urges State parties to create legal and policy frameworks in accordance with globally accepted standards to create national

and international regimes to effectively tackle corruption. India ratified the UNCAC in May, 2011.

Especially evident is the influence of the principles flowing from Article 9 of the Convention on 'Public Procurement and Management of Public Finances'; Article 12 on 'Prevention of Corruption in the private sector'; Article 21 on the criminalisation of the offence of 'Bribery in the private sector'; and Article 26 on establishing the 'Liability of legal persons'. This strong influence of probity – promoting principles is reflective of India's own internal pressing need at this moment of restoring public confidence in the administration through positive, legislation to curb corruption and the establishment of procedures which enhance transparency and accountability.

The PPB is but one in a series of enactments to promote good governance, which include the Prevention of Bribery of Foreign Public Officials Bill, 2011, the Public Interest Disclosure and Protection to Persons Making the Disclosure Bill, 2010, (commonly known as the Whistleblower's Bill), the Judicial Accountability Bill, 2010, The Right of Citizens for Time Bound Delivery of Goods and Services and Redressal of their Grievances Bill, 2011 and the Lokpal and Lokayukta Bill, 2011. The Bill is also in harmony with the government's current campaign against tax evasion and black money.

Most importantly, the Bill has also sought to create policy space for some very specific India-centric concerns: the concerns to preserve special and differential status for certain categories of bidders, the promotion of whose interest the government views as a special imperative to give expression to its socio-economic policies.

The WTO – compatibility of the PPB is, therefore, being examined as regards its objects and its main provisions in the light of the above context.

Statement of objects and reasons in the PPB vis-a-vis the Preamble to the WTO GPA

As discussed above, the PPB 2011 was introduced with the objective in mind of enhancing probity in the procurement process. To this end, one of the major objectives of the Bill is stated to be that of “ensuring transparency, accountability and probity in the procurement process and maintaining integrity and public confidence in the public procurement process”. To give effect to this objective, the Bill, *inter alia* seeks to:

- a. *Codify the basic norms governing public procurement and requires the procuring entities and their officials to comply with the norms;*
- b. *lay down a code of integrity to be followed by the procurement entity and the bidders;*
- c. *lay down the general principles to be followed during the procurement process and the conditions for use of, and brief procedures for, various methods of procurement ; and*
- d. *make provisions for offences and penalties relating to public procurement and for debarment of bidders.*

The above formulations reflect the influence of the UNCAC, whose Article 9 on ‘Public Procurement and management of public finances’ exhorts as follows:

“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”.

Interestingly, with the issue of corruption having become a global phenomenon, even the WTO GPA, in its amended version of December 2011 has, for the first time, reflected its concern for corruption in its preamble, which now includes the following wording:

“The Parties to this Agreement

Recognising the importance of transparent measures regarding government procurement, of carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices, in accordance with applicable international instruments, such as United Nations Convention against Corruption....

Hereby agree as follows.....”

The influence of current global concerns about corruption is also reflected in the Preamble of the UNCITRAL model law on public procurement, which *inter alia* seeks to promote the objective of “*Promoting the integrity of, and fairness and public confidence in, the procurement process*” and “*Achieving transparency in the procedures relating to procurement*”.

The second strand of thinking in the ‘Statement of Objects and Reasons’ of the PPB concerns ensuring fair competition through ‘*fair and equitable treatment of bidders, promoting competition, enhancing efficiency and economy*’. Such promotion of non-discrimination between bidders, including between domestic and foreign suppliers is one of the main objectives of major trade agreements, like the WTO GPA, whose primary objective, as stated in its Preamble, is to seek “*an effective multilateral framework for government procurement, with a view to achieving greater liberalisation and expansion of, and improving the framework for the conduct of international trade*”.

To achieve this overarching objective, the WTO GPA recognises that “*measures regarding government procurement should not be prepared, adopted or applied so as to afford protection to domestic suppliers, goods or services or to discriminate among foreign suppliers, goods or services*. The UNCITRAL Model Law on Public Procurement also highlights

among its objectives the following principles of non-discrimination and fair competition:

“Fostering and encouraging participation in procurement proceedings by suppliers and contractors regardless of nationality, thereby promoting international trade; and

Promoting competition among suppliers and contractors for the supply of the subject matter of the procurement”.

The interest in promoting a non-discriminatory and competitive procurement system is also reflected in the Statement of Objects and Reasons of the PPB through the stated intention of providing for “*a grievance redressal system*”, which is a new concept in Indian procurement. The GFR till date does not provide for an independent mechanism to address public grievance in procurement. Although not stated in the respective Preambles of the WTO GPA or the UNCITRAL Model Law, an independent grievance redressal mechanism is provided for in both these seminal legislations, which may have influenced the authors of the Public Procurement Bill.

Scope and Coverage

The PPB, vide Section 3, sub-section 2 thereof, applies to Central Government ministries and departments to whom powers of procurement have been delegated; to CPSEs or Undertakings owned and controlled by the Central Government; and to a wide range of other Central entities. The WTO GPA is applicable to entities covered in a Party's Annex 1, 2 or 3 to Appendix 1, which list the Central and sub Central Government entities as well as other entities e.g. public utilities, that each Party to the Agreement has committed to complying with as per the terms of the Agreement. The WTO Agreement potentially has a larger coverage, as it covers sub-central entities, if Parties so choose to commit. Some critiques of the PPB are that it would have been desirable for the Bill to also bring the states of the Indian federation under its coverage,

since the entries in the Constitution of India relating to “acquisition and requisition of property” and “contracts” are in the Concurrent List and therefore, Parliament is competent to enact a law applicable to state level procurement also. A uniform procurement law for India would have had a salutary effect in promoting competition in public procurement by contesting uniform standards and procedures across the country, leading to increased competition, it was felt by some. However, given the current situation where there is an increasing trend for states in the federation to assert their uniqueness, it is felt that the Bill has wisely restricted its scope only to Central entities.

Threshold Values

The threshold values to which the PPB applies is “*procurement the estimated costs/value of which is more than ₹50 lakhs*”, (US\$1,00,000 at the exchange rate of approximately ₹50/\$ being the average of the exchange rates prevailing over the last few years) vide Section 4(1) (a) thereof. The WTO GPA takes the threshold as set in a Party’s Annexes to Appendix I. The GPA’s general threshold is 1,30,000 Special Drawing Rights (SDRs) – currently equivalent to US\$2,02,000 - for goods and services procurement at the Central Government level and 5 million SDRs – equivalent to US\$7.78mn – for construction procurements. In negotiating their accession to the GPA, Parties can negotiate specific threshold levels for the GPA’s application, for example, agreeing to initially higher threshold with a multiyear phase-in period down to the general levels.

Apparently, India’s threshold for application of public procurement disciplines under the Bill set at ₹50 lakh (US\$1,00,000) is much lower than the general threshold for goods and services at US\$2,02,000 under the GPA, indicating the greater stringency of the Indian draft enactment, as

responsibility to follow procurement rules under it is cast on bidders who would be below the threshold in terms of the GPA. This is thus one condition with which Indian policy makers would have little compliance problem if India were to start considering the option of accession to the GPA.

Exceptions to Procurement Disciplines

Vide Section 4 (1) of the PPB, exceptions to the disciplines in the Bill, in so far as Chapter II, i.e. ‘General Principles of Procurement’ and Section 38 – 42, i.e. ‘Transparency Mechanisms’ and ‘Grievance Redressal’ are concerned, cover the following:

- a. Any emergency procurement necessary for the management of any disaster, as defined in Clause (d) of Section 2 of the Disaster Management Act, 2005 (Clause b of sub Section 1 of Section 4);
- b. Procurement for the purposes of national security or strategic consideration that the Central Government may, by order, specify (Clause c of sub Section 1 of Section 4);

According to Clauses (a) to (d) of sub Section 4 of Section 11 of the PPB, Central Government may limit participation of bidders in procurement on account of the need to protect public order, morality or safety/to protect human, animal or plant life or their health; to protect intellectual property; and to protect the essential security and strategic interest of India.

The WTO GPA has similar ‘Security and General Exceptions’ in its Article III. The Article in its para (2) provides that nothing in the Agreement would be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary “for the protection of its essential security interest relating to the procurement of arms, ammunition or war materials, or to procurement

indispensable for national security or national defence purposes”. The Article III (2) also provides to exempt measures to protect public morals, order or safety, human, animal or plant life or health or intellectual property. It goes further than the PPB in making further exceptions for exempting measures meant for the promotion of the products or services of handicapped persons, of philanthropic institutions or of prison labour.

Under the PPB, also excepted from the disciplines of the Bill, vide Section 3 (3), are procurements financed under the assistance from multilateral development banks, bilateral development agencies or foreign governments or pursuant to an international agreement. In such cases, the procurement proceedings stipulated in terms of the assistance or international agreement would prevail. Vide its Article III (3) (e), the WTO GPA also provides exceptions from general procurement rules for procurement conducted for providing international assistance/under the terms of an international agreement/under the conditions imposed by an international organisation.

The UNCITRAL Model Law, vide its Article 2 (n), has left the question of coverage to whatever options governments may wish to exercise with regard to governmental entities to be treated as procuring entities. However, to the extent that the Model Law “conflicts with any obligation of the State under or arising out of” any treaty or agreement with other State(s), and agreements with an inter-governmental institution, financing institution and agreement between the federal government and any of its sub-divisions or between two or more such sub-divisions, “the requirements of the treaty or agreement shall prevail, but in all other respects, the procurement shall be governed by this law” (vide Article III of UNCITRAL Model Law on Public Procurement).

The WTO has a wider list of exceptions from coverage compared to the PPB or the UNCITRAL Model Law, as featuring in Para 3 of Article II. These include acquisition or rental of land, buildings or immovable properties, non-contractual agreements or any form of assistance in the shape of grants, loans etc. that a Party provides, public employment contracts, and so on.

The exceptions from procurement disciplines in the PPB appear to be adequate in the light of the international practices as reflected in the WTO GPA or UNCITRAL. They also appear to be adequate for meeting India's own domestic requirements.

Definition of Public Procurement

Under the PPB, vide Section 2, Clause (r), the term public procurement means "acquisition by purchase, lease, licence or otherwise" of "goods, works or services or any other combination thereof", including award of PPP projects by procuring entities, but does not include any acquisition without consideration. Article II (2) of the GPA has a similar definition of "covered procurement", except that "works" is not specifically mentioned.

The definition under the WTO GPA is more hedged in by conditions. Covered procurement "means procurement for governmental purpose" of goods, services or any combination thereof as specified in each Party's annexes to Appendix 1 and not procured "with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale" by any contractual means, including purchase, lease and rental or hire purchase. Of course, the procurement must equal or exceed the threshold value declared by a procuring entity and the procurement should not otherwise be excluded from coverage in Para 3 of Article II or a Party's annexes to Appendix 1. It is important to note

that the concept of ‘non-usage for commercial purpose’ does not feature in the Indian definition.

It appears that the term “goods, services or any combination thereof” may cover in its fold public works which are not specifically mentioned, as is the case under the Indian procurement enactment. But there is no coverage apparently for Public Private Partnership projects under the GPA, although this is covered under the Indian enactment. Further, the definition “not procured with a view to commercial sale or resale or for use in the production or supply of goods or services for commercial sale/resale” would appear to rule out PPP projects, in which the private entity normally seeks to recover its investment by charging the public for the use of facilities created in the execution of the projects.

The UNCITRAL definition of Public Procurement in Article II Clause (j) is simple. It means “the acquisition of goods, construction, or services by a procuring entity”. It appears that the definitions under the PPB, the WTO GPA and the UNCITRAL Model Law are each effective in their own context.

General Principles of Procurement Covered in Chapter II (Sections 5-37 of PPB) & Article IV of GPA

Chapter II of the PPB focuses on ‘General Principles of Procurement’. *Ab initio*, the Bill reiterates the responsibility and accountability to the principles already mentioned in the Statement of Objects and Reasons, viz., ensuring efficiency, economy and transparency; providing fair and equitable treatment to bidders; promoting competition; evolving mechanisms to prevent corruption; and ensuring that the price of the successful bid is reasonable and consistent with the quality required.

Prominently elaborated amongst the General Principles is the ‘Code of integrity for procuring entity and bidders’. The

Code prohibits making offers, solicitation or acceptance of bribe, reward or any material benefit in exchange for an unfair advantage in the procurement process; any omission or misrepresentation that may mislead so that financial or other benefits may be obtained or an obligation avoided; any collusion, bid rigging or anticompetitive behaviour that may impair the transparency and fairness of the procurement process; any financial or business transaction between the bidder and any official of the procuring entity; any coercion to influence the procurement process; the obstruction of any investigation or auditing of a procurement process. It also enjoins certain disclosures, such as disclosure of conflict of interest; and any previous transgressions in procurement made by any entity in any country during the last three years or being debarred by any other procuring entity.

The breach of the code of integrity entails the exclusion of the bidder from the procurement process, calling off of pre-contract negotiations, forfeiture of bid security, recovery of payments made by the procuring entity, cancellation of the contract and recovery of compensation for loss incurred by the procuring entity, debarment of the bidder from participation in future procurements for a period of up to two years etc.

Compared to this, the WTO GPA in its Article IV on 'General Principles' makes only a passing mention of anti-corruption measures. Para 4 of Article IV enjoins that a procuring entity shall conduct covered procurement "in a transparent and impartial manner" such that *inter alia*, it "avoids conflicts of interest and prevents corrupt practices". Even these two brief mentions of anti-corruption principles is a new introduction in the 2012 version of the GPA.

The major focus of the PPB of India and the WTO GPA in respect of their general, overarching principles appear to be different. While the PPB, under the influence of UNCAC, is concerned in a major way with curbing corrupt practices in

procurement, while also ensuring transparency, non-discrimination amongst bidders and fair competition, the WTO GPA's general principles have as their core concern the Most Favoured Nation and National Treatment principles, which are the guiding principles of the WTO, adopted with the objective of keeping global markets open. The exhortation to abjure corrupt practices in tendering is not supported by any enforcement procedures or penalties for infringement, as is the case in the PPB provisions.

Not only does Article IV of the GPA provide for the Parties to the Agreement to provide for the products, services and suppliers of each Party for treatment no less favourable than that accorded to domestic products, services and suppliers and that accorded to products, services and suppliers of any other. Party, it also provides that each Party shall not discriminate against locally established suppliers on the basis of the degree of foreign affiliation or ownership or on the basis of country of production of the goods or services being supplied, provided that the country of production is a Party to the Agreement.

With the intention of keeping markets open, the GPA, even as regards the 'Use of Electronic Means' elaborated in Para 3 of Article IV, ensures that if procurement is conducted using information technology, the systems and the software used are those which are "generally available and interoperable with other generally available information technology systems and software". In order that they do not pose any market barriers, the 'Rules of Origin' (RoO) in Para 5 of Article III enjoin that those RoO should not be applied which are other than those used in the normal course of trade to imports of goods or services.

Most importantly, the concern to keep markets open leads to the banning of offsets (i.e. conditions that encourage local development ... such as use of domestic content, the licensing

of technology, investment, counter-trade and similar action or requirement). Para 6 of Article IV of the GPA states

“...with regard to covered procurement, a Party, including its procuring entities, shall not seek, take account of, impose or enforce any offset.”

Under the PPB 2012, Section 27 thereof, offsets are a policy instrument in the hands of the Central Government:

“The Central Government may, by notification, specify its offsets policy imposing any requirement for offsets and it shall be the duty of every procuring entity designated in the notification to implement such offsets policy.”

The use of offsets has been kept as a policy instrument in the hands of the Central Government under the PPB, to be used if required, perhaps for the reason that the Indian procurement market is not a protected market, like those of most countries, including those developed countries which are members of the GPA. This policy instrument may be required to safeguard domestic industry/disadvantaged sections of the population at any time, in an otherwise unprotected market. Thus, if accession to the GPA were to be contemplated by India, the giving up of this policy instrument would be one of the hard choices to be made.

Non-discrimination in the Public Procurement Bill

Another important issue covered under the General Principles of Procurement (Chapter II of the Bill) is the issue of ‘Participation of bidders’ i.e. the categorisation of suppliers who are eligible to bid. Section 11 (1) of the Bill mandates that

“The procuring entity shall not establish any requirement at limiting participation of bidders in the procurement process that discriminates against or amongst bidders or any category thereof, except when so authorised or required under the

provisions of this Act or the Rules made there under, or under the provisions of any other law for the time being in force”

The provision, read without the exception in the second part of the sentence, nearly approximates the MFN and National Treatment Clause of the GPA in Article IV of that enactment. But the second part of the sentence does leave scope for exceptions.

Sub section (2) of Section 11 clearly provides for exceptions from national treatment by mandating that the Central Government “may, by notification, provide for mandatory procurement of any subject from any category of bidders or purchase preference in procurement from any category of bidders” for “the promotion of domestic industry; socio economic policy of the Central Government; any other consideration in public interest in furtherance of a duly notified policy of the Central Government.” However, “the reason and justification for such mandatory or preferential procurement, the category of bidders chosen and the nature of preference given shall be specified in the notification.”

The non-discrimination provisions in Section 11 (1) treat domestic and foreign bidders on par, and as one commentator has observed, for the Central Government to provide for preferential treatment to any category, including the domestic industry, justification would have to be given on a “case by case basis” through a notification. Thus, according to this view, the PPB “does not seem to allow for nationality to be used as a basis for discrimination amongst bidders, implying foreign bidder participation in Indian government contracts was a default legal right – a formulation that is contrary to the established law in most important foreign jurisdictions, where Indian entities are legally barred from bidding as prime contractors”.²

Whether the Public Procurement Bill Leaves the Indian GP Market too Open

The non-discrimination provisions contained in Section 11(1) of the Bill have generated much debate in India. Indian procurement policy has traditionally made no distinction between domestic and foreign suppliers, a fact which is acknowledged *inter alia* by the WTO in the latest trade policy review of India. It would be recalled that the Government Procurement Manual, 2006 contains no specific exhortation against foreign participation. It also allows that where a Ministry/Department feels that the goods of the required quality, specifications etc., may not be available in the country and/or it is also necessary to look for suitable competitive offers from abroad, the Ministry/Department may opt for foreign tendering.

However, by reiterating this position in Section 11 of the Bill one view is that the PPB has apparently failed to take into account recent policy developments in India and also the international public procurement practices.³

In the National Manufacturing Policy (NMP), 2011 Government in India, while recognising the need to harmonise the objectives of trade and investment policy with manufacturing policy, has taken 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, such as solar energy equipment, electronic hardware, fuel efficient transport equipment and IT based security systems.”

The non-discrimination clauses of the PPB, which apparently make no distinction between domestic and foreign suppliers, therefore, is at cross purposes with the NMP. “The Revised Draft Procurement Bill thus converts a mandatory

policy requirement into an optional and an exceptional one, with the obvious implications 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.”⁴

Further, global practices appear to show that ‘national competitive bidding’ is the norm, rather than the exception, unlike the position reflected in the Indian Draft Bill. The instances to illustrate the point include the examples of China, the EU, the US and Canada, to name a few.

China, while acceding to the WTO in 2001, committed to join the GPA “as soon as possible”. But immediately thereafter, it passed a Government Procurement Law (GPL), which was adopted on June 29, 2002 and Article 10 of which contains a ‘Buy Chinese’, clause which gives preference to national goods, works and services, except (i) when those cannot be obtained in China or cannot be obtained in China under reasonable business conditions or (ii) are to be used out of China. The Chinese Ministry of Finance has further adopted two Decrees (No. 119/2007 and no. 120/2007) which specifically limit government procurement to Chinese companies and therefore tighten up the ‘Buy Chinese’ provisions further, except for the case where domestic product is unreasonably more expensive or of a lower quality.⁵

The EU directives on public procurement (notably the public sector Directive 2004/18/EC and the utilities sector Directive 2004/17/EC and the “remedies” Directive 89/665/EC, 92/13/EC and 2007/66/EC) consist of applying the basic principles of EU common market, notably non-discrimination, equal treatment and transparency only within the EU. It is not intended to extend these fair competition clauses to non-EU suppliers.⁶

The US Federal Procurement System similarly allows foreign bidders participation only from countries which have bilateral/ multilateral trade pacts with the US on GP and such

participation is further limited to contracts above specified values. As the 'Trade Investment Barriers Report', 2011 of the European Commission observes, "It is striking to note the low level of openness of US GP markets to EU bidders. This results partly from the limited scope of the GPA commitments made by the US, which covers only 3.2 percent of the US public procurement market.... The **Buy American** initiative has further inhibited the effective access to US public procurement markets in areas not covered by US. GPA commitments through new discriminatory provisions included in the American Economic Recovery and Reinvestment Act and similar legislation".

Canada's procurement system also follows the same trend, by allowing limited participation to foreign bidders under GPA obligations/bilateral obligations.

The position enunciated in the Indian PPB seems to be flying in the face of the established norms in this regard, according to the proponents of one school of thinking, by maintaining neutrality between domestic and foreign bidders. The economic rationale on which they rest their argument is that "unlike free choices expressed by consumers in the commercial market place, public funds spent on government contracts do not amount to 'voluntary' expenditure by a country's citizens. As a result, almost every country steers its public spending on procurement contracts towards domestic manufacturers and suppliers of services."⁷

By extending the policies which bind government departments to the public sector undertakings, this school of thinking sees it as "the imposition of non-commercial public policy objectives on procurement decisions on them" (i.e. PSEs), which is also against the procurement practices of most major emerging economies, like China, Mexico and Brazil.⁸ The logic of exempting PSEs from the application of the normal

procurement laws is to provide them with a level playing field with other actors in the commercial market place.

Lastly, it is contended by this school of thought that the fact that the draft PPB does not allow nationality to be used as a basis for discrimination among bidders has a collateral implication: existing GPA Member States will be left with virtually no incentive to allow India's accession to this plurilateral Agreement on Government Procurement, thereby perpetuating problems faced by Indian entities in bidding as prime contractors in foreign markets.⁹

The Other Point of View

There is no doubt that a valid concern is voiced through the series of newspaper articles on promoting domestic preferences in public procurement. Moreover, these views come at a time when the NMP, unveiled on November 04, 2011, seeks to impart new impetus to Indian manufacturing by enhancing the share of manufacturing in GDP (stagnating at 15 to 16 percent since 1980) to 25 percent within a decade and creating a hundred million jobs in the process. One of the policy instruments that has been conceptualised to achieve the above objectives includes leveraging GP for the purpose (vide para 1.1.2 of the NMP). As cited earlier in this Chapter, this implies consideration by the government of the use of public procurement in specified sectors with stipulation of local value addition in areas of critical technologies and wherever necessary.

However, it is felt that the concern for promoting domestic preferences wherever required in specified areas is already taken care of through the present wording of the Bill, if carefully examined. The flexibility to extend preferences to domestic industry is very much available, for example, in the much criticised Section 11 itself. No doubt the first part of Section 11 (1) reflects an assurance regarding non-

discrimination among bidders irrespective of nationality by stating

“The procuring entity shall not establish any requirement aimed at limiting participation of bidders in the procurement process through discrimination against or amongst bidders or against any category thereof....”

But this proposition is immediately qualified by an exception clause that runs thus:

“...except when so authorised or required under the provisions of this Act or the Rules made thereunder or under the provisions of any other law for the time being in force”.

Thus sub section (1) of Section 11 cannot be said to give blanket sanction for non-discrimination between domestic and foreign bidders, since it gives scope to build flexibility through other provisions of the Act and through the rules to the Act for the purpose of introducing any kind of preference, including preference for domestic bidders or a category of domestic bidders, such as, for example, micro and small industries.

Similar flexibility for building in domestic preferences is contained in the provisions regarding ‘Qualification of bidders’ in Section 12 (2) of the Bill. Clauses A to D of sub section (2) of Section 12 stipulate not only the necessary professional, technical, financial and managerial capabilities, which the bidders must possess, along with integrity, but in Clause (e) is given the right to the procuring entity to call for the bidders to “fulfil any other qualification as may be prescribed”. This clause gives scope for building in a preference, including a domestic preference, if so required.

Sub section (2) of Section 11 is the major provision for extending exception to the general rule of non-discrimination. It gives the right to the government to provide for any kind of preference, through providing for “mandatory procurement of any subject matter of procurement from any category of bidders.” It also provides for “purchase preference in

procurement from any category of bidders.” These preferences are permissible on the grounds of “promotion of domestic industry, socio economic policy of government” or on grounds of “public interest.” There has been criticism that a justification for the policy has to be given. This is as per democratic norms, where every policy announcement of the government has necessarily to be justified. It is a notification of the justification of the policy, which is required and not a “case by case” justification for each procurement, as held by critics.¹⁰

Also the parameters for justifying the preference, such as promotion of domestic industry or of any socio economic policy of government etc. are so broad, that there would be no major difficulty in invoking this exception to the general rule of non-discrimination, if and when government wishes to avail of the flexibility given under Section 11 (2).

The basic issue in framing a public procurement law for India is whether it wants to present a law which is basically equitable, subject to certain exceptions for well recognised national concerns, such as promotion of domestic industry/ socio economic policy of the government/interest of the general public or to adopt an in -the-face policy of protectionism, similar to that of China.

This basic issue has to be examined in the context of India’s recent economic history. The opening up of the Indian economy since 1991 has helped Indian industry to become competitive, to modernise and become cost effective. The striking contrasts between pre and post liberalisation is most marked, when witnessing the competition and consequent availability of consumer choice post 1991, especially in the telecom, automobile, IT and aviation industries, where the stranglehold of the State-run sector in these industries had proved to be a check on the natural evolution of the market in India. If India were to give a signal that it is once again going to revert to a

protectionist, closed economy model as far as GP is concerned, by explicitly stating it in the public procurement law, it is likely to be regarded as a step backwards. It may affect the competitive edge of the Indian industry, since the GP market in India is of considerable size, measuring approximately 20-30 percent of GDP.

Moreover, in this stage of evolution as an emerging economy, when India is dependent on imports for most of its high tech scientific and defence procurement, comprising 30-35 percent of the total public procurement market, it remains to be seen how suitable a law based on protectionist principles would be for India.

A certain balance, it is felt, has to be maintained in an economy like India's, which is in the process of emerging to its full maturity, and which, unlike China's, is not a command economy. There is a danger in invoking complete protectionism, where the domestic economy is not as competitive as, say, in the US, the EU and now, in China and where a reversion to a completely closed economic model is likely to once again increase inefficiency by cutting India off from the liberalising influence of global good practices in manufacturing and services. At the same time, it has to be ensured that, as stated in the NMP, in critical areas of technology India is able to build up its own expertise and manufacturing base, and therefore in these areas, it has to think local. This balance of global and local elements in India's Trade, Investment and Manufacturing Policy is best reflected in the NMP. Para 1.22 thereof, which states:

“While India will continue to integrate itself with the globalised world through bilateral and regional free trade agreements/comprehensive economy partnership agreements, it will be ensured that such agreements do not have a detrimental effect on domestic manufacturing in India. The government will...consider use of public procurement in

specified sectors with stipulation of local value addition in areas of critical technologies and wherever necessary.....”

It is this balance between the global and the national imperatives which the PPB seeks to reflect when it provides for a law which is basically non-discriminatory as regards nationality, but is subject to exceptions for well recognised national concerns, like promotion of domestic industry and the like. In fact, these preferences, present in the current GFR, are already being exploited, as would be evident in the MSE policy of government, including the new policy hiking up the reservation for the micro and small scale sector to 20 percent of government procurement from 2015; the newly enunciated National Electronics Policy and the Solar Power Equipment Policy of the government, with their emphasis on domestic inputs.

As for the argument that most countries do not bring their State-owned Enterprises (SoEs) under the requirement of transparency and competition norms, “to provide them with a level playing field with other actors in the commercial market place”, while the PPB stands out in imposing “non-commercial public policy objectives on procurement decisions of SoEs”, it may be mentioned that the flexibility necessary for the commercial operations of SoEs and Public Private Partnership (PPP) projects is once again found to be given scope for location in the rules to the Act.

Sub section (3) to Section 5 of the Bill carries the stipulation that “Without prejudice to the provisions of this Act, a different set of rules may be made for different categories of procuring entities and procurement”. The Explanation to the Section elaborates that the term “category of procuring entities” includes the Central Public Sector Enterprises and such other entity as may by notification be specified by the Central Government. The term “category of procurements” includes “the Goods, Works, Services, procurement for purposes of

national security and on strategic consideration, entering into PPPs, and such other procurement as may by notification be specified by the Central Government”.

Discussions with the Department of Expenditure, Ministry of Finance, appear to indicate that the rules to the Act, after the Bill has become an Act, will provide for a different set of rules for the commercial activities of SoEs, PPPs etc., while the non-commercial part of their activities will be governed by the principles of transparency, competition etc. of the Public Procurement Act.

As regards the notion of collateral damage through a totally non-discriminatory procurement policy to the effect that an already open government procurement market will provide no incentive to existing GPA Members to allow India's accession to the GPA, the fact of the matter is somewhat different. India appears to have been approached by developed economies such as EU and Japan to enter into bilateral arrangements on Government Procurement. Moreover, the WTO Secretariat, which reflects the sentiments of its Member Countries, has been pressing India to join this plurilateral Agreement.¹¹

Most likely, the reason for pressure on India to join the GPA is due to the fear of losing existing markets in India by the developed countries, who are watching the developments in recent Indian policies, particularly the thrust of sectoral policies, such as the new National Electronics Policy, announced in February 2012, which provides for procurement preference for domestically manufactured electrical products which have security implications or are being procured by government for its own use and not with a view to commercial uses. The preference to the MSE sector to supply up to 20 percent of the public procurement requirement of each department of government by 2015 and the preference for domestic content in the major solar energy projects of India

are other examples of closing of the Indian GP market in selected areas, which are cause for concern for developed country governments.

This situation is possibly leading to inducements to India by the developed country members of the WTO to join the GPA, with the motive of preserving their present market access in high value public procurement in India. The PPB's present formulation is such that through its exceptions and the scope available through its rules, it leaves scope for the present domestic preferences to be continued.

Treatment of Preferences in the Public Procurement Bill and the WTO GPA: Section 11 of the Public Procurement Bill & Article IV (1) & Article V of the GPA

As discussed above, the PPB allows departures from the non-discrimination provisions prescribed as the general rule for participation of bidders. These departures are allowed in special circumstances, under the exception clause contained in Section 11 (1) and most importantly in Section 11 (2), whose exceptions are based on broad trade and socio economic policy grounds, such as

- a) the promotion of domestic industry;
- b) to give effect to the socio-economic policies of government; and
- c) to give effect to any other consideration in public interest in furtherance of a duly notified policy of the Central Government.

On these grounds, the Central Government “may, by notification, provide for mandatory procurement of any subject matter of procurement from any category of bidders, or purchase preference in procurement from any category of bidders”. The only condition for operationalising these provisions is contained in the Proviso to sub section (2): The

Central Government must specify the reason and justification for such mandatory or preferential procurement, the category of bidders chosen and the nature of preference. Given the broad criteria for invoking these exceptions to the general rule of non-discrimination, it may not be difficult to justify any preference policy which the government may need to invoke.

The conditionality, however, for extending preferences is quite difficult under the WTO GPA, especially its 2012 version. The much tougher conditions *vis-à-vis* the PPB lies firstly in that MFN and National Treatment are the general rules even for a developing country and any concessions due to a developing country will have to be negotiated, vide Para 2 of Article V of GPA:

“Upon accession by a developing country to this Agreement each Party shall provide immediately to the goods, services and suppliers of that country, the most favourable coverage that the Party provides under its annexes to Appendix 1 to any other Party to this Agreement, subject to any terms negotiated between the Party and the developing country in order to maintain an appropriate balance of opportunity under this Agreement.”

Negotiations for S&DT were a condition in the 1994 GPA also. But the 2012 version of GPA has further diluted S&DT by making it only a “transitional measure”, available only for a period of 3 years to a developing country and 5 years for a least developed country after accession to the Agreement (Para 3 of Article V of the GPA).

The S&DT, (vide para 3(a) of Article V of GPA) comprises of (a) price preference, (b) maintenance of offsets, (c) phased-in addition of specific entities or sectors and (d) a threshold higher than the permanent threshold that a Party to the Agreement has to maintain. This implies that the most important of these derogations from MFN and National

Treatment, that is, offsets, can be maintained by a developing country only as a transitional measure, as opposed to their continued application by existing GPA Member States. This is indeed a discriminatory policy, given the fact that GPA Members like the US exclude a large portion of their public procurement from MFN and National Treatment disciplines on the ground of offsets for Small Business.

It is seen that the choice of instrument available for S&DT to developing countries is narrower in the revised GPA *vis-à-vis* GPA 1994 on some further grounds. Under the 1994 GPA, the acceptable exclusions from the rules of National Treatment for a developing country were with regard to “certain entities, products or services that are included in its coverage list”, and in negotiations for such exclusions, “the considerations mentioned in sub paragraphs 1(a) through 1 (c) shall be duly taken into account”. This meant that in the negotiations for S&DT, the needs of a developing country to safeguard its balance of payments position, to develop domestic industries, including small scale and cottage industries, to support industrial units dependent on government procurement etc. would be taken into consideration.

In the new GPA, there is no scope for total exclusion of specific entities, products or services, as all that is conceded is a “phased-in addition”, meaning that the exclusion is only for the transition period. Moreover, “products” are also taken out of the list of offsets. And there is no requirement that the disadvantages suffered by developing countries, which were listed in the 1994 version of GPA, would be given any weightage in negotiations under the revised text.

The further conditionality provided for in Para 3, Article V, further reduces the attractiveness, if any, of any preference policy for a developing country. *Inter alia*, a price preference under the Agreement is subject to the condition that it would be provided “only for that part of the tender incorporating

goods or services originating in the developing country applying the preference.”

The tough conditionality subject to which exclusion from National Treatment may be available under the GPA to India, as a developing country, *vis-à-vis* the much easier norms for invoking such exclusions under the offset norms of the PPB, make the latter much more attractive to India, as its procurement policy has certain goals to fulfil, besides value for money. These include socio economic objectives, like nurturing of the small scale sector and some economic objectives, like promotion of domestic industry.

Non-discrimination and Domestic Preference in the UNCITRAL Model Law on Public Procurement

The UNCITRAL Model Law and the PPB of India are similar in maintaining a balance between non-discrimination, irrespective of nationality and extension of domestic preference in special circumstances. As in the PPB, the UNCITRAL Model Law’s Article 8, titled Participation by Suppliers, mandates that “suppliers or contractors shall be permitted to participate without regard to nationality” as a general rule. But it allows limiting of participation in public procurement on the basis of nationality as an exception. The second part of paragraph 1 to Article 8 runs as follows:

“... except where the procuring entity decides to limit participation in procuring proceedings on the basis of nationality on the grounds specified in the procurement regulations or other provisions of law of this State.”

This balance between international openness and domestic preference is also evident in sub section 2 of Article 8 and sub section 6 of Article 9, which bar discriminatory treatment against any suppliers or contractors or against categories thereof, unless provided for under law or regulations:

“Except when authorised or required to do so by the procurement regulations or other provisions of law of this State, the procuring entity shall establish no other requirement aimed at limiting the participation of suppliers or contractors in procurement proceedings that discriminates against or among suppliers or contractors or against categories thereof”. [Article 8 (2)]

“Other than any criterion, requirement or procedure that may be imposed by the procuring entity in accordance with Article 8 of this Law, the procuring entity shall establish no criterion, requirement or procedure with respect to the qualification of suppliers or contractors that discriminates against or among suppliers or contractors or against categories thereof, or that is not objectively justifiable”. [Article 9(6)]

However, unlike the PPB, no policy framework on which to base exceptions from the general rules (such as promotion of domestic industry etc. given in the PPB) of non-discrimination irrespective of nationality has been prescribed in the UNCITRAL Model Law. The only requirement for invoking exception from the rule of non-discrimination is that the fact that the participation of suppliers is to be limited has to be mentioned “when first soliciting the participation of suppliers” (Para 3 of Article 8) and the reasons for so limiting participation has to be included in the record of procurement proceedings (Para 4 of Article 8) and such reasons have to be made available to any person upon request (Para 5 of Article 8).

Thus, it would appear that a Model Law for the use of developing countries, like the UNCITRAL, encourages non-discrimination, irrespective of nationality, but with exceptions, wherever the State or the procuring entity decides to limit participation in procurement proceeding on the basis of nationality. This is also the approach adopted by India in its draft enactment for revamping the public procurement system.

Machinery for Ensuring Transparency and Fair Competition in Public Procurement: A Comparison of the Public Procurement Bill (PPB) with the WTO GPA

A comparison of the main machinery provisions of the two enactments for the purpose of evaluating the effectiveness of the transparency and fair competition provisions each contains as regards the procurement process is important. In this connection, it is intended to compare the following major provisions in each of the two enactments:

- i) Obligations related to value of procurement;
- ii) Description of subject matter of procurement;
- iii) Time frame for submission of bids;
- iv) Qualification of bidders;
- v) Pre-qualification procedure and registration procedure of bidders;
- vi) Contents of bidding documents;
- vii) Time limit for processing of bids;
- viii) Criteria for evaluation of bids;
- ix) Exclusion of bids;
- x) Price negotiation;
- xi) Cancellation of procurement process;
- xii) Award of contract;
- xiii) Terms and conditions of procurement contract; and
- xiv) Modes of procurement.

Obligations related to Value of Procurement: Section 8 of PPB and Paragraph 6 of Article II of GPA

Section 8 of the PPB prescribes that a procuring entity shall neither divide its procurement nor take any other action so as to limit competition amongst bidders or to avoid its obligations under the Act. This prescription more or less echoes the

provisions of Paragraph 6 of Article II of GPA. However, the GPA provisions are more detailed, in that

- a) In arriving at the value of a long term contract, the inclusion of the estimated maximum total value of the procurement over its entire duration should be taken into account for arriving at the value of the contract. So much detail is not available in the PPB.
- b) Where an individual requirement for a procurement results in the award of more than one contract, the calculation of the estimated maximum total value would be based on the value of recurring contracts of the same type during the preceding 12 months. This level of detail is not available in the PPB.
- c) Elaborate methodology for arriving at value of contract in case of procurement by lease, rental or hire purchase has been laid down, which is not there in the PPB.

Description of the Subject Matter of Procurement: Section 9 of PPB and Article X of GPA

Section 9 of the PPB ('Description of the subject matter of procurement') and Section 10 of the GPA ('Technical specifications and tender documentation') set out the specifications of the subject matter of procurement in such a manner as to ensure fair play and transparency. Both the PPB and the GPA take care to guard against over-specifications, which is often used by procuring entities to qualify only a few select firms. PPB stresses in Section 9 (1) (a) that the description of the subject matter of procurement shall be "such as to meet the essential needs of the procuring entity" and Section 9 (1) (b) prescribes that to the extent possible, it should be "objective, functional, generic and measurable" and it sets out "required technical, qualitative and performance characteristics." It is in the same spirit that Article X of GPA stipulates in its Para 1 that "A procuring entity shall not prepare, adopt or apply

any technical specification or prescribe any conformity assessment procedure with the purpose or the effect of creating unnecessary obstacles to international trade”. The stipulation about specifications is a little more detailed in the GPA, in that para 2 (a) of Article X states that the procuring entity shall “set out the technical specifications in terms of performance and functional requirements, rather than design or descriptive characteristics”.

A slight difference in perception between the PPB and the GPA is with regard to standards. Whereas the PPB, in its Section 9 (2) prescribes that technical specifications shall,

“to the extent possible be based on national technical regulations or recognised national standards or building codes, wherever such standards exists, or in their absence, relevant international standards may be used” the GPA, in its Article X (2) (b) wants specifications to be “based on international standards, where such exists; otherwise on national technical regulations, recognised national standards or building codes”.

Further flexibility has been introduced into the May 14, 2012 version of the GPA, in that it now states as follows “Provided that a procuring entity may, for reasons to be recorded in writing, base the technical specifications on equal equivalent international standards even in cases where national technical regulations or recognised national standards or building code exists”.

The matter of adherence to standards, in any case, would not prove to be an unbridgeable gap, in case India considers accession to GPA, as 84 percent of Indian standards are harmonised with international standards, as noted, *inter alia* in India’s Trade Policy Review, 2011 at WTO.

Both the PPB and the GPA mandate that description of the subject matter of procurement shall not indicate a requirement for a particular trade mark, trade name or brand, so that objectivity and generic description are maintained.

Time Limit for Processing of Procurement

Section 10 of the PPB provides that “every procuring entity shall indicate in the pre-qualification document, bidder-registration document or bidding documents... the expected time limit for completion of various stages of the process of procurement” and “shall endeavour to adhere to the time limit specified... and shall record reasons for any modification of such time limit”.

Providing for such time bound procedure is expected to rule out the scope for backdoor negotiations and collusion between procuring entity and suppliers. There appear to be no similar provisions in the GPA in this regard. It appears, therefore, that the PPB has been even more vigilant than the GPA in this area, keeping in view domestic conditions.

Time Frame for Submission of Bids: Section 22 of PPB and Article XI of GPA

The PPB, through its Section 22 and the GPA, through its Article XI (‘Time Limit for Tendering and Delivery’) both foster fair opportunity to prospective suppliers. Section 22 (1) of PPB specifies that, while fixing the last date for submission of bids, the procuring entity should take into account “the need of the bidders for having a reasonable time to prepare and submit their bids”. The GPA, similarly holds in its Article XI (1) (a) that “Any prescribed time limit shall be adequate to allow suppliers of other Parties as well as domestic suppliers to prepare and submit tenders before the closing of the tendering procedure”.

The ‘fair opportunity’ element in the PPB would have been further strengthened if the concept of “reasonable time” could have been defined in detail, as in the GPA, where it provides that in determining any time limit for submission of tenders, procuring entities shall take into account “such factors as the complexity of the intended procurement, the extent of sub

contracting anticipated and the normal time for transmitting tenders by mail from foreign as well as domestic points”. Further, some limit could have been set to define “reasonable time”.

In the GPA, for example, leaving aside exceptional circumstances, in open procedures the period for receipt of tenders is prescribed as not less than 40 days from the date of publication of tender; in ‘selective procedures not involving the use of a permanent list of qualified suppliers’ the time limit for submitting an application is not to be less than 25 days from the date of publication of notice to tender; for ‘selective procedures involving the use of a permanent list of qualified suppliers’, the period for receipt of tenders is not to be less than 40 days from the date of initial issuance of invitation to tender. It is expected, however, that the level of detailing as given in the GPA to ensure reasonable opportunity to all suppliers which soon find its way into the Rules which will accompany the PPB, once it becomes an Act.

Qualification of Bidders: Section 12(2) of PPB and Article IV, Para 3 and 4 thereof of GPA

Under Section 12(2) of the PPB 2012, the participating bidders shall be those possessing “the necessary professional, technical, financial and managerial resources and competence required by the bidding documents” who have filed the required tax returns, do not have their affairs administered by a court/ do not have their business activities suspended, nor are in any legal proceedings for the foregoing reasons, who are not insolvent, in receivership or bankrupt, their directors or officers have not been convicted of any criminal offence related to their professional conduct/misrepresentation of qualifications to enter into a contract, or who are otherwise not disqualified pursuant to debarment proceedings and subject to their fulfilling “any other qualifications as may be

prescribed”. These provisions are required to be set out in the bidding document, pre-qualification document or bidder registration documents and shall apply equally to all bidders.

These provisions are basically in tune with the GPA’s Article VIII (‘Conditions for Participation’) particularly Paragraphs 3 (a) and 4 (a) (2) (f) thereof. The GPA carries certain prohibitions against the usual entry barriers which tend to limit competition, such as prohibiting a procuring entity from imposing conditions for participation such as the supplier having been awarded one or more contracts by a procuring entity. This may be of use if incorporated in the PPB also.

There is a difference in emphasis between the two legislations regarding qualification of bidders. Whereas the PPB states (Clause (e) of sub section (2) of Section 12) that a bidder should “fulfil any other qualifications as may be prescribed”, the GPA gives no such blanket discretion. The Clause (e) of sub Section 2 of Section 12 of the GPA gives additional flexibility to introduce, if needed, domestic preferences into the conditions for procurement. But, as discussed earlier, under the GPA, such domestic preferences are subject to negotiations under ‘Developing Country’ provisions and cannot be automatically invoked. These limitations are likely to act as disincentives to joining the GPA.

Pre-qualification Procedure and Registration Procedure of Bidders: Section 14 of PPB and Article IX of GPA

Section 13 of the PPB speaks of a situation where the procuring entity may engage in a pre-qualification process prior to inviting bids, “for the purpose of identifying the bidders that are qualified”. Section 14 speaks of a situation where, “with a view to establishing reliable sources for a subject matter of procurement/class of procurement which is commonly required across procuring entities or required on a recurring basis by a procuring entity” a procuring entity may

maintain a panel of registered bidders. These two sections are similar to Article IX, 'Qualification of Suppliers' in the GPA, which states that "A Party, including its procuring entities, may maintain a supplier registration system under which interested suppliers are required to register and provide certain information."

The Committee on Public Procurement established in its Report of 2011, highlighted how a system of limiting bidding to registered, pre-qualified bidders is subject to abuse. "... the combined effect of the limited number of registered vendors, the time taken in registration and the very limited volumes of supply allowed to a newly registered vendor suggests that the registration system is functioning in a manner that is not leading to adequate development of new vendors, so as to encourage competition, economy and effectiveness", observes the Report in Para 11.1. 3, while commenting on the procurement process of the Indian Railways.

However, in the "Parawise Dissent Note on Chapter 11 (Railways)", the representative of the Railways has given an effective defence of the system of procuring from pre-qualified registered bidders crucial items on the ground that "Railways cannot take the risk of premature failure of an item in terms of its quality. Safety/reliability in the Railways cannot be compromised by experimentation...." The Dissent Note has further gone on to highlight that the concept of approved vendors is recognised *inter alia* by UNCITRAL (vide its Article 7.1), the Federal Acquisition to Regulators (FAR) of the US (which deals with public procurement by the US government) and Article VIII (d) of the WTO GPA. In the revised GPA, the relevant provisions would be found in Article IX, which acknowledges the rights of Parties to the GPA and their procuring entities in maintaining a supplier registration system.

Recognising the merits of both sides of the argument, what the PPB has attempted to do is to make the process of prequalification of bidders under Section 13 and registration of bidders under Section 14 a very broad based, transparent and competitive process. To that effect, it has prescribed the following main safeguards:

- Wide publicity to be given to the invitation to pre-qualify (sub section 5 of Section 13) and the invitation to register as a bidder (sub section 2 of Section 14);
- Allowing potential bidders to apply for registration on a continuous basis or by inviting offers for a registration at least once a year (sub section 3 of Section 14);
- List of pre-qualified bidders to be valid only for a period and not on a permanent basis (sub section 2 of Section 13);
- Placing the list of qualified/registered bidders on the Central Public Procurement Portal (sub section 5 of Section 13 and sub section 4 of Section 14 respectively);
- Keeping no limitation of value of procurement for newly registered bidders, as currently done by the Indian Railways; and
- Criteria identifying pre-qualified bidders under Section 13(7) and registered under Section 14 (2) carry qualification criteria specified in Section 12 ('Qualification of Bidders').

These measures to make the process of pre-qualification and registration of vendors broad-based, competitive and transparent in the PPB find support in Article IX of the GPA, 'Qualification of Suppliers'. However, the said Article contains many more criteria than the PPB for ensuring the fairness, transparency and broad-based participation. *Inter alia* these include the following:

- The procuring entity to mention upfront, i.e. in the notice of intended procurement that it intends to use selective tendering, if such IS the case;
- Procuring entities must make efforts to minimise differences in their qualification procedures;
- Parties to the GPA should not adopt registration systems/ qualification procedures to create obstacles to participation of suppliers of other Parties to the GPA;
- All qualified suppliers should be allowed to participate in a particular procurement unless any specific limitation has been stated in the notice of intended procurement;
- When a procuring entity maintains a multi-user list of suppliers, the list is to be published annually. Where the list is published electronically, it should be made available on a continuous basis;
- Allowing suppliers to apply at any time for inclusion in a multi-user list and including in the list all qualified suppliers within a reasonably short time (this is similar to sub Section 3 of Section 14 of the PPB); and
- Informing any suppliers that submits a request for participation in procurement or applies for inclusion in a multi-user list of the procuring entity's decision with regard to the application. This is similar to sub Section 5 of Section 13 of the PPB.

Thus the monopolistic situation engendered by the restrictive system of registering of pre-qualified vendors, which has led to cartels being formed by vendors (vide Report of The Energy and Resources Institute in its Report to the Competition Commissioner of India cited at Page 85 of the Report of the Committee on Public Procurement, 2011) has been addressed to a large extent in the PPB, by making the pre-qualification and registration process broad-based and

transparent, while giving due recognition to the fact that pre-qualified registered vendors provide a reliable source of supply to procuring entities in certain situations.

But the additional features for strengthening transparency and fair competition as found in the GPA could be considered for adaptation by the PPB, as also the merging of Sections 13 and 14 of the PPB for better coherence.

Contents of Bidding Documents: Section 15 of the PPB and Article VII of the GPA

The standardisation of bidding documents is an important recommendation by the Committee on Public Procurement and other expert body reports. Its intention is to maximise objectivity in the conditions for bidding, thereby encouraging fair competition and wide participation. These objectives appear to be met in the provisions of Section 15 of the PPB. Comparison with the corresponding Article 7 of GPA ('Notices') also supports the PPB in the detailing of terms and conditions to be given in the notice of proposed procurement. Some extra features to be mentioned in the notice for inviting bids prescribed in the GPA which impart greater clarity/cover more situations than envisaged in the PPB include the following in para 2 of the said Article:

- The procurement method that will be used and whether it will involve negotiation or electronic auction;
- For recurring contracts, an estimate, if possible, of the timing of subsequent notices of intended procurement;
- The language or languages in which tenders or requests for participation may be submitted, if they may be submitted in a language other than an official language of the Party of the procuring entity; and
- Where a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them/any limitation

on the number of suppliers that will be permitted to tender.

The PPB could do well to incorporate some of these provisions of the GPA that the notice or invitation to bid can ensure better participation and competition.

Modes of Procurement: Section 29-36 of PPB and Article VII of GPA

The PPB2012 apparently provides for a wider variety of procurement methods, vide Section 29 thereof, compared to the GPA, vide Article IV thereof.

The PPB provides for as many as 8 procurement methods, vide sub section 1 of Section 29, which lists the following:-

- (a) Open Competitive Bidding; or
- (b) Limited Competitive Bidding; or
- (c) Two-stage Bidding; or
- (d) Single Source Procurement; or
- (e) Electronic Reverse Auctions; or
- (f) Request for Quotations; or
- (g) Spot Purchase.
- (h) "... any other method or procurement notified by the Central Government satisfying the principles of procurement contained in this Act and which that Government considers necessary in public interest".

Vis-à-vis this comprehensive list in the PPB Article VII of GPA provides for only 3 broad tendering procedures. Para 4 of Article IV provides as follows:

"A procuring entity shall conduct covered procurement in a transparent and impartial manner that is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering..."

The three major modes of tendering indicated in the GPA are defined as follows:

- a) Open tendering procedure, which means “a procurement method under which all interested suppliers may submit a tender” (Article 1 (m) of ‘Definition’).
- b) Selective tendering procedure, “whereby only qualified suppliers are invited by the procuring entity to submit a tender” (Article 1 (s) of ‘Definition’).
- c) Limited tender means “a procuring method whereby the procuring entity contacts a supplier or suppliers of its choice” (Article 1 (h) of ‘Definition’).

The PPB has not bothered to define each of the modes of procurement prescribed. It may be assumed, from the reading of the relevant section, that “Open Competitive Bidding” as mentioned in Section 29 (1) (a) refers to “Open tendering procedure” as defined in Art. 1 (m) of the GPA and Article 28 of the UNCITRAL model law; Limited Competitive Bidding refers to what is defined as “Selective tendering procedure” under Art. 1(s) of the GPA and “Restricted Tendering” in Article 29 (1) of the UNCITRAL model law; and “Single Source Procurement” approximates what is meant by “Limited tender” as defined in Article 1(h) of the GPA and “Single-source procurement” in Article 30 (5) of the UNCITRAL model law. All the other types of bids as mentioned in the PPB are variations on the 3 generic modes of bidding mentioned in the GPA.

Major Principles Regarding Modes of Procurement

The three major principles regarding the modes of procurement as appearing in the Bill are:

- (i) that “every procuring entity shall prefer open competitive bidding as the method of procurement to be followed” [Section 30(1)].

- (ii) that if a procuring entity chooses a procurement mode other than open competitive bidding “it shall record the reasons and circumstances thereof” [Section 30 (2)].
- (ii) 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”.

The reflection of these provisions (on first preference to open tendering and the option to government to make e-procurement compulsory) in the law of the land will, if properly implemented, do a great deal to bring transparency, competition and probity to the Indian procurement process.

In the WTO GPA, there is an exhortation in Paragraph 4 of Article IV that “a procuring entity shall conduct covered procurements in a transparent and impartial manner that ... is consistent with this Agreement, using methods such as open tendering, selected tendering and limited tendering”. Although the preference for open competitive bidding is not expressly mentioned in the GPA, the limitations set for use of other methods of procurement makes it clear that open competitive bidding is the preferred method.

As regards electronic procurement, the GPA does not appear to have accorded to it such paramount importance as in the PPB, where the right of government to make e-procurement compulsory for different stages and types of procurement has been envisaged in the provisions of Section 29(4) thereof. Although the Preamble to the GPA recognises “the importance of using and encouraging the use of electronic means for procurement covered by this Agreement”, the need to make electronic procurement compulsory has not been envisaged in the GPA.

Although not compulsory, e-procurement has been encouraged in the GPA. For example, in Article VII ('Notices'), regarding notice of intended procurement, Para 1 of the Article states

"Parties, including their procuring entities ... are encouraged to publish their notices by electronic means free of charge through a single point of access."

The UNCITRAL model law on procurement displays the same bias for open competitive bidding/open tendering, vide its Article 28(1), which mandates as follows:

"Except as otherwise provided for in Article 29 to 31(dealing with restricted tendering, two-stage tendering and electronic reverse auction), a procuring entity shall conduct procurement by means of open tendering."

However, like the GPA, the UNCITRAL model, although it encourages electronic procurement, unlike the PPB, nowhere mandates that it be made compulsory.

Open Competitive Bidding: Section 30 of PPB and Article VII of GPA

Section 30 of the PPB, already discussed above, displays the importance of this form of bidding in the Indian procurement system. This coincides with the spirit of the GPA, where, in almost every Article, exhortative or operational, the principles of non- discrimination and competition are upheld.

"Wide publicity" norms for open competitive bidding are prescribed "by exhibiting the invitation to bid on the Central Public Procurement Portal, by the procuring entity on its own website, and by giving wide publicity in the manner as may be prescribed."

The spirit of affording fair opportunity reflected through the above mentioned provisions are in common with the GPA,

whose Art. VII ('Notices') provides through its Para (1) that for "each covered procurement...a procuring entity shall publish a notice of intended procurement in appropriate paper or electronic medium listed in Appendix-III" except in the case of limited tendering and "such medium shall be widely disseminated and such notices shall remain readily accessible to the public, at least until expiration of the time period indicated in the notice".

What is confusing in Section 30 dealing with Open Competitive Bidding is its sub-section 4, which states that "The procuring entity may follow the pre-qualification procedure specified in Section 13 and invite bids from pre-qualified bidders." Surely, pre-qualification procedure refers to Limited Competitive Bidding (Section 31 of PPB) or Selective tendering procedure as defined in Art. I (s) of GPA and, therefore, should not have featured in these provisions dealing with open tendering.

Limited Competitive Bidding (Section 31 PPB)

Section 31 of the PPB lists the very limited circumstances in which limited competitive bidding may be undertaken, namely if:

- a) The subject matter of procurement can be supplied only by a limited number of bidders; or
- b) The time and cost involved to examine and evaluate a large number of bids may not be commensurate with the value of the subject matter of procurement; or
- c) Owing to an urgency brought about by unforeseen events...the subject matter of procurement cannot be usefully obtained by adopting the method of open competitive bidding; or
- d) Procurement from a category of prospective bidders is necessary in accordance with the provisions of sub-section 2 of Section 11 (dealing with offsets); or

- e) A list of registered bidders is maintained for the subject matter of procurement in accordance with the provisions of Section 14 (dealing with registration of bidders).

The justification for selective bidding has not been specifically given in the GPA, in contrast to the elaborate justifications in Section 31 of the PPB. In this regard, it appears that the PPB has kept more safeguards against erroneous use of discretion.

The procedure for limited competitive bidding in the PPB includes the invitation of bids from

- a. All bidders who can supply the subject matter of procurement; or
- b. An adequate number of bidders who can supply the subject matter for procurement selected in a non-discriminatory manner; or
- c. All bidders registered for the subject matter OF procurement in accordance with clause (c) of subsection 1: or
- d. The procuring entity is also to exhibit the invitation to bid on the Central Public Procurement Portal.

This provision appears to give an unnecessary amount of discretion to the procuring entity as to whom to invite for bids. When there is a system for registering of qualified bidders prescribed in Section 14 of the Act, which is maintained “with a view to identify reliable bidders for a subject matter of procurement or a class of procurement which may be commonly required across procuring entities” there is no reason why bids should not be invited from this systematically managed panel.

No criteria are mentioned in the Section for selection of award of contract. In contrast, the GPA contains provisions for supplying justification in this regard, vide the provisions contained in Para 2 (k) of Art. VII, which states as follows:

“...where, pursuant to Art. IX (‘Qualification of Suppliers’), a procuring entity intends to select a limited number of qualified suppliers to be invited to tender, the criteria that will be used to select them, and, where applicable, any limitation on the number of suppliers that will be permitted to tender” has to be mentioned in the notice of intended procurement.

Likewise, in Para 5 of Art. IX of the GPA, under ‘Selective Tendering’, “A procuring entity shall allow all qualified supplier to participate in a particular procurement, unless the procuring entity states in the notice of intended procurement any limitation on the number of supplier that will be permitted to tender and the criteria for selecting the limited number of suppliers.”

It would increase the element of transparency and fair play in the PPB if similar justification of criteria for selecting the suppliers who would be eligible to participate in a selective tendering process and the criteria that will be used to select for purpose of award of contract were prescribed as necessary conditions to be mentioned when engaging in Limited Competitive Bidding.

Single Source or Limited Tendering: Section 32 of PPB and Art. XIII of GPA

The PPB, through its Section 32 and the GPA, through its Article XIII, stipulates that single/limited tendering can be entered into only in exceptional circumstances, viz. the following:

- (i) Urgent, unforeseen need for procurement and engaging in any other mode of procurement being impracticable

- (vide Section 32 (1) (b) of PPB, comparable with Para 1(c) of Article XIII of GPA).
- (ii) The subject matter of procurement can be supplied only by a particular prospective bidder or a particular prospective bidder who has exclusive rights in respect of the subject matter of procurement (vide Section 32 (1) (a) of the PPB comparable with Article XIII (1) (b) of GPA).
 - (iii) Additional supplies required from the supplier who made original supply, for reasons of compatibility/standardisation with existing goods, equipment, technology or services (vide Section 32 (1) (c) of PPB comparable with Article XIII (1) (c) of GPA).

However, there are some important considerations in the GPA for engaging in limited tendering which have impact on competition/efficiency/price aspects of procurement. These conditions, in which restricted or limited tendering is permissible under the GPA may be considered for inclusion in the PPB, viz. the following:

- (i) In a case where no tenders were submitted/no suppliers requested participation; no tenders that conform to the essential requirements of the tender documentation were submitted; no suppliers satisfied the conditions for participation; or the tenders were collusive (Para 1 (a) of Article XIII);
- (ii) For purchases made under exceptionally advantageous conditions, which only arise in the very short term, like unusual disposal by firms which are not normally suppliers/disposal of assets of businesses in liquidation or receivership (Para 1(g) of Art. XIII).
- (iii) For goods purchased on a commodity market;
- (iv) For a “first good or service that is developed at its request in the course of ... a particular contract for

- research, experiment, study or original development” where the procuring entity has requested for the same.
- (v) Where a contract is awarded to a winner of a design contest, subject to certain conditions.

The PPB characteristically, maintains its emphasis on its core concerns of using procurement as an instrument of socio-economic upliftment/national security, by highlighting the national security interest clause and the purchase preference for promoting domestic industry/central public sector enterprises clause as reasons for procuring from a ‘single source’ if so required. As already discussed, carve-outs from the general non-discrimination principles to accommodate these concerns are not automatic, and have to be negotiated in the WTO GPA.

Under the PPB, as regards Single Source Procurement procedure provided in Section 32, subject to the conditions mentioned above, the procuring entity shall solicit a bid from a single prospective bidder and may engage in negotiations in good faith with the bidder. However, in the GPA, the transparency provisions are stricter: The procuring entity has to prepare a report on each contract awarded under Limited Tendering method, mentioning, *inter alia*, the circumstances and conditions that justified the use of limited tendering [Section 32 (2) of PPB/Art. XIII (2) of GPA].

Two-stage Bidding (Section 33 of PPB)

Mentioned in Section 29(1) (c) as one of the modes of procurement and elaborated in Section 33, it is yet one more technique of procurement based on standard procurement principles of open competitive bidding etc. Its special feature lies in that the technical bid is called for in the first instance. Thereafter, there is evaluation on the technical criteria, including, through discussions with the bidders, if required,

but affording equal opportunity to all bidders to participate in the discussion. All bidders whose bids were not rejected at the first stage are invited to bid with bid prices in response to a revised set of terms and conditions.

Two stage bidding is prescribed to meet special circumstances, such as the lack of feasibility for the procuring entity to formulate detailed specifications without receiving inputs regarding technical aspects from bidders or in a situation where the subject matter of procurement is subject to such rapid technological advances and market fluctuations to make open competitive bidding unfeasible; or the bidder is expected to carry out a detailed survey/undertake comprehensive assessment of risks, costs, obligations associated with the procurement; or the procuring entity seeks to enter into a contract for purposes of research. Two stage bidding has no exactly corresponding provision in the GPA, but since it is based on basic principles of competitive procurement, it is GPA-compliant.

Framework Agreements: Section 36 PPB

Mentioned as one of the methods of procurement in Section 29(2), and elaborated on in Section 36, it is a technique which may be based on open competitive bidding or any other procurement method in accordance with the provisions of the PPB (vide sub section 2 of Section 36). It is meant for the special circumstance where “the need for the subject matter of procurement is expected to arise on a recurring basis during a given period of time”, or the need for the subject matter of procurement, by virtue of its nature, “may arise on an urgent basis during a given point of time”. A Central Purchase Organisation or a procuring entity may enter into a framework agreement or a rate contract where it determines that the above mentioned conditions necessitate it. This type of contract has no parallel in the GPA, but since it is based on the established

modes of procurement, it cannot be said to be GPA non-compliant.

Request for Quotation and Spot Purchase modes: Section 35 of PPB

‘Request for Quotation’ and ‘Spot Purchase Modes (Section 35 of PPB) appear to be *ad hoc* modes of open competitive bidding, restricted to the procurement of goods and services below a prescribed monetary value and comprising of either readily available goods and services that are not specially produced/provided “to the particular description of the procuring entity” or goods, services and works “urgently required for maintenance of emergency repairs.” Even in such circumstances, quotations “shall be required from as many potential bidders as practicable.”

Price Negotiations: Section 23 of PPB and Article XII of GPA

The PPB prohibits price negotiation except where allowed in case of exceptional circumstances given under the provisions of Section 32, dealing with ‘Single Source Procurement’. Single Source Procurement is undertaken in exceptional circumstances and a further exception to the general rules of procurement in the PPB is this provision for the procuring entity to “to engage in negotiations in good faith with the bidder.”

Commentators on the PPB¹² have observed that procurement procedures practised hitherto in awarding public contracts in most developing countries “have generally refrained from allowing simultaneous negotiations between procuring entities and participating bidders at the pre-contract stage, the default practice being the selection of the lowest-priced supplier out of technically acceptable bids received.”

These private sector-like methods of public procurement, introduced in the US in the 1990s, are practised extensively in

the US, but the system places a great degree of trust on Contracting Officers. This trust is effectively supplemented by strong law enforcement with respect to maintaining integrity of the procurement process. The prime advantage in using these modern methods of procurement is their utility in achieving best 'Value for Money' for the Government through simultaneous negotiations. But use of these procedures requires that risks of unequal discussions and unauthorised transmissions of bid information are effectively contained through strong contractual oversight.¹³

The critics of the PPB have observed that since the draft PPB contains "only a skeletal framework for contracting, using these new methods, minus the details that will be available in rules to be subsequently promulgated, the new public procurement systems will certainly pose interesting challenges for Government Contracting Officers, for participating bidders and for legal practitioners alike."¹⁴

It is interesting to note that in the WTO GPA, vide Article XII thereof, the conditions under which negotiations may be conducted are different from that required under the PPB. Whereas, in the PPB, price negotiations are to be undertaken in Single Source Procurement, where the procuring entity has no options but to approach a single supplier, and the price negotiation is aimed at getting the best value for money in these conditions, in the GPA, such negotiations, are undertaken "where it appears from the evaluation that no tender is obviously the most advantageous in terms of the specific evaluation criteria set out in the notice of intended procurement or tender documentation." This is also subject to mention in the notice of intended procurement that the procurement method used would also involve negotiation; that eliminations of suppliers participating in negotiations is to be carried out in accordance with the evaluation criteria set out in the notice of intended procurement/tender documentation; and that

where negotiations are concluded, a common deadline is provided for the remaining participating suppliers to submit any new or revised tenders.

Even though the Indian draft Bill and the WTO GPA use negotiations under different contingencies, the conditions under which such negotiations can be entered into, such as fair notice to suppliers, elimination of suppliers only in terms of already published evaluation criteria etc. prescribed in the WTO GPA appear to be good checks against misuse of discretion and in favour of maintaining objectivity, fair play and transparency.

Given the note of warning by commentators aware of the international use of negotiating practices, it is advisable that the rules to be promulgated after the Act comes into existence should take into account the pros and cons of price negotiations as emerging from global practices as also the strict conditions which the WTO GPA uses for such negotiations.

Electronic Reverse Auctions and E-Procurement

Amongst the procurement methods mentioned in Section 29 (1) of the PPB is Electronic Reverse Auctions. Sub Section 4 of Section 29 of PPB further stipulates that “the Central Government may, by notification, declare adoption of electronic procurement as compulsory for different stages and types of procurement, and on such declaration, every requirement for written communication under this Act shall be deemed to have been satisfied if it were done by electronic means.”

In the revised version of GPA (2012 version) not only has the Preamble to the Agreement recognised the importance of using and encouraging the use of electronic means for procurement, but throughout the Agreement, wherever the modalities of procurement have featured, the main trend of the provisions has been to ensure that the use of electronic

means do not become a new trade barrier in some way. To that effect, Article IV containing ‘General Principles of Procurement’ emphasises that when conducting procurement by electronic means, it should be ensured that “the procurement is conducted using information technology systems and software ... that are generally available and interoperable with other generally available information technology systems”.

Similarly, in the ‘Tender Documentation’ procedures prescribed in Article X(7) it is provided that the documentation shall *inter alia* include “a description of authentication and encryption requirements /other requirements related to the submission of information by electronic means” where the procuring entity conducts procurement by electronic means. Where the procuring entity holds an electronic auction, “the rules, including identification of the elements of the tender related to the evaluation criteria on which the auction will be conducted” must be mentioned.

The PPB does have similar provisions to ensure that the electronic technique used does not itself restrict entry. Clause (b) to sub-section (2) to Section 34 provides that the invitation to participate in the auction shall include details relating to “(i) access to and registration for the auction; (ii) opening and closing of auction; (iii) norms for conduct of the auction and (iv) any other information as may be relevant to the method of procurement.” However, the detailed provisions of the GPA regarding the technical details to be provided for broad-basing e-auctioning may be considered in the Rules which would be promulgated once the Bill becomes law.

In India, the Committee for Public Procurement appointed by the Central Government, has recommended a comprehensive reform in procurement practices through the setting up of an electronic Public Procurement Portal to conduct various stages of the procurement process (vide

Chapter V of the Report of the said Committee submitted to Government in 2011). The perceived benefits from establishing a Centralised Public Procurement Portal are as follows:

- (a) The urgent need to bring transparency into the procurement process is addressed by ensuring proper publicity to tender inquiries, absence of which often prevents wide participation of vendors;
- (b) The effectiveness of this step could further be enhanced by ensuring that tender documents for all procurements are available on the website linked to the CPP;
- (c) The result of each bid, including the declaration of the successful bidders and the successful bid price should be published on the portal. This would bring under public scrutiny whether the conditions of the contract have been modified in any way during the processing of the tender, thereby giving opportunity to bidders to represent/seek redressal against any unjustified departure from the terms and conditions of the original tender notice;
- (d) Delays in procurement decisions can be effectively monitored through the CPP, obviating time and cost over-runs and depriving opportunity for malpractices;
- (e) Complaints/representations regarding the tendering process could be posted and traced in a separate section of the CPP so that the grievance redressal mechanism becomes more transparent/effective; and
- (f) As the centralised portal would be a means to enable disclosure of information on procurement across ministries/departments, comparison and analysis of the information uploaded could be used to maintain important efficiency indicators. These include comparison of prices of similar items across procuring entities: comparison of time taken in finalising contracts etc.

Although such a comprehensive role for electronic procurement as envisaged in the Report of the Committee of Public Procurement has not yet featured in the PPB, a beginning has already been made by Central Government. In the O.M. No. 10/1/2011-PPC, the Department of Expenditure as on November 30, 2011 made mandatory the publication of tender inquiries on the public procurement portal accessible at URL eprocure.gov.in developed by the National Informatics Centre (NIC) of India. This is with effect from January 01, 2012 for Central Ministries/Departments; with effect from February 01, 2012 for Central Public Sector Enterprises; and with effect from April 01, 2012 for autonomous/statutory bodies under the administrative aegis of the Central Government.

The Department of Expenditure's further notification dated March 30, 2012 (O.M. No. 10/3/2012 – PPC) mandates end-to-end e-procurement for all ministries and departments of Central Government and their attached and subordinate offices for all procurement worth an estimated value of INR 10,00,000 or more in a phased manner, as per a month-wise schedule for different departments. Copies of the two circulars are annexed (Appendix I & II) and available on the link <http://eprocure.gov.in>.

Electronic Reverse Auction has been defined as “an online real-time purchasing technique utilised by the procuring entity to select the successful submission, which involves presentation by bidders of successively lower bids during a scheduled period of time and the automatic evaluation of bids”, vide the definition given in Section 2 of the PPB.

The introduction of E-Reverse Auction into public procurement practice is a relatively recent phenomenon, enabled by contemporary developments in information and communications technology. Countries which have pioneered the technique of application of E-Reverse Auctions to public procurement include Brazil, the UK, Canada, Singapore,

Finland, France and the US. Countries in Central and Eastern Europe also promulgated e-reverse auctions over time.¹⁵ The WTO GPA has only recently, in its 2012 version and the UNCITRAL model law on procurement in its 2011 version, have, for the first time included e-procurement as a relevant mode of procurement. Thus, India is in the vanguard of early practitioners of this technique.

Due to the nature of the electronic reverse auction technique, in which bids are automatically ranked and re-ranked on the basis of price and some additional criteria which can readily be quantified, there has been a general tendency in international practice to confine the use of such procurement to standardised goods and some types of services. It is appropriate that the PPB restricts the scope of reverse e-auctions to such procurement, vide Section 34 (1) of PPB, which states that a procuring entity may choose to procure using the method of electronic reverse auctions if:

- “(a) It is feasible for the procuring entity to formulate a detailed description of the subject matter of the procurement; and
- (b) There is a competitive market of bidders anticipated to be qualified to participate in the electronic reverse auction, such that effective competition is ensured; and
- (c) The criteria to be used by the procuring entity in determining the successful bid are quantifiable and can be expressed in monetary terms”.

There appears to be no corresponding provisions to these either in Article XIV of the GPA, dealing with ‘Electronic Auctions’ or in Articles 53-57 of the UNCITRAL model law, dealing with E-Reverse Auction.

The fundamental principle of public procurement entails that the procuring entity should disclose to bidders, when soliciting their participation, the nature of the criteria and the

specifications, which would be used to evaluate the bid. The PPB fulfils these principles of transparency and fair play upheld by both the GPA (vide its Article VII dealing with ‘Notices’ and especially its para 2(f)) and the UNCITRAL model law (vide its Article 53), by prescribing in Section 34 (2) (a) that bids shall be solicited “by causing an invitation to the e-reverse auction to be published in accordance with sub section 5 of Section 30” (dealing with invitation to bid under the Open Competitive Bidding system) “or sub section 2 of Section 31” (dealing with the procedure of writing to potential bidders directly in case of selective bidding).

However, there is in the literature on the subject, disclosure requirements further to those mentioned in the GPA’s Art. X (7) cited above and in Art. 53 of the PPB, about the holding of e-reverse auctions that are specific to such a procedure.¹⁶

These include disclosures regarding:

- (a) The website where the reverse auction is to be held;
- (b) Technical requirements as to IT equipment to be utilised in conducting the reverse auction;
- (c) Information concerning the procedure to be followed in the reverse auction, including whether there is to be only a single stage, or multiple stages, and, in the latter case, the number of stages; and the duration of the stages;
- (d) Information about any starting price or other values (i.e. levels of technical features or terms such as delivery date) against which bidders would be bidding;
- (e) The minimum increment by which a variable feature subject to the auction is to be changed each time it is the subject matter of a new bid; and
- (f) The mathematical formula to be used in the electronic reverse auction to determine automatic re-ranking of bids etc.

The Section 34 of the PPB does give some particulars of this type, vide the provisions of its Section 34 (2) (b) discussed above. But the PPB's provisions for inviting suppliers to participate in e-reverse auctions would be further broad based if the above elaborated on disclosure norms, which are specific to the e-reverse auction technique, are mandated therein. Alternatively, they should find mention in the Rules accompanying the enactment.

A comparison of the procedures of e-procurement and e-auction as available in the PPB, the GPA and the UNCITRAL model law show that UNCITRAL has laid down the most detailed procedure of the three, taking into account many different contingencies and variations of the basic e-procurement model. There are, for example, important provisions contained in Article 56 of the UNCITRAL model law regarding 'Request during the e-reverse auction process', which are important to ensure fair play, taking into account the electronic medium being used.

These include that "(a) All bidders shall have an equal and continuous opportunity to present their bids; (b) there shall be automatic evaluation of all bids in accordance with the criteria, procedure and formula provided to suppliers ...; (c) each bidder must receive instantaneously and on a continuous basis during the auction, sufficient information allowing it to determine the standing of its bid *vis-a-vis* other bids; (d) there shall be no communication between the procuring entity and the bidders or among bidders," other than as specifically provided.

These detailed provisions of the UNCITRAL model may be considered for inclusion in Rules to the PPB, once the Bill is passed in the Parliament.

Additional Conditions for Use of Methods of Procurement (Section 37 of PPB)

This provision gives Central Government the leeway to add conditions for the use of any of the methods of procurement mentioned in the Bill, provided this is consistent with the principles of transparency and accountability. As such, there is no problem of incompatibility with any of the GPA principles.

Transparency Mechanism

Over and above the requirements for transparency mandated in every stage of the procurement process under the PPB, the GPA and the UNCITRAL model law, each of the three also have specific provisions prescribing norms for transparency. These are as follows:

- (i) In the PPB - Provisions under the heading 'Transparency Mechanisms' contained in Chapter III of the PPB comprising Sections 38 -39 thereof;
- (ii) In the GPA - Provisions under the heading 'Transparency of Procurement Information' featuring in Article XVI;
- (iii) In the UNCITRAL Model Law - Provisions relating to 'Publication of Legal Texts' featuring in Article 5, 'Information on possible forthcoming procurement' featuring in Article 6 'Communications in Procurement' featuring in Article 7 and 'Public Notice of Award of Procurement Contract or framework Agreement' featuring in Article 23.

These provisions, contained in Section 38 of the PPB, are new additions introduced at the stage of Cabinet approval and correspond to a large extent with Article XVIII of the GPA. The transparency mechanism in the Indian Bill is through a Central Public Procurement Portal to be set up by the

Government of India and accessible to the public for posting and exhibiting matters relating to public procurement, subject to the confidentiality provisions contained in Section 28 of the PPB. The Central Public Procurement Portal would, *inter alia*, provide access to information relating to pre-qualification documents, bidder registration documents, bidding documents any modification or clarification including those pursuant to pre-bid conference; list of bidders that presented bids and of bidders who were pre-qualified and registered, as the case may be; list of bidders excluded under Section 22, with reasons thereof; decisions taken during the process of grievance redressal under the provisions of Chapter III; details of successful bids, their prices and bidders; and names and particulars of bidders debarred by Central Government/a procuring entity, together with the name of the procuring entity, cause for the debarment action and period of debarment.

The information exhibited in terms of these provisions would be available on the portal for a prescribed period. Transparency on most of the main matters germane to fair play in the procurement process provided for through the said provisions of the Bill is likely to act as an effective check on discretion and arbitrary use thereof in the procurement process, given, of course, that the provisions are implemented in the right spirit.

Comparing these provisions of the PPB with those in Article XVI of the GPA, it is found that the GPA places dual responsibility on the procuring entity – to provide information to suppliers and also to publish decisions regarding award of contract publicly, in the prescribed paper or electronic medium mentioned in its Appendix III. The said Article, through its Para 1, prescribes for the provision of information by the procuring entity promptly to participating suppliers “on the entity’s contract award decisions”. One special feature which

the Article contains, and which is not available in the PPB, is that, on request, it provides “an unsuccessful supplier with an explanation of the reasons why the entity did not select its tender and the relative advantage of the successful supplier’s tender”. This feature may be considered for adoption in the PPB, to strengthen its transparency provisions further.

As regards ‘Publication of Award Information’, Para 2 of Article XVI of the GPA provides that the procuring entity publish, within 72 days after the award of each contract covered by the Agreement, the main features of the Award of contract, including the type of procurement method used, and “in the cases where limited tendering was used, ... a description of the circumstances justifying the use of limited tendering.” This is an attractive feature of transparency in the procuring process. It is heartening to note that the PPB also features this provision in its Section 39(1)(c).

The additional features of value in the PPB regarding transparency which are not provided for in the GPA are the stipulation to display in the Central Procurement Portal of particulars of bidders debarred by the Central Government/a procuring entity and decisions taken during the process of grievance redressal.

The UNCITRAL model law, in its Article 5, provides for public dissemination of procurement rules and regulations. Its Article 23 provides that award of procurement or framework Agreement should be published promptly.

All the three, that is the PPB, the GPA and the UNCITRAL model law contain provisions of non-disclosure of information/confidentiality provisions, in order to ensure that confidential information, whose disclosure would impede law enforcement/affect security interests of a State/might prejudice fair competition between suppliers or otherwise prejudice the legitimate commercial interests of supplier/would be contrary to the public interest, should not be disclosed. Section 28 of

the PPB, Article XVII of the GPA and Article 24 of the UNCITRAL model law may be seen in this regard.

Documentary Record of Procurement Proceedings

Contained in Section 39 of the PPB, this is a new provision introduced at the stage of Cabinet approval of the Bill. The provision requires a procuring entity to maintain a record of procurement proceedings and specifies the information that is to be mandatorily kept record of. It also provides for the period for retention of records after expiry of the procuring contract, for the purposes of its audit etc., which period is to be specified in the Rules.

The above provision was probably introduced to comply with India's obligations under the UNCAC, which India ratified in 2011. Article 9 of the UNCAC (titled 'Public Procurement and Management of Public Finances') in its para 3 prescribes that "Each State Party shall take such civil and administrative measures as may be necessary..... to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents."

The corresponding provisions in the GPA, vide para 3 of Article XVI, titled 'Maintenance of Documentation, Reports and Electronic Traceability' mandates that procuring entities maintain, for a period of at least three years from the date of award of contract, the documentation and reports of tendering procedures and contract awards, including reports under Article XIII(dealing with Limited Tendering). The appropriate "traceability of the conduct of covered procurement by electronic means" is also required. This requirement is worth taking note of and may be considered for incorporation in the rules to the PPB, once it becomes an Act.

The UNCITRAL model law, through its Article 25, provides that "the procuring entity shall maintain a record of the

procurement proceeding” and its Article 7 provides for communications in procurement made under the Act should be in a form that a record of the same can be maintained, which is accessible so as to be usable for subsequent reference. The provisions mentioned do not have any special features which could further enrich the PPB, if emulated.

Professionalisation: Section 43 of the PPB

The PPB provides that the Central Government “may prescribe professional standards to be achieved by officials dealing with procurement matters under this Act and specify suitable training and certification requirements for the same”. Through this requirement, the PPB takes note of the Indian reality, whereby, in many a case, it is seen that procurement professionals lack the necessary skills and specialisations to function as per required standards. This is a lacuna noted, *inter alia* by the Committee on Public Procurement in its report to the government, and it has noted amongst its recommendation that “the training need assessments may be done at the departmental/organisational level ... Since public procurement is an emerging field in India, the Department of Public Procurement (to be set up) should engage an existing institute to set up an ‘Institute of Public Procurement’ as a centre of excellence so that its academic input can add value to this nascent but vastly important field.”

It appears that this provision empowering government to take steps for professionalisation of the cadres dealing with public procurement are inspired, on the one hand, by the recommendations of the above mentioned Committee on Public Procurement, and, on the other hand by Article 9 (E) of the UNCAC, which states as follows:

“Each State Party shall ... 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. Such systems ... shall address, *inter alia*...

Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.”

Grievance Redressal in the PPB vis-à-vis Challenge Procedure in the GPA: Section 40 - 42 of the PPB, Article XVIII of the GPA and Article 64 - 69 of the UNCITRAL model law

The single most welcome feature of the the PPB is that it has *prima facie* addressed the lacuna felt in the existing Indian procurement system by providing for an independent grievance redressal structure. The draft Bill provides, through its Section 40 that “any bidder or prospective bidder, aggrieved by any decision, action or omission of the procuring entity which is in contravention to the provisions of this Act and the rules made thereunder may, within a period of ten days or such other period as may be specified in the pre-qualification document, bidder registration document or bidding document, as the case may be, from the date of such decision or action, make an application for review of such decision, action or omission as the case may be, to the procuring entity...”

If the procuring entity fails to dispose of within the prescribed time/fails to dispose of to the satisfaction of an aggrieved party a grievance application filed before it, then, within 15 days of the time limit set for disposal/receipt of its decision by the aggrieved bidder, the said bidder can take its case to an “independent procurement redressal committee” (vide Section 41 of the PPB). The Central Government is authorised to constitute one or more independent redressal committees of not less than 3 members, including its chairperson, who shall be a retired Judge of a High Court (sub section 3 & 4 of Section 41). The members of the

committee shall have “proven integrity, experience in public procurement” and experience at senior level in public administration or public finance or management OR engineering or scientific projects or management of central public enterprise”, vide sub-section (5) of Section 41.

Provision for such an independent review body, it goes without saying, is in tune with world best practices, including with the model available in the WTO GPA. The GPA provides that if resolution of the complaint in consultation with the procurement entity fails, there is provision for challenge to be heard “... by an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge” (vide para 5 of Article XVIII, GPA).

However, the next feature which strikes while studying the two systems available in the PPB and the GPA, is that there is a marked difference in the powers of the independent review body in each system to provide meaningful relief, if it finds that a grievance/bid protest is justified. The review body, under the provisions of para 7 of Article XVIII of the GPA has authority to determine “that there has been a breach or a failure”, to ask that each Party to the Agreement “shall adopt or maintain procedures that provide for ... corrective action or compensation for the loss or damage suffered ...” In short, the review body can issue binding orders to the contracting agency, under the GPA. IN contrast, under sub sections 8,13 and 14 of Section 41 of the PPB, the independent Procurement Redressal Committee can do no more than recommend action to the contracting agency, vide the following sub sections of Section 41:

Sub section 8: “On receipt of an application under sub section 1, the committee shall, after giving an opportunity of being heard to the procuring entity as well as the applicants, determine as to whether the procuring entity has complied

with the provisions of this Act, the Rules made thereunder and the terms of the pre-qualification, bidder registration or bidding document, as the case may be, and communicate its recommendations, including the corrective measures to be taken, to the procuring entity and to the applicant”.

Sub section 13; “The procurement redressal committee may recommend to the procuring entity the suspension of the procurement process pending disposal of the application, if, in its opinion, failure to do so is likely to lead to miscarriage of justice”.

Sub section 14; “An application filed under sub section 1 shall be dealt with as expeditiously as possible and the committee shall, within the period of 30 days from the date of its receipt make its recommendations on the action to be taken by the procuring entity or applicant or both”.

Since the contracting agency is itself a party to the dispute, its objectivity and willingness to act on recommendations of the tribunal are debatable. As commentators on the subject have observed, “The question of the forum’s (that is the independent review body’s) political environment may be critical in terms of whether the recommendations are usually followed.”¹⁷

Even though some other well-established procurement redressal systems, like that of Canada, have only power to recommend relief, this perceived weakness is to some extent mitigated by the obligation that recommendations are to be implemented to the greatest extent possible by the relevant procuring institution. In contrast, in India, “On receipt of a recommendation of the procurement redressal committee, the procuring entity shall communicate its decision thereon to the applicant and to the committee within a period of 15 days or such further period not exceeding 15 days, as may be considered necessary from the date of receipt of the recommendation, and in case of non-acceptance of any

recommendation, the reasons for such non-acceptance shall also be mentioned in such communication.

No doubt the requirement for recording reasons for non-acceptance of the recommendations of the procurement redressal committee will enforce disciplines on the procuring entity to give objective and judicious defence of its reasons for non-acceptance. Even so, the ineffectiveness of the procurement redressal machinery may be said to lie in its inability to get its determination implemented mandatorily. In the absence of any further appellate body to give relief, the aggrieved vendor's chance for redressal finally depends on the will of the procuring entity to accept or refuse the recommendation of the review body. The aggrieved vendor has no other choice thereafter but to enter into the age-old, time-taking and costly procedure of arbitration or of invoking the writ jurisdiction of the High Court. This was also earlier the case, before the PPB was formulated.

Under the WTO GPA, there is a judicial forum which the aggrieved party can approach in case the review body is not a Court, but an administrative authority, like the procurement redressal committee under the PPB. Article VIII, vide its para 6 of the GPA provides that “... that a review body that is not a court shall have its decisions subject to judicial review or have procedures that provide...” that the full formalities of judicial procedures be accorded to the aggrieved party. These include right of the aggrieved party to be heard, to be represented, to have access to all proceedings, to public proceedings and production of witnesses and to have a decision of the review body in timely fashion, in writing and including explanation of the basis for each decision or recommendation. Since under the PPB, full-fledged judicial procedure as prescribed in the GPA has not been provided for, it is felt that the right to judicial review should have been afforded with

regard to the decisions of the Procurement Redressal Committee.

Even expert bodies in India are unanimous in recommending, albeit with minor variations, a three-tier redressal mechanism. The Committee on Public Procurement set up by the government recommends an internal review mechanism at the level of the Head of the procuring entity or a senior officer designated by him, at the first level, followed by an independent quasi-judicial review body at the second level, with a provision for appeal to a Procurement Tribunal at the third level, and “exclude the jurisdiction of the courts, except for writ jurisdiction, which cannot be excluded” (para 3.3 of the report of the committee on Public Procurement, 2011). The TERI of India, in its report of 2012, recommends appeal to the procurement department, to be followed by appeal to an independent quasi-judicial body, followed by a right to appeal against the decision of the quasi-judicial body to a higher judicial body.

However, what the expert body reports have failed to highlight, is that allowing sequential protests, as available in the WTO GPA or the Canadian system, involves a series of trade-offs. On the one hand, allowing sequential protest increases accountability and “due process”. On the other hand, it also increases the cost and time spent in resolving the challenge. Thus, the choices before the policy makers in this regard are not that simple. A via media between the two alternatives would be to allow reference from the internal review mechanism to an independent quasi-judicial review body having powers to give a binding decision and end it at that in normal situations, but in case of contracts over a considerable threshold value, allow appeals to a court from the orders of the Tribunal.

Other features of the PPB are on par with the international best practices incorporated to a large measure in the GPA.

For example, its procedures are such that they afford natural justice for the aggrieved bidder while presenting its case through affording it an opportunity of being heard (sub section 8 of Section 41) and by mandating that “every committee shall dispose of the application by such procedure as it may consider appropriate and shall follow the principles of natural justice” (sub section 11 of Section 41). This corresponds in spirit with the fair opportunity provisions of para 6 of Article XVIII of GPA, although the full formality of court procedures required in the GPA are absent.

The UNCITRAL model law under its Chapter VIII dealing with ‘Challenge Proceedings’ and comprising of Article 64 to 69, also provides for an independent review body, whose decisions are binding.

A new public procurement legislation, ushering in major reforms in the procurement system coming down since India’s independence, was meant to be an important instrument in the government’s armoury of measures to address the public perception about the rise in corruption in the utilisation of public funds. Given the dimensions of the recent instances of malpractice by procuring entities in the award of public contracts, effective public procurement legislation was very much a public expectation, and at the heart of the effectiveness of this legislation was an effective bid challenge procedure. It is of the utmost importance that serious consideration be given to giving teeth to the bid challenge procedure under the PPB by making the determination by the review body, i.e. the procurement redressal committee, a binding one and by introducing a mode for appeal against the orders of this body for contracts above a certain threshold value.

The Probity Aspects of the Public Procurement Bill

One vital difference between the PPB and the WTO GPA is the emphasis each of these instruments place on probity

aspects. The PPB, since India signed the UN Convention Against Corruption in May 2011, has taken on the mandate of promoting “accountability and probity” and “maintaining integrity and public confidence in the public procurement process”, in addition to promoting “competition, enhancing efficiency and economy” through “transparency, fair and equitable treatment of bidders”, vide its ‘Statement of Objects and Reasons’ dated May 02, 2012. The WTO GPA, till its amendment in December 2011, had, as its main focus as evident from its Preamble, the need to maintain “an effective multilateral framework for government procurement with a view to achieving greater liberalisation and expansion of ... international trade” through non-discrimination among foreign and domestic products or services, transparency of laws and procedures etc.

In fact, the OECD guidelines of 2008 admit to a certain lacuna in the WTO GPA and the UNCITRAL, when it states that “International legal instruments, such as WTO GPA and UNCITRAL model law, that primarily aim at ensuring the free movement of goods and services, are under review to reflect the underlying concerns in relation to integrity and the fight against corruption”. However, after its amendment in 2011, the GPA added certain probity features. Its Preamble recognised “the importance of ... carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices in accordance with applicable international instruments, such as the UN Convention Against Corruption.”

However, the emphasis on probity and integrity aspects in the GPA is somewhat cursory. Other than its Preamble, the main reference to the probity aspect comes only in Article IV, Para 4, which *inter alia* holds that the conduct of procurement shall be “in a transparent and impartial manner that ... avoids conflict of interest and prevents corrupt practices.” However,

unlike the PPB, it has neither a Code of Integrity binding on both the procuring entity and the bidders nor does it provide for recognition of offences, provision of penalties and debarment on account of corrupt practices engaged in by either side in a procurement contract. In short, its reference to avoidance of conflict of interest and corrupt practices is merely exhortative, and carries no consequences in case of infringement.

Unlike the GPA, the PPB provides for a detailed code of conduct binding on both sides in a procurement situation and carrying with it, in case of infringement, certain consequences. These include exclusion of the bidder from the procurement process, calling off of pre-contract negotiations and forfeiture or encashment of bid security, recovery of payments made by procuring entity, cancellation of the relevant contract and recovery of compensation as also debarment of the bidder from participation in future procurement of the procuring entity for a period not exceeding two years.

The PPB's focus on probity in the procurement process owes its origins to a domestic felt need for the government to put in place a multi-pronged strategy to tackle corruption. The terms of reference of the GoM on corruption constituted by the government in 2010 were to suggest measures to tackle corruption, including legislative and administrative measures, with a special highlight on "ensuring full transparency in public procurement and contracts, including enunciation of public procurement standards and a public procurement policy."

The second big impetus for highlighting the probity aspect in public procurement probably owes its origins to India's UNCAC, ratification of the UNCAC, 2005 in May, 2011. The purposes of the Convention, *inter alia* are:

"to promote integrity, accountability and proper management of public affairs and public probity."

Article 9 of the Convention, which is on ‘public procurement and management of public finance’ mandates each State Party to 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.” Two other Articles of the UNCAC which impinge the integrity of the procurement process and which have influenced the formulation of the PPB, are Article 12, governing the conduct of the Private Sector and Article 26 (Liability of Legal Person) committing States to adopt measures to establish the liability of legal persons for participation in the offences established in accordance with the Convention, such liability being without prejudice to the criminal liability of the natural persons who have committed the offences.

The specific focus on probity of the PPB is evident in the provisions for introducing a ‘Code of Integrity for the procuring entity and bidder’ (Section 6); requiring professional standard, training and certificates for Procurement Personnel (Section 43); and introduction of ‘Penalties and Debarment’ for criminal offences under the Bill. The penal provisions include mandating punishment for taking or offering gratification in respect of public procurement (Section 44, 45) and abetment of such offences (Section 48), as also providing for debarment from bidding (Section 49) in certain circumstances. The GPA, whose main concern is with promoting fair competition and transparency, has no corresponding provisions mirroring these concerns.

The unique features of the Code of Integrity for Procuring entity and Bidders provided for under Section 6 of the Bill is that it is simultaneously binding on the officials of the procuring entity and the bidder, that is the bribe taker and the bribe giver. This is a unique feature in Indian anti corruption legislation. The main anti-corruption enactment in India, the

Prevention of Corruption Act, 1988, is binding only on the bribe-taker. There is no mention of the bribe-giver directly in the Prevention of Corruption Act. Section 12 contains a prohibition against ‘abetment’ of offences defined in Section 7 (‘Public Servant Taking Gratification other than Legal Remuneration in respect of any official act’) and Section 11 (‘public servant obtaining valuable things without consideration from person concerned in proceedings or business transactions by such public servant’) and presumably, the act of offering illegal gratification is covered under the ambit of ‘abetment’, which will then have to be proved. Moreover, even the offence of abetment is diluted in the Prevention of Corruption Act by exempting the bribe-giver from prosecution in case he turns approver, through “a statement made by a person against a public servant for an offence under Section 7-11 or under Section 13 or Section 15, that he offered or agreed to offer any gratification or any valuable thing” (Section 24 of the Prevention of Corruption Act).

Not only does the Code of Integrity bind both the procurement entity officials and the bidders against acceptance or offer of illegal gratification in exchange for unfair advantage in the procurement process, it also prohibits omission or misrepresentation to obtain financial benefit; collusion, bid rigging or other anticompetitive behaviour; improper use of information provided through the procuring entity by a bidder, coercion or threat to influence the procurement process; obstruction of investigation in a process etc. (Clause A of sub section 2 of Section 6). It enjoins the disclosure of conflict of interest and disclosure by the bidder of any previous transgression in terms of any acts prohibited in sub section 2 (a).

The span of control of these provisions, attempting to deal with both criminal and anticompetitive behaviour, are unprecedented in the previous Indian anti-corruption

legislation, like the Indian Penal Code (IPC) or the Prevention of Corruption Act, 1988 and makes these provisions in tune with the market realities of a fast- globalising India. The proactive stance of the PPB on offences of the private sector bring it in tune with the UNCAC, whose Article 12 mandates that “each State Party shall take measures in accordance with the fundamental principle of its domestic law, to prevent corruption involving the private sector.... and where appropriate provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures”.

Another new step in corruption deterrence in the Indian context is the provision contained in section 47 which holds that where an offence under the act has been committed by a company, not only every person who at the time was responsible for the conduct of the business of the company, but the company as well “shall be deemed to be guilty of having committed the offence and shall be liable to be proceeded against and punished accordingly”. Inspired by Article 26 of the UNCAC on the liability of legal persons in offences committed, it is likely to further strengthen the probity aspects of the bill.

The UNCITRAL model law remains limited to concerns to promote transparency and fair competition and, unlike the PPB, does not display any other specific commitment to integrity concerns, as through a Code of Conduct or penal provisions for malpractices.

Overall Comparison of the PPB with the WTO GPA

An overall comparison of the two shows that in terms of ensuring transparency, competition, non-discrimination and fairness of procedures in the procurement process, both the PPB and the WTO are equally effective. There are a few matters in which the Rules to be promulgated once the PPB

becomes an Act, must take care to see that the objectivity of procedures is further complemented through them.

Certain broad departures in outlook from the GPA are discernible in the Bill, in that it is not purely meant to provide a stimulus to trade, like the GPA, but is, on the one hand, meant to leverage public procurement to serve India's socio-economic concerns, such as promotion of domestic industry or extension of procurement preference to micro and small industry, and, on the other hand, to reflect India's concerns regarding issues of probity in public procurement and promotion of the principles enshrined in the UN Convention Against Corruption, which Convention India ratified in 2011.

Thus, the PPB creates clear policy space, through its Section 11.2 which allows government to provide for purchase and price preference to any category of bidders to promote domestic industry, give expression to its socio-economic concerns or for any other consideration in public interest, in furtherance of a duly notified policy. The GPA, in contrast, makes non-discrimination between domestic and foreign suppliers the general rule, and allows domestic preferences to new entrants to the GPA only as favours which may be extended to developing countries, and that, too, subject to negotiations.

As regards probity issues, whereas the GPA is merely exhortative, the PPB puts forth a code of conduct binding on both parties to a procurement contract, makes non-adherence to this code of conduct damaging for those concerned and defines offences and lays down penalties for malpractices.

The PPB, although it has created an independent grievance redressal or review mechanism, in the shape of procurement redressal tribunals, completely independent of the procuring entity, comprising of eminent persons of undoubted integrity under the chairpersonship of a retired judge of a High Court, unlike the GPA, has empowered these tribunals with

recommendatory powers only. Unless the grievance redressal authority is able to give binding decisions, fair play cannot be ensured under the disciplines ushered in by the PPB. The procuring entity, which is itself a party to wrongdoing and has already rejected the direct request of the aggrieved party for redressal (only after which rejection the aggrieved party may approach the tribunal) is hardly likely to accept the recommendations of the tribunal. Nor is there any provision for judicial review from the decisions of the tribunal, as has been provided for under the GPA, in case the review body, like the public procurement tribunal under the PPB, is not a judicial body. In the matter of grievance redressal/review/bid challenge mechanism, it is felt, the PPB needs to adopt a model on lines of the GPA to be more effective.

The question as to whether, in view of the major differences in outlook between the WTO Agreement and the Indian draft legislation, there would be any inclination for India to accede to the WTO GPA sometime in the future is addressed in the final chapter of this study.

Overall Assessment of the Public Procurement Bill, 2012: Whether the Bill Lives up to its Expectations?

The introduction of an enactment on the subject of public procurement fulfils a long-perceived need to bring order to the chaos prevailing in the Indian procurement scenario, which, till date, is regulated only by executive instructions in the form of GFR, which do not have the force of law, and where there are marked differences in the practices being followed across ministries and organisations, some of which are at odds with the GFR.

Coming to the substance of the Bill, its objectives are to serve the twin goals of “*ensuring transparency, accountability and probity... and maintaining integrity and public confidence in the public procurement process*” on the one hand and

promoting “*fair and equitable treatment of bidders, promoting competition, enhancing efficiency and economy*” on the other. In a way, the very duality of its objectives, the deep-rooted concern with both competition and probity issues, makes the bill unique, as the international legal instruments and guidelines on the subject mainly comprehend only one perspective or the other. The UNCITRAL Model Law and the WTO Agreement on Government Procurement, for instance, are mainly focused on competition and transparency issues, as they primarily aim at ensuring the free movement of goods and services, while instruments like the UN Conventional Against Corruption, 2003 and the OECD Guidelines, 2008 (“Enhancing Integrity in Public Procurement”) are mainly concerned in providing guidance at the policy level on enhancing integrity in public procurement.

The PPB’s focus on probity in the procurement process owes its origins to a domestic felt need for the Indian government to put in place a multi-pronged strategy to tackle corruption as also to its becoming a party to the UNCAC in December 2005 and its ratification of the said Convention in May 2011. To this effect, the PPB puts forth a code of integrity binding on both parties to a procurement contract, makes non-adherence to this code of conduct have damaging consequences and defines offences and lays down penalties for malpractices.

The WTO GPA, after its amendment in 2011, added certain exhortations to probity in its Preamble which recognises “the importance of ... carrying out procurements in a transparent and impartial manner and of avoiding conflicts of interest and corrupt practices in accordance with applicable international instruments, such as the UN Convention Against Corruption” and in its Article IV, Para 4, which *inter alia* exhorts that the conduct of procurement shall be “in a transparent and impartial manner that ... avoids conflict of interest and prevents corrupt practices...”.

However, the emphasis on probity and integrity aspects remains restricted to exhortations, as there are no operative clauses which enforce adherence to probity principles. The PPB also strikes some new notes in Indian anti-corruption law, as, unlike the Prevention of Corruption Act, India's main anti-corruption legislation, it addresses both the supply and the demand side of corruption, making both acceptance and offer of inducement for wrongful advantage an offence. In this, it follows the lead of the UNCAC, which seeks to address corruption in both the public and the private sector.

The competition concerns in the Bill are well served by provisions which ensure broad-basing of bidders through adequate publicity on procurement opportunities/objective pre-qualifying criteria for bidders; framing of objective specifications for the items of supply; evaluation of bids based on pre-disclosed criteria; enshrining open competitive bidding as the norm and allowing restricted bidding only in exceptional circumstances; fixing time lines for processing the bids to obviate interference in the procurement process; compulsory publishing of tender results; promoting e-procurement; restricting cartelisation; and provision of an independent review/grievance redressal mechanism. In this regard, the Bill incorporates the best international practices as reflected in the WTO's GPA and the UNCITRAL model law, and sometimes even improves on the original, for example, by empowering government to make electronic procurement mandatory/providing for the setting up of a central e-procurement portal, which takes the standards of transparency to a higher level than that prescribed in the GPA.

However, the jewel – in the crown of any system of rules is its ability to address perceived transgressions. That is where it is tested whether the rules have “bite”, i.e. enforceability, or they are simply “best intention” clauses. Unfortunately, it is in this critical area that the Bill falters. The Bill sets up an

independent grievance redressal mechanism, but it is nowhere as effective as that provided for in the WTO GPA.

Although the Procurement Redressal Committees to be set up by the Central Government under the provisions of Bill would be completely independent from the procuring entity and would comprise of individuals of “proven integrity and experience in public procurement” under the chairmanship of a retired Judge of the High Court, the fact remains that the powers of the Tribunal are restricted to simply making recommendations to the procuring entity. The latter has a right to reject the recommendation under sub section 15 of Section 41 of the Bill, the only saving grace in the matter being that reasons for non-acceptance of the recommendations would have to be communicated to the aggrieved bidder and the Procurement Redressal Committee. Since the procurement agency is itself a party to the dispute, its objectivity and willingness to accept the recommendations of the Tribunal are debatable.

In contrast, other international enactments on public procurement, like the WTO GPA, provide for an independent body to be set up under the ‘Challenge Procedure’, which has the authority to order the correction of a breach of the Agreement or compensation for the loss or damages suffered by a supplier, and, pending the outcome of the challenge, the authority to order rapid interim measures, including the suspension of the procurement process, to correct breaches of the Agreement/ preserve commercial opportunity (vide Article XX:7 of GPA). The UNCITRAL model law on public procurement, under its Chapter VIII dealing with ‘Challenge Proceedings’ and comprising of Article 64 to 69, also provides for an independent review body, whose decisions are binding.

Furthermore, there is not even a next level of appeal provided for, which could act as the final refuge for the aggrieved bidder, although a two-tier redressal mechanism has

been recommended in the Report of the Expert Committee on Government Procurement set up by the government, on whose recommendations the Bill is largely based. Having sequential appeal mechanism is no doubt expensive and time-consuming and delays in execution of the contract impact public interest which is of paramount importance in public procurement. But on the other hand, it ensures “due process.” A golden mean would be to provide for reference to a higher body only in cases where the procurement contract is above a very high threshold level.

India’s public procurement regime, except for a limited degree of preference for micro and small enterprises/public sector enterprises, maintains non-discrimination between domestic and foreign suppliers, a fact which is *inter alia* confirmed in every four-yearly trade policy review of India by the WTO. This basic feature of the GP regime has not undergone any change in the newly formulated Bill. There is a criticism by some commentators regarding the draft PPB that if under its disciplines, non-discrimination between domestic and foreign suppliers is a rule, with provisions for preference to domestic industry as an exception to be invoked in special circumstances, there may be strategic disadvantage for India and the Bill may be running against the trend of current government policy.¹⁸

The NMP, 2011, *inter alia*, leverages public procurement to stimulate manufacturing in India. Also, the international practice is to limit participation in government procurement to domestic players, except to the extent necessitated by force of bilateral/plurilateral agreements. In the face of the current economic recession, this protectionist tendency is being strengthened by further policy instruments, such as the US mandate, as part of its Federal stimulus funding package, that all steel and cement to be used in public works would have to be US manufactured. The EU’s latest directive reducing

minimum mandatory time limits for notification of public tenders/increasing the maximum threshold for restricted tendering, effectively reduces the opportunities for foreign bidders.

A criticism of the PPB, 2012 is that in unconditionally providing national treatment to foreign bidders, through its Section 11, it flies in the face of both current economic strategy in India, and also goes counter to the international practice in this regard. It takes away the negotiating space necessary for a government to cater to its domestic preferences freely, without taking recourse to exceptions under the law. It may also be not left with any leverage with which to squeeze out concessions from its trading partners in exchange for providing reciprocal market access, in case accession to GPA is contemplated.

There are two arguments against this approach. First, the concern for India is not merely one of securing protection for its domestic industry. It is also that of securing best quality at best price for its domestic consumers, who are to a large extent dependent on publically procured goods and services. Fostering open competition in the Indian market, including from foreign players, is important for this purpose. A totally protected market in government procurement, as in the pre-liberalised era of the Indian economy, will have its dangers of regression for the entire economy, given the considerable size of the Indian GP market.

Secondly, the Bill provides the necessary flexibility to safeguard domestic preference in the sectors in which there is a perceived need. The Bill empowers the Central Government to provide by notification for “mandatory procurement of any subject of procurement from any category of bidders or purchase preference in procurement from any category of bidders” on the ground of (a) promotion of domestic industry, (b) socio-economic policy of the Central Government and (c)

“any other consideration in public interest in furtherance of a duly notified policy of the Central Government”(sub section 2 of Section 11 of the draft Bill). The further deepening of the special preference accorded to the MSE sector by reserving 20 percent of all Central procurement for this sector with effect from April 01, 2012 (vide Central Government notification dated March 23, 2012) is one example of the government’s ability to prioritise domestic preference as and when needed, utilising the flexibilities within the procurement system.

To sum up, the PPB appears to have internalised some of the best international practices and presented them in a way suited to India’s current needs. The few areas where it needs strengthening have been mentioned. Government procurement comprises as much as 20-30 percent of GDP in India, if both procurement by Centre and State and their PSEs and attached organisations are taken into account. Given this weightage of public procurement in the nation’s economic activity, the early passage of the Bill with the modifications indicated, through the competitive and transparent practices upheld by it, will help to usher in a healthier business ambience and thereby facilitate the much awaited second generation economic reforms in India.

Endnotes

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- 4 *Ibid*
- 5 Fiches, B (2011) ‘Public Procurement - Buy Chinese Policy’ etc., October dated 10, 11. 2011 available at http://madb.europa.eu/madb_barriers/barriers_details.htm accessed on August 01, 2012

- 6 Support for Improvement in Governance and Management (2011) “Brief 1: Public Procurement in EU: Legislative Framework, Basic Principles and Institutions”, available online at <http://www.oecd.org/site/sigma/publicationsdocuments/publicprocurementpolicybriefs.htm>Support for improvement in Governance and Management,” Brief 1: Public Procurement in E.U : Legislative Framework, Basic Principles and Institutions”, January, 2011,
- 7 Sandeep Verma, ‘Domestic Preferences in Public Procurement’, the Business Standard, December 26, 2011 available at www.business-standard.com/india/print page accessed on August 01, 2012
- 8 *Ibid*
- 9 Supra Note 2
- 10 As claimed in an article published in the Financial Express, May 05, 2012, Cited Supra in Note 2
- 11 This is evident through several working papers of the WTO and academia and the presentations made by the Deputy Director General WTO, Harsh Vardhan Singh and Robert D Anderson, Head, Government Procurement Wing of WTO Secretariat. Anderson, R et al (2012) ‘The Government Contractor’ Public Law and Legal Theory Paper No. 2012-7, of the George Washington University Law School, Volume 54, Number 1.
- 12 Sandeep Verma, ‘Competitive Negotiations in Government Procurement’, Business Standard, January 16, 2012.
- 13 *Ibid*
- 14 *Ibid*
- 15 Sahaydachny, S (2005) (Draft) ‘Electronic Reverse Auctions’, available online at <http://docs.law.gwu.edu/facweb/schooner/RevAuctions-Sahay.pdf>.
- 16 *Ibid*
- 17 Gordon, D (2006) ‘Constructing a Bid Protest Process’ Public Law and Legal Theory Paper No.2000, the George Washington University School, Washington DC, USA.
- 18 Sandeep Verma, ‘Domestic Preferences in Public Procurement’, Business Standard, December 26, 2011.

Annexure 3.1
Office Memorandum on
Central Public Procurement Portal

No.10/1/2011-PPC
Ministry of Expenditure
Department of Expenditure
Public Procurement Cell

North Block, New Delhi
Dated 30th November, 2011

OFFICE MEMORANDUM

Subject: Mandatory publication of Tender Enquiries on the Central Public Procurement Portal

Pursuant to the decisions of the Group of Ministers constituted to consider measures to tackle corruption and improve transparency, on the recommendations of the Committee on Public Procurement set up to look into various issues having an impact on public Procurement policy, standards and procedures, it has been decided that:

- a. NIC will set up a portal called the Central Public Procurement Portal (hereinafter referred to as CPP Portal) with an e-publishing module (similar to NIC's website www.tenders.gov.in) and e-procurement module (similar to NIC's e-procurement sites such as pmgsytenders.gov.in and epro-nics.nic.in). The CPP Portal will be accessible at the URL **eprocare.gov.in** and will provide links to the non-NIC e-procurement sites being used at present by various Ministries/ Departments, CPSEs and autonomous/ statutory bodies.
- b. While e-publishing of tender enquiries, corrigenda thereto and details of contracts awarded thereon, on the Portal, shall be made mandatory in a phased manner w.e.f 1st January 2012, the comprehensive end-to-end e-procurement feature would be implemented in a phased manner w.e.f 1st April 2012, for which instructions will be issued separately. IN the meantime, Digital Signature, which is essential at the e-procurement phase, may

be obtained from any Certifying Authority or from NIC which is also a Certifying Authority, for the concerned officials.

E-Publishing:

- c. It will be mandatory for all Ministries/ Departments of the Central Government, their attached and subordinate offices, Central Public Sector Enterprises (CPEs) and autonomous/ statutory bodies to publish their tender enquiries, corrigenda thereon and details of bid awards on the CPP Portal using e-publishing module with effect from the following dates:
 - c.i. Ministries/ Departments and their attached and subordinate offices w.e.f 1st January 2012;
 - c.ii. CPSEs w.e.f 1st February 2012;
 - c.iii. Autonomous/ statutory bodies' w.e.f 1st April 2012.
- d. Individual cases where confidentiality is required, for reasons of national security or to safeguard legitimate commercial interest of CPSE's would be exempted from the mandatory e-publishing requirement. As far as Ministries/ Departments are concerned, decisions to exempt any case on the said grounds should be approved by the Secretary of the Ministry/ Department with the concurrence of the concerned Financial Advisor. In the case of CPSEs, approval of the Chairman & Managing Director with the concurrence of Director (finance) should be obtained in each case to be exempted. In the case of autonomous bodies/ statutory bodies, approval of the head of the body with the concurrence of the head of the Finance function, should be obtained in each such case. Statistical information on the number of cases in which exemption was granted and the value of the concerned contract, may be intimated on a Quarterly basis to the Ministry of Finance, Department of Expenditure at the email id cppp-doe@nic.in
- e. Ministries/ Departments, CPEs and autonomous/ statutory bodies that are already publishing their tender enquiries on www.tender.ov.in and/or their respective websites, shall ensure that their tender enquiries are simultaneously published/ mirrored on the CPP Portal also. They may also ensure of the corrigenda and details of the contract awarded as a result of the tender enquiry, are also published on the CPP Portal
- f. Ministries/ Departments, CPSEs and autonomous statutory bodies that are already carrying out e-procurement through

NIC or their own website or through any other service provider, shall ensure that details of all their tender enquiries, related corrigenda and details of contracts awarded thereon, including those that are issued through e-procurement, are simultaneously published/ mirrored on the CPP Portal. As stated at (a) above, they should also ensure that their e-procurement website is linked to the CPP Portal.

- g. The above instructions apply to all Tender Enquiries, Requests for Proposals, Requests for Expressions of Interests, Notice for pre-Qualification/ Registration or any other notice inviting bids or proposals in any form, issued on or after the dates indicated at (c) above whether they are advertised, issued to limited number of parties or to a single party.
- h. In the case of procurements made through DGS&D Rate Contracts or through Kendriya Bhandar/NCCF, only award details need to be published on the Portal.
- i. These instructions would not apply to procurements made in terms of [provisions of Rules 145 (Purchase of goods without quotations) or 146 (Purchase of goods by purchase committee) of General Financial Rules-2005 (or similar provisions relating to procurements by CPEs, autonomous bodies).

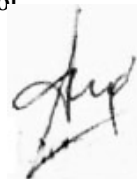
2. In order to facilitate implementation of aforesaid decisions regarding e-publishing of tender details, NIC will provide detailed guidelines for using the e-Publishing module of the CPP Portal. These guidelines will also be available in the CPP Portal. **User IDs and Passwords would have to be obtained from NIC for accessing the portal. Details in this regard will also be available in the CPP Portal.**

3. NIC will also provide the following support:

- a. NIC will make arrangements for necessary training to the concerned officials in the use of the CPP Portal for e-publishing. For this purpose, Ministries/ Departments may contact NIC through email at cpp-nic@nic.in to work out the details.
- b. Detailed guidelines for the use of e-publishing module will be made available in the CPP Portal and this would also be circulated separately to all Ministries/ Departments.
- c. A demonstration web site, similar to the CPP Portal, would be made available for training and hands-on practice. The site

will also contain necessary user manuals and presentation materials.

4. Ministries/ Departments are requested to take necessary action to ensure that e-publishing of tender details on the Portal is commenced in terms of the time lines mentioned in Para 2 (c) above. **It is also requested that necessary instructions may be issued in this regard to all attached and subordinate offices as also to CPSEs, autonomous and statutory bodies under their administrative contro^l**



Suchindra Misra
OSD (PPC)
011-23092689

To,
Secretaries of all Ministries/ Departments

Copy to
FAs of all Ministries/ Departments

Copy also to
DG (NIC), CGO Complex, and New Delhi

Annexure 3.2

Implementation of comprehensive end to end e - procurement

No. 10/3/2012-PPC
Ministry of Finance
Department of Expenditure
Public Procurement Cell

North Block, New Delhi
30th March, 2012

OFFICE MEMORANDUM

SUBJECT: Implementation of Comprehensive end-to-end e-procurement

1. Reference is invited to this Department's O.M No. 10/1/2011-PPC dated 30th November, 2011 vide which instructions were issued for mandatory publication of all tender enquiries, corrigenda thereto and details of contracts awarded thereon on the Central Public Procurement Portal (CPP Portal) by all Ministries/ Departments, their attached and subordinate offices, Central Public Sector Enterprises and autonomous/ statutory bodies. There instructions further envisaged implementation of comprehensive end-to-end e-procurement, guidelines for which were to be issued subsequently.

2. In pursuance of the above, it has now been decided that **Ministries/ Departments of the Central Government, their attached and subordinate offices may commence e-procurement in respect of all procurements with estimated value of Rs.10 Lakh or more in a phased manner as per the month-wise schedule given at Annexure I.**

3. in this context, NIC has developed an e-procurement solution which can be accessed on the link <http://eprocure.gov.in>. Detailed guidelines on using the solution on the CPP Portal. However, the basic requirement to be met by Ministries/ Departments is enclosed as

Annexure II. NIC will also provide a training schedule a demo site and hands on training on how to use their e-procurement solution, details of which will also be made available on the CPP Portal. Training request may be forwarded to cppp-nic@nic.in. The proposed training schedule is enclosed as **Annexure III**.

4. Ministries/Departments, which are already carrying out e-procurement through other service providers or have developed e-procurement solutions in house, may continue to do, so ensuring that,

- i. the e-procurement solution meets all the requirements notified by Department of information Technology under the “Guidelines for compliance to Quality requirements of e-procurement Systems” published on the e-Governance Standards Portal (<http://egovstandards.gov.in>);
- ii. the procurement procedure adopted conforms to the general principles envisaged under General Financial Rules-2005 and the CVC guidelines;
- iii details of all their tender enquiries, related corrigenda and details of contracts award thereon, through e-procurement are simultaneously published/ mirrored on the CPP Portal.

5. Ministries/Departments which do not have a large volume of procurement or carry out procurements required for day to day running of offices and also have not initiated e-procurement through any other solution provider may use the e-procurement solution developed by NIC.

6. Ministries/Departments with large volume of procurement other than of the nature covered in para 5 above may either use the e-procurement solution developed by NIC or engage any other service provider following due process.

7. As already stated, the implementation of e-procurement is to be done in a phased manner as per the month-wise schedule proposed vide **Annexure I**. In the first month, the Ministry/ Department should commence e-procurement in the Ministry/Department itself and thereafter cover all attached and subordinate offices within a period of six months. Ministries/ Departments should draw up a time frame for implementing e-procurement in their attached and subordinate

units/ offices and issue necessary instructions so as to ensure complete implementation in all units/ offices within the prescribed timelines.

8. Ministries/Departments which are already doing some e-procurement or which are considering implementation of e-procurement have been included in the first two months in the proposed month-wise schedule. These Ministries/Departments should also ensure that all attached and subordinate offices under them commence e-procurement within a period of six months from the commencement of e-procurement in the Ministry/Department.

9. The nodal Officers appointed by various Ministries/ Departments during the implementation of mandatory e-publishing of tender enquiries on the CPP Portal will oversee all aspects of implementation of e-procurement as well. Ministries/ Departments which face any difficulty in following the proposed month-wise schedule may send their requests for alternate slots to email id **ppc-exp@nic.in**.

10. Ministries /Departments may also tie up with NIC for training and support where e-procurement solution developed by NIC adopted so that timely commencement of e-procurement is ensured. In this regard, request for training and support may be sent to **cPPP-nic@nic.in**.

11. These instructions will not apply to procurements made by Ministries/ Departments through DGS&D rate contracts or through Kendriya Bhandar and NCCF. However, as stated in para 1 (h) of this Department's O.M dated November 30, 2011, award details in such cases are to be published mandatorily on the CPP Portal under the e-publishing module.

12. Although, all cases above ₹10 lakh are to be covered by e-procurement, however in individual cases where national security and strategic considerations demand confidentiality, Ministries/ Departments may exempt such cases after seeking approval of the Secretary of the Ministry/ Department with the concurrence of their Internal Financial Advisers. Statistical information on the number of cases in which exemption was granted and the value of the Department of Expenditure at the email id **ppc-exp@nic.in**.

13. Ministries/ Departments are requested to take necessary action to ensure that e-procurement is commenced in terms of the times lines mentioned in para 7 above.

Yashashri Shukla

(Yashashri Shukla)
Director (PPC)
011-23093457

To,

Secretaries of all Ministries/ Departments

Copy to:

FAs of all Ministries/ Departments

Copy also to:

DG (NIC) CGO Complex, New Delhi

Annexure I

Proposed schedule for implementation of e-procurement in Ministries/Departments

Month from which e-procurement is to commence	Name of the Ministry/ Department	Time by which all attached and subordinate offices shall have commenced e-procurement
May 2012	Ministry of Railways Ordinance Factory Board, Ministry of Defence CPWD, Ministry of Urban Development DGS&D, Department of Commerce NHAI, Ministry of Road Transport and Highways Planning Commission Department of Information Technology Department of Expenditure	October 2012
June 2012	Department of commerce for procurement other than of DGS&D Ministry of Rural Development for procurement other than of PMGSY Ministry of Urban Development for procurement other than CPWD Ministry of Road Transport and Highways for procurement other than by NHAI Department of Economic Affairs Department of Public Enterprises Department of Telecommunication Ministry of Drinking Water and Sanitation Ministry of External Affairs Department of Agriculture and Cooperation	November 2012
July 2012	Department of Revenue Department of Land Resources Ministry of Mines Ministry of Coal Ministry of Corporate Affairs Ministry of Culture	December 2012

	Department of Science and Technology Department of Fertilisers Department of Consumer Affairs Department of Heavy Industries	
August 2012	Department of Disinvestment Department of Health and Family Welfare Department of Higher Education Ministry of Information and Broadcasting Ministry of Labour and Employment Ministry of New and Renewable Energy Department of Personnel and Training Ministry of Petroleum and Natural Gas Department of Posts Ministry of Shipping	January 2013
Sept. 2012	Department of Financial Services Ministry of Planning Department of Scientific and Industrial Research Department of Animal Husbandry, Dairying and Fisheries Department of Pharmaceuticals Department of Defence Research and Development Ministry of Earth Sciences Department of AIDS Control Department of Official language Department of School Education and Literacy	February 2012
October 2012	Legislative Department Ministry of Overseas Indian Affairs Ministry of Parliamentary Affairs Ministry of Power Ministry of Civil Aviation Ministry of Textiles President's Secretariat Prime Minister's Office Cabinet Secretariat Department of Ex-Serviceman Welfare	March 2013
November 2012	Vice President's Secretariat Ministry of Food Processing Industries Department of Agricultural Research and Education Department of Food and Public Distribution	April 2013

	Department of Defence Production Department of Health Research Department of Internal Security Department of Justice Department of Pensions and Pensioners Welfare Ministry of Social Justice and Empowerment	
December 2012	Ministry of Tribal Affairs Ministry of Water Resources Department of Space Department of Atomic Energy Department of Sports Department of Chemicals and Petro-Chemicals Department of Industrial Policy and Promotion Department of Defence Ministry of Development of North Eastern Region Department of Ayurveda, Yoga & Naturopathy, Unani Siddha and Homoeopathy (AYUSH)	May 2013
January 2013	Ministry of Panchayati Raj Department of Administrative Reforms and public Grievances Department of Bio-Technology Ministry of Statistics and Programme Implementation Ministry of Tourism Ministry of Environment and forests Department of States Department of Home Department of Jammu and Kashmir Affairs Ministry of Micro, Small and Medium Enterprises	June 2013
February 2013	Ministry of Minority Affairs Ministry of Steel Ministry of Housing and Urban Poverty Alleviation Ministry of Women and Child Development Department of Youth Affairs Department of Legal Affairs Department of Border Management	July 2013

Annexure II

The basic requirements to be met by Ministries/Departments for implementation of e-procurement solution provided by NIC are:

I. Nodal Officer's responsibilities for e-procurement

A. Requirement of Digital Signature Certificate (DSC)

- Valid email ID and Digital Signature Certificate (DSC) is required for all authorised users in a Ministry/ department to carry out e-procurement.
- Digital Signature Certificates (DSC) obtained for concerned officials for e-publishing can be used for e-procurement as well.
- The DSCs can be obtained by Ministries/Departments directly from any of the Certifying Authorities (CA). NIC is also one of the CA and provides DSCs to the Government officials.
- The instructions to obtain a DSC, DSC Request Form, fee structure, and payment details are available at <http://nicca.nic.in> and in the FAQ section of the CPP Portal.
- Issuance of DSC to private bidders – Since NIC offers DSC only for Government officials, bidders need to obtain DSCs from other Certifying Authorities such as TCS/ SIFY/ nCode etc.

B. Identification and creation of users

Nodal officer of all Ministries/Departments will have the responsibility for identifying and creating the users accounts for e-procurement roles such as Bid Openers and Bid Evaluators in addition to tender Creators and Tender Publishers created earlier for e-publishing.

Annexure III

Detailed training schedule for implementation of e-procurement solution developed by NIC

- a. A half-day awareness session to be conducted by NIC for Ministries/Departments at their premises, to provide them an overview of the e-procurement solution developed by NIC and accessible through the link www.eprocure.gov.in.
- b. NIC will schedule a two-day hands' on training on e-procurement solution developed by them for nominated officials from each of the Ministry/ Department.
- c. NIC will deploy one Facility Management Person (FMP) in each user organisation to provide hand-holding support for a period of one week. Ministries/ Department may utilise the services of the FMP for internal training, installation and mapping of DSCs, handholding support for e-procurement activities etc. for continued support from these FMPs after one week, Ministries/ Departments will be required to bear the cost of the FMP.
- d. A demo site will also be available on the CPP portal which can be accessed with the help of a DSC.
- e. Further, each Ministry/Department will be required to identify the prospective bidder for their forthcoming tenders.
- f. A half day training and awareness session for the potential bidders of each Ministry/ Department will be conducted by NIC in the premises of the Ministry/ Department to make them aware of the various features and requirements of the e-procurement solution developed by NIC which will include the following:
 - i. Acquiring DSC
 - ii. Process of registration on the CPP Portal
 - iii. Process of tracking tenders through the CPP Portal, raising pre-bid queries, participating in pre-bid meetings etc.
 - iv. Process of submission of online bids
 - v. Other processes such as online presence at the time of bid opening, availability of comparison charts etc.

Annexure 3.3

**Excerpt from Government of India Ministry of Commerce &
Industry Department of Industrial Policy & Promotion
(Manufacturing Policy Section)**

PRESS NOTE NO. 2 (2011 SERIES)
Subject: National Manufacturing Policy
Dated 04, November, 2011

1.22 Trade and investment policy are inextricably linked with manufacturing policy to ensure greater harmony of objectives. While India will continue to integrate itself with the globalised world through bilateral and regional free trade agreements/comprehensive economic partnership agreements, it will be ensured that such agreements do not have a detrimental effect on domestic manufacturing in India. 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 such as solar energy equipment, electronic hardware, fuel efficient transport equipment and IT based security systems.

4

An Overview of Government Procurement in Health Sector of India

*Federico Lupo Pasini & Suresh P Singh**

Introduction

Government Procurement in the Indian health sector is a complex process which spans across several agencies and ministries in the government as well as manufacturers and suppliers. Plagued by a limited amount of public funds available for healthcare, and the existing inadequacy in health care delivery mechanisms to meet the ever-growing needs of the Indian population, especially in smaller towns and rural areas, the supply of healthcare products and services sometimes does not meet the intrinsic demand generated by the population. The Constitution of India directs that the State is bound by a responsibility to adopt measures which strengthen the health framework in the country.

The implementation of Government Procurement is critical to the Indian health sector given that it has to cater services to the second-most populous country in the world. The limited healthcare facilities available in the country are skewed in

* Data analysis in the chapter was carried by Suresh P Singh.

favour of the affluent category of the population. The paradox is that though the country may attract medical tourism owing to the presence of world-class doctors, clinics and technologies, the majority of India's population may not be in a position to be able to afford primordial healthcare. Low health insurance coverage (estimated at less than 10 percent of population) worsens the situation, dilating the issues of increasing focus on the role of government support.

It is indeed pertinent to note that alongside the dismal statistics pertaining to the distribution of medicine, and medicare related products in India, the Indian pharmaceutical industry, known as the 'world pharmacy', still faces challenges in domestic and other government procurement markets. The extant government procurement policies, rules and regulations as well as institutional structures are often inadequate and hamper overall efficiency in the functioning of the healthcare market.

This chapter seeks to cover the legal framework for government procurement in the health sector. The health sector includes the pharmaceutical and medical equipment as the policies and practices in these two sectors largely influence the healthcare sector in India. It attempts to capture the potential of the Indian pharmaceutical industry and to estimate the optimal share achievable in the Indian government procurement market and in the Government Procurement markets in other countries. It also seeks to estimate market access opportunities for both foreign products in the Indian markets, and Indian products in markets abroad.

An estimation of the size of the government procurement market in India and in foreign markets is undertaken in this chapter along with an analysis of the factors (both internal and external) which may positively influence or interfere with the process of improving access to government procurement in the markets. The internal factors deal with the current state

of play in the Indian pharmaceutical industry; it provides insights into the current government procurement system at predominantly the central level and touches upon a few examples/models at the state level. It focuses on certain bodies which oversee the regulation of the health care industry in India: some of the limitations in the tendering system are identified.

Market Size, Landscape and Competitiveness of the Indian Health Sector

Market size of the Indian government procurement

Given the lack of accurate information pertaining to procurement statistics in the health care sector, approximations are drawn based on projections from the documents obtained from the concerned ministry and the industry dossiers. Generally, medicines represent a large part of health care expenditures, as they account around 40 percent of the overall health care budget in developing countries.¹ Currently the public health system in India spends about Rs 6000 crores (0.1 percent of GDP) for procuring drugs. In the union budget of India, 2012, measures have been delineated to improve access to health needs, particularly for the poor and the rural populace.

A total outlay of ₹34,488 crores is estimated in the budget for 2012-13, which is 13.24 percent more than the budget estimates of ₹30,456 crores for the ongoing fiscal year. The increasing emphasis by the government of India on health and the large public space occupied by this sector in the life of a citizen of India makes it imperative that such allocation of funds, major chunk of which is utilised in procurement of drugs and medical equipment, are used effectively and that it reaches the destined targets. The chapter therefore, looks into procurement practices, process and policy in drugs and medical equipments.

An overview of the position of the Indian Pharmaceutical Industry is presented to assess if this industry has a capacity to cater to the needs of the domestic government procurement market and to other procurement markets. The analysis of the forecasted impact will provide some direction in estimating the potential of Indian pharmaceutical industry to venture into other government procurement markets, and to increase its market share in domestic market.

Estimation of government procurement market size

The scope of procurement and distribution in the health sector generally includes activities such as the procurement of drugs, equipment and other ancillary products. Official data detailing the market size of government procurement of drugs and equipment in the health sector is scarce in India. Consequently, the data applied is based on and derived from reasonable estimates.

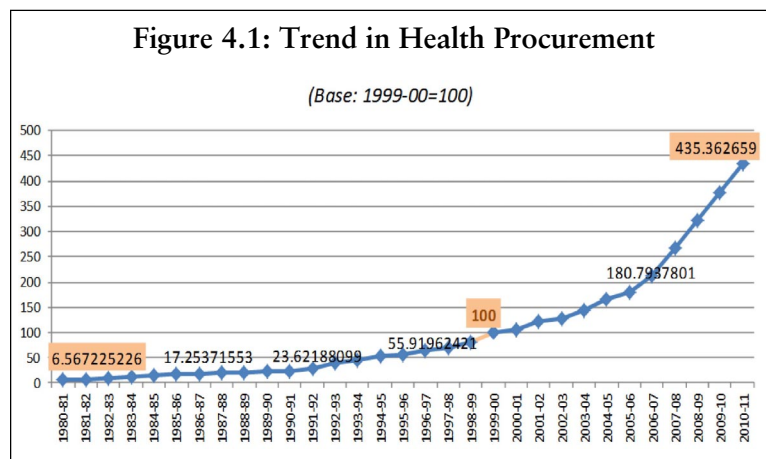
As per the National Commission on Macroeconomics and Health, in 2002, the combined budget for drugs procurement by both the Central and the state governments was ₹20,000 million (or ₹2000 crores) (Sakthivel 2005:186).² The report depicts that approximately 25 percent of the total public sector drugs are procured by the Central Government health services such as defence and public sector units. State sector units also negotiate prices directly with the manufacturers.

According to the Central Vigilance Commission (CVC), Government Procurement in the health sector constitutes about 26 percent of the health budget. The present study relies on this estimate for the central and state government. It is assumed that the procurement at the municipal level is much higher than as is reflected by the present estimates owing to the compiled data pertaining to revenue and capital expenditure of the Centre and states on medical, public health, water supply and sanitation. This is currently estimated to be valued at over

₹82,000 crores in 2010-2011.³ An approximation of the overall Government Procurement market at the central, state and local level would yield the result of a substantial ₹20000 crores for the years 1980 to 2011 assuming that 26 percent of the total budget is spent on procurement of drugs and medical equipment

Based on the above criteria of estimation, government procurement in health sector is estimated at having initially been ₹91 crores in 1980-81. This escalated by 3.6 times to ₹329 crores in 1990-1991, and further by 4.7 times to ₹1460 crores in 2000-01. In the 2000s, the total procurement by the health sector in India is estimated at over ₹6000 crores, a 4.7 times increase.

Taking into consideration, the past three decades, an index with 1999-2000 as base has been prepared. The index clearly demonstrates that the procurement increased by 62 times. Further, it also shows that while it took two decades for the index to reach 100, it reached 435 in the next one decade demonstrating a sharp increase. It can be concluded that the market for Government Procurement in health is rapidly increasing value-wise.



A Brief Overview of the Indian Health Sector

The Indian Pharmaceutical industry is assessed keeping in mind two objectives: (i) to determine whether the domestic pharmaceutical industry can cater to the needs of the Indian population; and (ii) to judge its export competitiveness abroad. The general market conditions in the country provide some indication as to the consumption levels in a country. Hence, the scope for Government Procurement in India is assessed keeping in mind the size of the Indian market. The two sectors considered within the health sector are the medical equipment industry and the Indian pharmaceutical industry.

An Overview of the Medical Equipment Industry

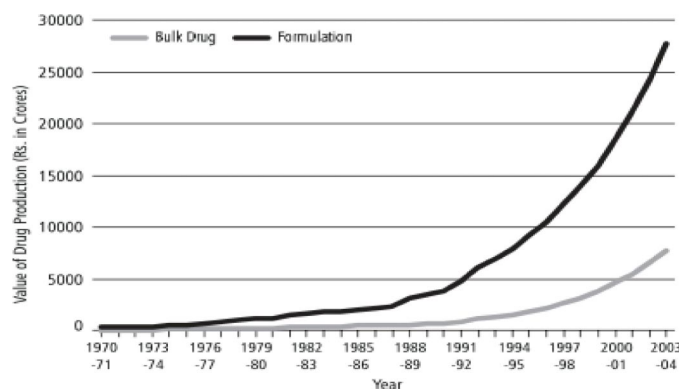
The medical equipment industry is dependent on imports. It imports 65-60 percent of its medical equipment such as catheters, pacemakers, orthopaedic and prosthetic appliances and other equipments.⁴ The medical equipment market is currently estimated at US\$3.5bn. This is expected to reach 7 billion owing to the increase in the number of healthcare facilities. The US exports nearly 30 percent of the total imports in medical equipment to the Indian market.⁵ Germany, EU countries, China and Japan constitute a large percentage of the exporters who serve the Indian market.

An Assessment of the Capacity of the Indian Pharmaceutical Industry

The Indian pharmaceutical industry is one of the largest: it is ranked 3rd in terms of volume and 14th in terms of value in the global pharmaceutical market. In 2009, the size of the Indian pharmaceutical market had reached US\$10.75bn. The industry ranks 4th globally in terms of production of generics and 17th in terms of export of bulk actives and dosage forms. There are more than 20,000 pharmaceutical manufacturing units, large and small, located across the country.⁶

Indian companies export their drugs to more than 200 countries for a value of a total of US\$8bn. It is noteworthy that owing to the positive perception of the quality of the products, the exports are directed to highly regulated markets such as the US, European Union, Australia, and Japan.⁷

Figure 4.2: Trends in the Production of Bulk Drugs and Formulations in India since the 1970s



Source: S. Sakthivel (2005), "Access to Essential Drugs and Medicines In Financing and Delivery of Health Care Services in India", In *Financing and Delivery of Health Care Services in India*, NCMH Background Papers. New Delhi: Ministry of Health and Family Welfare.

FDI Policy in Healthcare

With a view to assessing the possible penetration by foreign players in the Indian government procurement market, an assessment of the FDI policy and its impact in the market is carried out. The Indian pharmaceutical industry is one of the most important export sectors in India's economy, and the world's third largest pharmaceutical industry in terms of volume home to around 20,000 pharmaceutical companies with a market valued at around US\$1.75bn. The pharmaceutical

(Indian) companies supply medicines to hospitals across India and have a good supply management and distribution system which engenders access to all levels of the Indian healthcare system, even in the most remote areas of the country.⁸

India permits a 100 percent FDI under automatic route both in greenfield investments which are predominantly used for the transfer of technology in the R&D field and in existing Indian pharmaceutical companies. The policy led to a record inflow of FDIs in the sector amounting to US\$8.99bn in the past one decade, of which, nearly half (US\$4.84bn)⁹ were through mergers and acquisitions (M&As) in form of brownfield investments (acquisition of operating companies). The inflow of FDIs is more in brownfield than in the greenfield sector. Some of the major Indian companies which have recently been acquired by foreign companies are highlighted in Table 4.1. These represent the attempts by foreign players to enter the domestic pharmaceutical market in general. However, such acquisitions and alliances have an implicit/explicit impact on the GP market as these MNCs then become suppliers in the GP markets. These acquisitions result in the increased market dominance of fewer players.

Considering the fact that investments are broadly made in the brownfield sector and not the greenfield sector, their contribution to facilitating the transfer of technology is minimal. Concerns that these acquisitions/strategic alliances have a likelihood of creating an oligopolistic market with large companies working as a cartel have been expressed. There is the possibility that the acquirer-pharmaceutical companies may use the existent distribution channels of the Indian companies to drive generics out of the markets.

A key factor for rendering the climate in India positive towards receiving participation in government procurement market in the health sector is the FDI policy. The government

Table 4.1: Acquisitions in Healthcare

Year	Indian company taken over	Foreign company which acquired	Country of origin	Taken Over amount in US\$mn
Aug 2006	Matrix Lab	Mylan Inc	US	736
April 2008	Dabur Pharma	Fresenius Kabi	Singapore	219
June 2008	Ranbaxy	Daiichi Sanyko	Japan	4.6
July 2009	Shanta Biotech	Sanofi Aventis	France	783
Dec 2009	Orchid Chemicals	Hospira	USA	400
May 2010	Piramal Healthcare	Abbot Labs	USA	3.7
2011	Paras Pharma	Reckitt Benckiser	UK	724

Source: Compiled from various sources such as IBEF etc.

has taken some initiatives to bring in the required changes to make FDI a more potent tool for increasing accessibility to drugs by the poor on the one hand and also to ensure that FDI leads to economic growth through increased investments. Some major highlights of the proposed changes in FDI policy¹⁰ for the pharmaceutical sector are: (i) India will continue to allow FDI without any limits (100 percent) under the automatic route for greenfield investments in the pharmaceutical sector. This will facilitate addition of manufacturing capacities, technology acquisition and development; (ii) In case of brownfield investments in the pharmaceutical sector, FDI will be allowed through the Foreign Investment Promotion Board (FIPB) approval route for a period of up to six months. During this period, necessary enabling regulations will be put in place by the Competition Commission of India (CCI) for effective oversight on M&As to ensure that there is a balance between public health concerns and attracting FDI in the pharmaceutical

sector. Thereafter, the requisite oversight will be done by the CCI entirely in accordance with the competition laws of the country.

Opportunities for Foreign Suppliers in the Domestic Government Procurement Market

Several stakeholders, particularly from the line ministries, revealed in their interviews that in the event of further opening of the Indian government procurement market for drugs, it is posited that it will be challenging for the foreign suppliers to be able to match the level of distribution of Indian companies at the district and sub-district levels. The stakeholders further reaffirmed that the Indian drug manufacturing sector supplies approximately 75 percent of generics across the world. As noted before, the acquisition/alliances of Indian generic companies by the foreign firms may be viewed more as a strategic response to penetrate deep into the Indian and other export markets catered by Indian companies.

A sector where competition from foreign players is anticipated is the acquisition of cold chain facilities, where there is room for improvement in the performance of the Indian suppliers. Some of the factors which have to be considered as barriers for the penetration of foreign players into the domestic market are as follows:

- One reason is the current high level of competition in the Indian market, whereby local manufacturers are able to offer much lower prices with the same standards of quality: with the exception of the sector of rapid diagnostic kits, foreign suppliers have not exhibited interest in the Indian market for a number of reasons.
- Foreign companies might also be bound by their own regulatory/internal rules and clearance time. There are

restrictions in the European Union pertaining to the shelf life of a pharmaceutical product which may present barriers to foreign companies.

- For procurement in pharmaceuticals to become attractive to pharmaceutical industry members, anti-corruption standards must be improved in India.
- Intellectual property law enforcement in India currently seeks to ensure access to medicines to the populace: this is evident through litigation pertaining to the refusal to grant patents which seek to lengthen the term of protection (“ever greening”), and the use of Compulsory Licensing as a tool to ensure that medicines are available at prices affordable by the Indian population.

One of the most important positive elements of the opening of the GP market for health care would be technology transfer. Indian authorities have submitted a proposal for the creation of an industrial zone specialising in the production of medical equipment called “*Medipark*” which would host foreign companies, which will be given all facilities to set up their manufacturing base. It is hoped that this will facilitate the transfer of technology in the sector of medical equipment from foreign players to domestic players.

Emerging Trends and Future Requirements

Currently the public health system in India spends about ₹6000 crores (0.1 percent of GDP) for procuring drugs. It is estimated that if a Universal Health Coverage system is adopted in India, an additional medicine purchase of amount ₹24,000 crores would be required by the public health system. This would amount to an additional spending of 0.5 percent of its GDP on procuring medicines alone in the event of universal health coverage (total spending on healthcare at present is 1.2 percent of GDP). This presents an enormous

space for both domestic and foreign players in Government Procurement.

A report by the Planning Commission,¹¹ Government of India, indicates that the level of public expenditure needs to rise about four-fold from present levels in order to support a more equitable and effective healthcare system, providing universal access, fair distribution of financial costs, and special attention to vulnerable groups such as women, children, the aged and disabled. This in a sense implies that government spending on health is likely to increase substantially during the period from 2012 to 2020, and along with this one can expect a substantial increase in the government procurement of drugs and equipment which ultimately makes the discussion of government procurement system to be transparent and efficient in health sector to be of increasing importance to the tax payers.

A positive indicator for the Government Procurement market is the forecasted increase in size. The Indian healthcare sector currently represents a US\$40bn industry divided in the following manner: hospital care accounts for the biggest share (50 percent); pharmaceuticals (25 percent); insurance and medical equipment (15 percent); and diagnostics (10 percent).¹² Despite the large market size, India's healthcare spending is lower than the world average of 9.7 cent. It is also lower than that of developing countries like China – this will positively impact the growth of the Government procurement market. In the coming years, the industry is expected to grow to US\$280bn by 2020 and grow at a CAGR of 21 percent during the period which in turn will positively impact the increase in size of the government procurement market in this sector.¹³

One of the main reasons for this expected growth rate is that India's pharmaceutical industry has a favourable macro-environment to sustain itself. On the other hand, the industry,

particularly pharmaceutical industry, is witnessing trends such as acquisitions, strategic collaborations, deeper penetration in urban and rural market, increased investment, and expansion of insurance coverage. The Indian middle class is expanding rapidly with enhanced percentage of disposable income spent by household alongside the increasing affordability of medicines. In line with the growing need for adequate public healthcare facilities in India, the government of India has taken various steps to improve the situation. The government introduced some new initiatives to improve the public healthcare system in India, *inter-alia*, with the launch of the National Rural Health Mission (NRHM) in 2005 aims to provide quality healthcare for all and increase the expenditure on healthcare from 0.9 percent of GDP to 2-3 percent of GDP by 2012. Together, these developments constitute the macro environment propelling the expansion of the Government Procurement market.

Another important driver indicating improved performance of Indian companies in the GP Market is the recent 'drying of the patent pipeline'. Further, approximately 90 percent of India's pharmaceutical market consists of branded generics and this market is likely to grow with a CAGR of 15-20 percent for the next five years.

According to a report by Department of Pharmaceuticals, Government of India, an assessment of the Indian Pharmaceutical industry highlights various strengths which will be instrumental in meeting the demands posed by the foreign markets in government procurement of medicine and health care services:

- i. Strong export market- India exported drugs worth US\$8bn to more than 200 countries including highly regulated markets in the US, Europe, Japan and Australia;
- ii. Large Indian pharma companies have emerged as among the most competitive in the evolving generic space in North

America and have created an unmatched platform in this space;

- iii. Indian companies are also making their presence felt in the emerging markets around the world, particularly with a strong portfolio in anti-infective and anti-retroviral drugs;
- iv. Large domestic pharma companies have continued to grow, assuming leadership position in many therapies and segments in the Indian market as well as creating a strong international exports back-bone;
- v. Competitive market with the emergence of a number of second tier Indian companies with new and innovative business modules;
- vi. Indian players have also developed expertise in significant biologics capabilities;
- vii. Multinational companies have continued to invest significantly in India and are making their presence felt across most segment of the Indian pharma market. Companies have also began to invest in increasing their presence in tier II cities and rural areas and making medical care more accessible to large section of the Indian population;
- viii. Massive investments by Indian pharma-currently projects worth more than 1.2 billion dollars are under implementation on various products;
- ix. Self-reliance displayed by the production of 70 percent of bulk drugs and almost the entire requirement of formulations within the country;
- x. Low cost of production;
- xi. Low R&D costs;
- xii. Innovative scientific manpower;
- xiii. Excellent and world-class national laboratories specialising in process development and development of cost effective technologies;

- xiv. Increasing balance of trade in Pharma sector;
- xv. An efficient and cost effective source for procuring generic drugs, especially the drugs going off patent in the next few years; and
- xvi. An excellent centre for clinical trials in view of the diversity in population.

Analysis of the Pharmaceutical Industry

A “Strength- Limitation- Opportunity- Threat” analysis of the pharmaceutical industry further provides insights into the capacity of Indian industry to be of greater influence to the government procurement from the supply side perspective.

Table 4.2: SLOT – Indian Pharmaceutical Industry		
Internal Factors	Strengths	Limitations
	Vast market with huge potential to grow	Poor regulatory framework
	Good and cost competitive manufacturing base	Fragmented procurement system
	Availability of specialised personnel	Existence of a bureaucracy
	Good technological skills and low R & D costs	Lack of transparency
External Factors	Opportunities	Threats
	Experience in foreign (new) markets	Presence of stringent regulatory norms in other markets
	Possibility of surge in FDI inflows	
	Technology and skill transfer	
	Competition may bring down procurement costs & increase transparency	

While assessing the market penetration and capability of Indian pharmaceutical industry in drug procurement is concerned, it appears that in the main export destinations for Indian pharmaceutical industry, various opportunities are available in the domestic as well as other government procurement markets. The question is of assessing availability of market for Indian companies in other government procurement market in which it has export competitiveness (essentially generic drugs). This needs to be weighed with long/short term perspective.

Legal Framework for Government Procurement

The Indian health procurement system is fragmented and would benefit from an appropriate uniformity in the rules and regulations governing it. An efficient procurement policy will warrant that all the beneficiaries receive the right medicine at the opportune time. Optimum quantities have to be procured at the lowest price to secure the maximum therapeutic value with the available resources.

Existing Procurement System

As discussed in the current chapter, the extant procurement system is inadequate and suffers from shortcomings in the areas of transparency and efficiency. Procurement practices and procedural delays in the system dissuade a number of companies from participating in the Indian government procurement market thus eluding the benefits to reach to the consumers order.

The Indian Constitution envisages a federal structure with areas of operation divided between the Central and state governments. The seventh schedule of the Constitution of India contains three exhaustive lists of items: the Union List which enlists items which are legislated on by the Centre; the State

List which recounts items which fall under the purview of the State Legislature; and the Concurrent List. As per the allocation of items to the authority of the State and the Centre, although some items like public health, hospitals, sanitation, etc. fall in the State list, the items that have wider ramification at the national level like family welfare and population control, medical education, prevention of food adulteration and quality control in manufacture of drugs etc. have been included in the concurrent list.

An Analysis of the Structure of Implementation of the GP System

The procurement scenario in the health sector is complex and may even seem fragmented with numerous institutions being constituted within the framework of health. Principally, the Ministry of Health and Family Welfare (hereinafter “MoHFW”) is instrumental for the implementation of various programmes on a national scale in the areas of Health and Family Welfare, prevention and control of major communicable diseases and promotion of traditional and indigenous systems of medicines. In addition, the Ministry assist states in preventing and controlling the spread of seasonal disease outbreaks and epidemics through technical assistance.

There is no single central government procurement office dedicated although almost a quarter of total of drug volume procurement is carried out by the Central Government for the Central Government Health Services (CGHS), Defence (Armed forces Medical Services), Public sector units and State sector units. These units negotiate the price of the drugs directly with the manufacturers. Further, the Medical Store Organisation (MSO) is responsible for procurement and supply of quality drugs and medical equipment to all the central government hospitals and dispensaries in rural areas. The MSO consists of seven medical store depots located in Mumbai,

Kolkata, Chennai, Hyderabad, Guwahati, Karnal and New Delhi. The depots at Mumbai, Kolkata, and Chennai have chemical testing laboratories which assess the quality of drugs purchased from the firms.

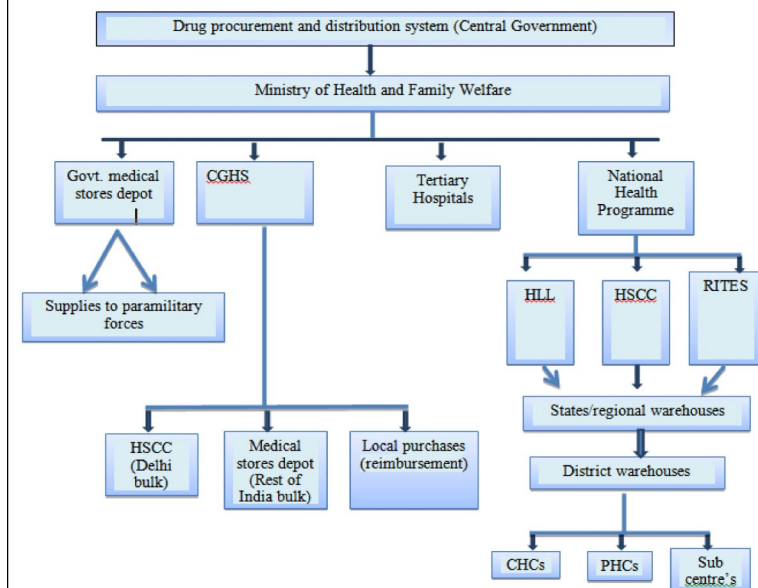
The Central Government either provides financial aid or supplies drugs to States through centrally procured arrangements under different National Health Programmes (NHPs). Currently, the NHPs are: (i) Revised National Tuberculosis Programme; (ii) National Leprosy Elimination Programme; (iii) Reproductive and Child Health (RCH); (iv) National Malaria Control Programme; (v) National AIDS Control Programme; and (vi) National Blindness Control Programme. Each of the six NHPs follows its own procurement procedures resulting in duplication of effort with no attendant benefits of lower prices that a bulk purchase would entail. The following flowchart provides the health sector dynamics so far as the procurement at the union government level is concerned.

One of the main lacunae that the current procurement has not been able to counter is to have an effective mechanism of quality assurance while procuring drugs. Lack of consistency in quality control has encouraged the supply of a number of substandard drugs in the market.

Current Government Procurement System

In India, Central and State Government institutions follow one or more of these arrangements for public procurement: (i) Central Rate Contract System; (ii) Pooled Procurement either by the government or through an autonomous corporation; (iii) Decentralised procurement; and (iv) Local purchase.¹⁴ These systems are explained in detail and their strengths and weaknesses are highlighted herein.

Figure 4.3: Diagrammatical Representation of the Departments Pertaining to Medicine



Source: Compiled from various government agencies and from a presentation by S Sakthivel on Public Procurement of Drugs in India

Central Rate Contract System: Drugs are financed, procured and distributed by the government, which owns the funds and manages the entire system. Selection, procurement and distribution are all handled by a unit within the Ministry of Health, Government of India. In India, Central Government focusses on procuring and distributing drugs to its various health schemes/programmes through its different agencies. It is the preferred drug procurement and distribution system by the central government for MoHFW.¹⁵ The different NHPs with six NHPs have their own procurement procedures, which extinguishes any possibility of obtaining a benefit under a bulk purchase scheme, apart from resulting in increasing

procurement efforts involved.¹⁶ Such a system experiences problems with financial management, quantification of requirements, management of tenders, warehouse management, transport and security of drugs and other administrative issues.¹⁷

Pooled Procurement: Autonomous corporations are constituted as parastatals, either under the Ministry of Health or as an independent organisation with the management including representation from other (than health) government ministries. The board is autonomous in running the agency but reports to a higher official from the ministry of health who may be involved in the appointment of the chairman of the board or the executive officer. The purpose of establishing an autonomous supply agency is to achieve the efficiency, flexibility, transparency and accountability in the system.

This type of procurement system contains a two-stage tender system. This ensures that only those companies which have a capacity to supply adequate products of required quality receive orders, which means the tender process is restricted to companies fulfilling the technical criteria. Through a two-envelope system (technical bid and price bid), the drug-purchase committee of the society is able to ensure that the purchases made from companies comply with the Good Manufacturing Practices (GMPs). A company which does not fulfil the technical criteria of a minimum annual turnover of ₹12 crore and adherence to prescribed GMP, is automatically disqualified for making a price bid. The companies are required to undergo GMP inspections and random testing of products. There are instances of companies being blacklisted for want of proper compliance with GMP and poor quality of products. Doctors are asked to prescribe only products on the procurement list, although hospitals are allowed to use up to 10 percent of their drug budget on unlisted products.

These pooled systems which both ensure the constant flow of medicines and are cost-effective are widely regarded as good practices for medicines procurement in developing countries.

Through interviews conducted with health officials, it was gleaned that one major shortcoming of the extant system is that it operates on a top-bottom approach – the officials in the Central Government estimate the needs of the different government administered health programmes. However, once the Central Procurement Agency is fully operational, there is likely to be a bottom-up approach which will be based on inputs of consumption, with the consumer's agency of the government placing their requirements before the central government – an MIS is currently being instituted for the purpose. After the conclusion of the procurement process and the supply of the procured items to the field agencies, the inspection process of the field samples could be strengthened.

The issue of availability of drugs is attributable to the shortage of funds, inefficient procurement procedures and poor inventory management. In order to offset this problem, many Indian states introduced their own centralised systems for the purchase of the medicines in the early 90s. The most important examples are the Drug Policy for Delhi introduced in 1994 by the Delhi government, the Tamil Nadu Medical Services Corporation Limited (TNMSC) and the modified Central Purchase Committee (CPC) in 1994 in Tamil Nadu and Kerala, respectively, which are now been considered to be good procurement models to be followed at the central government level, hence are referred here.

Box 4.1: Tamil Nadu Model

Tamil Nadu Medical Service Corporation (TNMSC) was set up by the Tamil Nadu government with the primary objective of ensuring ready availability of all essential drugs and medicines in all the Government health facilities by adopting a streamlined procedure for their procurement, storage and distribution (which began functioning from January 1995).

TNMSC upon its institution took into consideration the WHO's Model List of essential drugs, and finalised a list of essential drugs to be procured. Currently, there are 271 items of drugs and medicines (from initial approx. 900 drugs), accounting for around 90 percent of the budget outlay for the purpose, setting aside remaining 10 percent for other drugs of small quantities to be purchased locally by the institutions. All TNMSC procurements are done through open tenders, notified through national newspapers and also posted on World Bank website. This is to ensure that only quality drugs at competitive prices are procured and purchases are made only from manufacturers and not through propaganda agents or distributors. The manufacturers are required to have a GMP certificate and a market standing for at least three years. A minimum turnover is fixed to eliminate small firms because it is presumed that such small firms may fail to keep up with delivery commitments. In order to reduce dependence on one supplier, the next two lower suppliers willing to match the lowest price are also approved.

Various practices have been incorporated with a view to maintain high quality and minimise/eliminate wastages and pilferages: all tablets and capsules are procured with only strip or blister packing. This is opposed to the earlier practice of bulk packing which required manual handling at the time of distribution. The inner and outer packages of all items bear the logo of TNMSC to authenticate that the drugs are manufactured only for the state government supply and are 'Not for Sale.' Moreover, coding is carried on samples from different batches which are then verified by the private approved laboratories to ensure effective quality control. These practices have led to an improved credibility and acceptability of the drugs by the public in general.

Contd...

The TNMSC is completely computerised. The receipt and issue of drugs to a warehouse in every district is documented, linked and relayed to the Head Office computer via the internet thereby ensuring that information pertaining to the inventory level for a drug at any warehouse is readily available. This facilitates the monitoring of stockpiles to prevent any stock out situation and ensures transparency and predictability of the procurement system. Further, on the basis of the inventory levels of all the warehouses, transfer of items from one warehouse to another are effected so as to optimise the utilisation of drugs and to maintain minimum required stock levels. Other activities such as accounting, quality control, warehouse monitoring and administration are also conducted through computers for total error free strong logistic management. Computerisation of the entire operation has improved inventory management, cost control, and enhanced availability of drugs in government health facilities.

This innovation of the Government of Tamil Nadu in drug procurement and management has improved availability of drugs in nearly 2000 government medical institutions throughout the State. The competitive procurement system has resulted in savings in the outlay on drugs to an extent of 36 percent of the allocation. Apart from better budgetary control on drug consumption, medical institutions have become more cost conscious. It also resulted in a better perception amongst the people and augmented the enhanced availability of drugs at all facilities.

Source: Gathered from the official website of Tamil Nadu Medical Services Corporation

Procurement Methods Used by the MoHFW

The MoHFW adopts numerous procurement methods to procure drugs and other healthcare products. These are detailed in the table below and include the following: (i) Competitive bidding (National and International); (ii) Limited tendering; (iii) Shopping; (iv) Direct contracting; and (v) Using a procurement service agent (such as HSCC and RITES). The choice of procurement method depends on both the value of the intended procurement and, the content of the procurement.

Table 4.3: Procurement Methods of Ministry of Health and Family Welfare (threshold and content)¹⁸				
Procurement Method	Pharmaceutical	Vaccines	Contraceptives	Medical Equipment
International Competitive Bidding	<ul style="list-style-type: none"> • Procurement value > ₹ 2.5 mn 	<ul style="list-style-type: none"> • Not recommended given there are limited number of reputed manufacturers 	<ul style="list-style-type: none"> • Procurement value > ₹ 2.5 mn 	<ul style="list-style-type: none"> • Procurement value > ₹ 2.5 mn (concerns on spares, maintenance, compatibility needs to be addressed before adoption of mode)
National Competitive Bidding	<ul style="list-style-type: none"> • Contract value more than ₹ 2.5 mn. • Large no of domestic manufactures, licensed importers 	<ul style="list-style-type: none"> • Not recommended given limited number of domestic manufacturers 	<ul style="list-style-type: none"> • Contract value more than Rs 2.5 mn. • Large no of domestic manufacturers, licensed importers 	<ul style="list-style-type: none"> • Contract value more than ₹ 2.5 mn • No of domestic manufacturers for equipments having the required specifications
Limited Tendering	<ul style="list-style-type: none"> • Contract value less than ₹ 2.5 mn. • Products having limited number of manufacturers 	<ul style="list-style-type: none"> • Contract value less than ₹ 2.5 mn. • Recommended given limited number of domestic manufacturers 	<ul style="list-style-type: none"> • Contract value less than ₹ 2.5 mn. • Acceptable for items having limited number of manufacturers 	<ul style="list-style-type: none"> • Contract value less than ₹ 2.5 mn. • Acceptable for items having limited number of manufacturers and where there are concerns on availability of spares, service centres, etc.
Shopping	Acceptable for: <ul style="list-style-type: none"> • Small procurement volumes 	Acceptable for: <ul style="list-style-type: none"> • small procurement volumes 	Acceptable for: <ul style="list-style-type: none"> • Specific items like injectables 	Acceptable for: <ul style="list-style-type: none"> • Small procurement volumes

Contd...

Procurement Method	Pharmaceutical	Vaccines	Contraceptives	Medical Equipment
	<ul style="list-style-type: none"> • Drugs with limited shelf life • Limited number of manufacturers 	<ul style="list-style-type: none"> • Limited number of manufacturers 	<ul style="list-style-type: none"> • Limited number of manufacturers 	<ul style="list-style-type: none"> • Limited number of manufacturers for equipment with required specifications and concerns on availability of spares and after sales service.
Direct Contracting	<ul style="list-style-type: none"> • Acceptable for Patented/ proprietary product • Single manufacturer 	<ul style="list-style-type: none"> • Acceptable for Patented/ proprietary product • Single manufacturer 	<ul style="list-style-type: none"> • Acceptable for Patented/ proprietary product • Single manufacturer 	<ul style="list-style-type: none"> • Acceptable for Patented/ proprietary product • Single manufacturer • In case of spare parts for existing equipments
Procurement Service Agent	<ul style="list-style-type: none"> • Acceptable where limited procurement capacity at procurement agency 	<ul style="list-style-type: none"> • Acceptable where limited procurement capacity at procurement agency 	<ul style="list-style-type: none"> • Acceptable where limited procurement capacity at procurement agency 	<ul style="list-style-type: none"> • Acceptable where limited procurement capacity at procurement agency
Source: The Procurement Manual, Ministry of Health and Family Welfare and the information gathered through stakeholders' interview				

International Competitive Bidding

The primary aim of International Competitive Bidding (ICB) is to provide all eligible prospective bidders with timely and adequate notification of the buyer's requirements and an equal opportunity to bid for the required goods and services. The ICB method is usually employed when the supplies are required to be imported and it is expected that the foreign bidders will participate.

ICB is generally applied to the World Bank funded schemes/programmes. However, it is noteworthy that it is adopted by Government of India only when goods/services are not produced/available in sufficient quantity in the country. As per World Bank procurement guidelines, ICB is generally required for all individual procurement valued at US\$200,000 or more.

The National Competitive Bid

On the other hand, the National Competitive Bid method is applied in cases where the possibility of foreign bidder participating is less or absent due to low contract value, scattered geographical spread or goods available locally at prices below international market. Preference to domestic suppliers is clearly laid out for this type of bidding.

Available Grievance Mechanisms

In case of disagreement between the Ministry and the supplier, the system provides for grievance mechanisms to resolve the dispute. Such mechanism requires mandatory consultations within 21 days of the institution of the dispute failing which the parties can resort to arbitration. When the contract is with a foreign supplier, the supplier has the option to choose either the Indian Arbitration or Conciliation Act, 1996 or Arbitration in accordance with the provision of UNCITRAL Arbitration Rules. In case of World Bank funded projects, it is suggested generally international arbitration rules are used, such as UNCITRAL, Rules of Conciliation and Arbitration of the International Chamber of Commerce (ICC), Rules of the London Court of International Arbitration, or Rules of Arbitration Institute of the Stockholm Chamber of Commerce. This process of redressal is time taking and often alleged to be less impartial.

The results from the stakeholders' field research provide that the industry is also concerned with lack of effective alternative dispute resolution mechanism. A positive move in this direction would be highly encouraging for the stakeholders. Currently, issues are usually addressed via the departmental redressal or through Indian court system which take exceedingly long time periods. The Public Procurement Bill, 2012 is likely to plug this lacuna.

Qualification Criteria in Tender Bidding

Both open and limited tender bidding is opted depending on the programme under which procurement is made. Some of these programmes mention qualifying criterion which are required for participation in the bidding process. For example, for World Bank funded vaccinations programmes, the qualification requirements siphon the vendors who are DGCI complaint (this comes from the WHO GMP compliant list). In case of other central procurement, it is an open bidding. An example for qualifying criterion for bidding is that installed capacity of the manufacturer must be 10 percent of the value of the procurement per annum.

Annual Turnover as Qualification Criteria

Not all criteria stipulated through tender criteria is salutary. The criteria requiring minimum turnover may prove debilitating to the participation of small and medium-sized enterprises even though the criteria requiring compliance with GMP is salutary. There is a possibility that the medium size enterprises who follow GMPs and fulfil this criteria may fail on account of 'market standing' and 'turnover'. Criteria which exclude companies/business on the turnover criteria *per se*, could interfere with the entry for the Indian pharmaceutical SMEs. As noted before, in case of Tamil Nadu, it is assumed that smaller firms may fail in supplying the requisite drugs in

right amount at the correct time. However, this concern has to be proven, and if it is proven, measures must be taken to improve the participation of SMEs in the procurement process. It may be essential to examine as to whether the technical criteria pertaining to annual turnover may result in the creation of an entry barrier to new enterprises.

Disadvantages of the System of 'Procurement at Lowest Price'

Procurement of quality products at a price which provides value of money to the taxpayers may be undermined in the quest for lowest price bid. This is especially critical in light of examining as to whether the bidders are compliant with Good Manufacturing Practices. It may be attractive to the bidders to flout GMPs in order to cut prices and offer the lowest price in order to obtain a bid.

Further, it is also to be understood that the mechanism in which these drugs are manufactured (whether GMP is followed or not) at a low price, so as to fit in the lowest tender price, needs to be reassessed from time to time.

In practice, procurement of drugs is often based on the lowest tender price quotations. Many domestic and international pharmaceutical brand suppliers are discouraged by this and cease to participate in the government procurement market resulting in reduced competition and diminished value for money. The 'two-bid' system which has a two rounds of application with both the technical bid and the financial bid may be a step in the right direction.

Drug Procurement Mechanism by HSCC

The MoHFW delegates the procurement of drugs and pharmaceuticals to an agency called the Hospital Services Consultancy Corporation (HSCC), a multi-disciplinary consultancy organisation established to provide quality

consultancy services in healthcare and other social sectors. HSCC provides a range of services such as the construction of hospitals, laboratories, research centres etc., the procurement of drugs and medicines, the procurement & commissioning of medical equipments including solid & medical waste management systems and services pertaining to the establishment of IT-based management systems in healthcare. The HSCC undertakes procurement of drugs and pharmaceuticals by making specifications, tendering, order placement, expediting and follow-up, inspection and dispatch. A number of World Bank-supported programmes for procurement of drugs and pharmaceuticals have been undertaken by the HSCC for diseases such as Malaria, TB, reproductive child health etc.

The Procurement by the Empowered Procurement Wing

The Empowered Procurement Wing (hereinafter EPW) is a designated body authorised to make procurements for multiple programmes according to the procurement manual of the Ministry of Health and Family Welfare. In the present study, the EPW is crucial as it currently is responsible for the central procurement of pharmaceuticals, vaccines, contraceptive products, medical supplies and equipment for the RCH II programme as well as its subsequent distribution to the States and Union Territories. The EPW can also procure pharmaceuticals and medical supplies directly from UN agencies with prior approval of the World Bank.

The structure of public procurement managed by the EPW relies on three committees: a) Procurement Committee; b) Tender Evaluation Committee and; c) Integrated Purchase Committee. The functions performed by these three committees have been outlined below in order to present a picture of the allocation of the duties and responsibilities

between the three bodies, crucial from the point of view of principles of transparency and fair principles in the procurement.

Table 4.4: Public Procurement by the EPW		
Procurement Committee	Tender Evaluation Committee	Integrated Purchase Committee
Ensure that the procurement plans support the objectives and operations of EPW.	Responsible for evaluating the Pre-qualification applications and would prepare a report explaining the specific reasons for its recommendations.	Cases relating to procurement up to a value of ₹4 crore could be deliberated by the IPC by circulation of agenda papers amongst the members of the Committee.
Approve the range of acceptable cost of items to be procured and compare it with the available funds in the approved budget.	Evaluation of bids should be made strictly in terms of the provisions in the bid document to ensure compliance with the commercial and technical aspects. The evaluation criteria for evaluating the bid should be predetermined and publicly published.	
Evaluate the schedules for procurement and specifications and ensure that the procurement process strictly conforms to the provisions of this manual and its operating regulations and guidelines.	Will prepare a detailed report on the evaluation and comparison of bids for submission to the Integrated Purchase Committee explaining clearly the specific reasons for recommendation for the award of contract.	
Ensure that all reporting requirements are being met and all contracts are duly administered.		
Endorse every intended purchase before implementation.		
Recommend the proper mode of procurement for each item to be procured.		
Source: Ministry of Health and Family Welfare (2011), “Procurement and Operational Manual for Medical Store Organisation and Government Medical Store Depots”.		

An analysis of the above system, points out that the orders placed by service providers (hospitals and district officers etc) with suppliers are based on available budget and the availability of also the direct supplies from suppliers to service providers. This basis of the system could be improved to accommodate other procurement objectives like placing an emphasis on quality assessments.

It is critical to note the volume which will be available for public procurement: The International Competitive Tender is open only for procurement of pharmaceuticals, contraceptives, and medical equipment with a value above ₹2.5 million, while it is explicitly excluded for vaccines and for procurement below the ₹2.5 million threshold.

Purchase Preference Policy

While the GFR 2005 Rules seem to be the principal regulation with respect to government procurement, there are other departmental orders dealing with the purchase of drugs and other medical devices. Moreover, different states (and also different programmes) appear to have their own procedures of public health procurement. Deserving special mention is a Central Government order issued by the Department of Chemicals & Petrochemicals, granting purchase preference exclusively to Pharma Central Public Sector Enterprises (CPSEs) and their subsidiaries in respect of 102 specified medicines manufactured by them has been dealt with in detail in Box 4.2. Interviews with the relevant stakeholders confirmed that there exists a preference policy in favour of Indian companies (PSUs or Indian MNCs). For example, if A (Indian company) manufactures the drugs/medicines and bids for its supply in the GP market, it will be preferred over company B (foreign company) for identical medicines. This

practice curtails competition in the GP market and reduces the benefits that could otherwise be relayed to the consumers.

Depending on the method of procurement used, the procurement system adopted for central government purchases shall be advertised for any competitive bidding on national and international newspapers according to the Ministry of Health Manual. The Ministry may formulate specifications based on international or Bureau of Indian Standards (BIS) standards and specifications. The ministry has its own specification committee headed by Special Director Health Services. These flexibilities help the Health Ministry to choose the best specifications from either system.

The Central Public Procurement Portal (CPPP) is being set up on a similar model like the TN Medical Supplies Corporation. The TNMSC is recognised by the World Bank for the transparency/competition that it has promoted. It is mandatory to publish tender invitation, result of tender, bidding rules and procedures etc. on this website. This will result in improvement of the bidding procedures in terms of transparency and competition. Ridding the system of corruption and taking steps to render the process more accountable will make the procurement system in health sector, particularly the drug procurement, to become attractive to pharmaceutical industry. The provision pertaining to the redressal mechanism provided under the Procurement Bill 2012, may be instrumental in resolving the issue of long waiting periods for decisions/forum shopping and would incentivise the industry to have enough transparency, stability and predictability.

**Box 4.2: Purchase Preference Policy for Products of
Pharma Central Public Sector Enterprises and Their
Subsidiaries**

The Union Cabinet gave its approval to the following proposals in regard to preferential purchase policy for 102 drugs / pharmaceuticals exclusively from Pharma CPSUs and their subsidiaries by Central Departments, PSUs, autonomous bodies:

- i. Purchase Preference Policy (PPP) in respect of a maximum of 102 medicines would be valid for a period of five years.
- ii. This would also be applicable to purchase of 102 drugs made by State Governments under healthy programmes which are funded by Government of India.
- iii. PPP will extend only to Pharma CPSEs and their subsidiaries (ie. Where Pharma CPSEs own 51 percent or above shareholding).
- iv. It would be applicable to maximum of 102 medicines as notified by Department of Chemicals & Petrochemicals from time to time.
- v. The Purchasing Departments / PSUs / autonomous bodies etc. may invite limited tenders from Pharma CPSEs and their subsidiaries or purchase directly from them at NPPA certified / notified price with a discount up to 35 percent.
- vi. The purchasing departments would purchase from Pharma CPSEs and their subsidiaries subject to their meeting GMPs norms as per Schedule 'M' of the Drugs & Cosmetic Rules. If no Pharma CPSE is forthcoming to supply these 102 medicines, the purchasing departments would be at liberty to purchase from other manufacturers.
- vii. If the Pharma CPSEs or their subsidiaries which has the benefit of PPP, fail to perform as per the purchase order, it would be subject to payment of liquidated damages or any other penalty included in the contract.
- viii. The medicines covered under DPCO would be supplied at the rates fixed by NPPA rates minus discount up to 35 percent.
- ix. In case of medicines not covered under DPCO, prices would be certified from NPPA, only for the limited purpose of supply

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| <p>to Central Government Departments and their Public Sector Undertakings, autonomous bodies etc. On the certified price, Pharma CPSEs and their subsidiaries would provide discount up to 35percent.</p> <p>x. Pharma CPSEs and their subsidiaries would strengthen their marketing capabilities for a larger market share in the open market during the currency of Purchase Preference Policy.</p> |
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Source: Press Information Bureau, Government of India, July 27, 2006

Market Access Opportunities for Indian Suppliers in Foreign Government Procurement Markets

Indian pharmaceutical companies have been successfully exporting to various markets in the world thereby indicating an opportunity to further exploit the government procurement markets under suitable conditions. The overall pharmaceutical exports sourced from Indian companies are directed to more than 200 countries around the globe including highly regulated markets of US, Europe, Japan and Australia. During 1999-2000, production of bulk Active Product Ingredients (APIs) is estimated at US\$860mn and value of dosage forms is estimated around US\$3bn (growth + 15 percent). The country has shown excellent performance on the export front with the exports approximating US\$10.3bn during 2010-11 as per provisional statistics of Pharmaceutical Exports Promotion Council (Pharmexcil). The pharmaceutical industry in India has achieved global recognition as a low cost producer and supplier of quality bulk drugs and formulations to the world.

Country-wise, the US remains the top importer of Indian pharmaceuticals followed by the UK, Germany and South Africa. Also, these pharmaceutical markets are characterised by various compliant requirements in regards to quality and other standards and often being slated as being barriers to

enter the market. The Indian companies have a good record of quality, as most of the Indian pharma companies operating on a global level comply with all the standards set by EU and US authorities.

Table 4.5: Export of drugs and pharmaceuticals from 2007-08 to 2009-10

Year	Exports (in US\$bn)	Growth
2007-08	6.3	14.4
2008-09	8.6	35.7
2009-10	9.1	5.9
<i>Source: Directorate General of Commercial Intelligence and Statistics, (DGCIS) Kolkata</i>		

Difficulties Encountered by Local Producers in Accessing Foreign Government Procurement Markets

According to the stakeholders' interviews with representatives of one of the Indian pharmaceutical association, the main benefit of acceding to the international agreements such as the GPA or through free trade agreements is the increased market access to other high value markets with enhanced government procurement activities. For instance, the opening of the procurement market in Japan would allow Indian manufacturers to export their products to the second-largest medicine market.

Some stakeholders further clarified that though there had existed a perception that Indian products were not of superior quality a decade ago, however, this view has been removed owing to the consistent performance of Indian pharmaceuticals in international markets. In recent times, fake drugs identified in Africa were alleged to have originated from India. Though this claim was found to be unfounded, the Indian government

has now introduced bar coding on Indian drug supplies to improve traceability and to successfully defend any complaints pertaining to the quality of the product.

On the other hand, patents on 16 ‘blockbuster’ drugs with over US\$1bn in annual global sales are scheduled to expire between 2011 and 2013, creating generic competition in the major economies: this is referred to as the ‘drying patent pipeline’. This could result in increasing generic production and sale, and provide an opportunity for exports. The stakeholder’s research and literature research revealed that India’s pharmaceutical companies are already looking for partnerships to access the US market (40 percent of the total generic market).

Some of the roadblocks which Indian companies seeking to enter foreign GP markets may encounter are as follows: In the EU and the US, government tenders from drugs posit many pre-qualification criteria, such as market experience of minimum five years, price preferences etc. In some countries such as Belgium, there is a 15 percent price preference for domestic companies. Further, the user fees for making the tender application is too high (typically in the US), while language issues especially in Japan and some countries in the European Union may discourage an Indian player from participating in the tender process. The stakeholders’ research indicated that the quality of the drugs supplied by Indian companies is well-regarded in the US, EU and Japanese markets. Indian companies may face competition from cheaper drugs produced by Chinese companies – however, quality concerns have not shifted to Chinese pharmaceutical-company offerings.

Pre-Qualification Requirements: The local regulatory standards or pre-inspection requirements, especially in the US, the EU, and Japan are critical to this analysis. Inspection of

each of the products and at each of the facility centres in which these products are manufactured after a stipulated interval or 2-3 years as required by some of these pre-qualification requirements may prove to be expensive, and further may require the companies to disclose sensitive information like the ingredients of the product to the foreign authorities.

All these requirements may render the system very expensive, sometimes opaque and render it difficult for Indian players to bid in foreign tender procedures. This would result in discouraging Indian exports into the local markets.

Preference for Branded Generics: Many countries display a predilection for expensive branded generics rather than non-branded equivalents despite the stark difference in costs between the two: countries such as Poland and France pay as much as ten times due to their favouring branded generics, unlike in the UK. A solution to ensure a greater use of non-branded generics is to instruct medical students by the non-branded name for a drug – this is done in UK medical schools. India must frame its procurement policy to focus on obtaining medicines at the cheapest possible price, and explore the option of using unbranded generics because the marginal benefits of national favouritism are vastly outweighed by the associated marginal costs. Interestingly, in the UK, it appears that the greatest challenge facing the pharmaceuticals industry is the highly competitive nature of the existing market structure in the country. The driving down of prices and squeezing of profit margins has led to certain firms withdrawing from the UK market as they are unable to compete. In response, however, these companies have sought to diversify its portfolio of products in an attempt to increase the number of tenders it can compete for, and hopefully maintain overall profits by increasing the volume of units sold.

Other Concerns: A concern unearthed during the consultations with public authorities was that Indian suppliers may choose to derogate from their commitments to the domestic market. Companies may focus on increasing exports to lucrative markets in Europe and North America rather than supplying to domestic public health programmes.

Indian drug makers have taken over much of the global trade in medicines and now manufacture more than 80 percent of the active ingredients in drugs sold worldwide. However, Indian pharmaceutical companies are still grappling with production of complex and expensive biotech medicines increasingly used to treat cancer/diabetes and other diseases. It would be a step in the right direction if investments in R&D increased as a whole.

Box 4.3: Regulatory Barriers in Foreign Jurisdictions

European Union

In 2000, the NHS Purchasing and Supply Agency (PASA) was set up as an executive agency of the Department of Health and was entrusted to centralise and carry out procurement on behalf of all NHS entities.

In the European Union, the Directive 2004/18 regulates the public procurement in the health sector and lists the public entities bound by the public procurement rules. Other entities are free to procure based on their own criteria.

- In Belgium, both private and public hospitals are bound by the public procurement rules.
- In Italy, all bodies administering compulsory social security and welfare schemes and a general category of 'organisations providing services in the public interest are similarly covered.
- Netherlands lists the university hospitals, within the meaning of the Law on Higher Education and Scientific Research and several bodies involved in the management of hospital facilities, accreditation of health providers, etc.

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- In the UK, the entities bound by the procurement rules are the Strategic Health Authorities (SHAs), who are the entities responsible for the attainment of the health targets decided by the Secretary of State for Health. However, under the current design of the national health system, the largest part of contracting is not done by the Primary Care Trusts (PCTs).

Hospital pharmacies operate within an economic environment in which governments play a major role directly or indirectly in the strategic management of health care delivery.¹⁹ Procurement by hospital pharmacies in many EU countries takes place through national tendering of contracts to suppliers by regional purchasing groups (EAHP 2002). In some countries this is coupled with negotiated arrangements with local wholesalers. Sometimes hospitals arrange contacts through cooperative purchasing with other hospitals in order to secure the best purchasing power through consortium arrangements.

Canada

In 2007, pharmaceuticals represented the second biggest expenditure sector in Canada. Around 48 percent of public expenditure on health goes to medicines. Health is a matter of concern for local states in Canada. Each local government procures according to its own rules and systems. While some procure on a competitive basis at the international level, the others procure through group purchases, intra-state pooling and provincial tenders.

Compiled by the Author from various government and other procurement agencies websites

Possible Penetration in the Government Procurement Health Sector

Despite the overall success of Indian pharmaceutical industry in entering some important procurement markets, the global slowdown has resulted in difficulty in entering and sustaining trade in medicines because of a cautious approach being adopted by countries. Two countries which are being focussed upon are the EU and the US.

Future of Government Procurement in the EU: The EU Directive

In the year 2007, public procurement accounted for over •2,000bn or around 17 percent of EU GDP.²⁰ Despite the seemingly large scope for procurement, studies have indicated that of this approximately •2000bn market, only •309bn is above the threshold of which only 3.5-4.2 percent may be accessible to non-EU suppliers.²¹ The Ministry of Health is one of the government bodies which has been listed under Annex I of the commitments of the EU.

Of further relevance is a directive relating to medicinal products for human use. This prevents the entry of falsified medicinal products into the legal supply chain. This new legislation introduces tougher rules to improve the protection of public health with new harmonised, pan-European measures to ensure that medicines are safe and that the trade in medicines is rigorously controlled. To this end, these new measures include: (i) an obligatory authenticity feature on the outer packaging of the medicines; (ii) a common, EU-wide logo to identify and distinguish between legitimate online pharmacy-entities and illegal entities; (iii) Tougher rules on the controls and inspections of producers of Active Pharmaceutical Ingredients; and (iv) Strengthened record-keeping requirements for every wholesale distributor.

This directive will be effective from January 02, 2013 (Annexed herewith the chapter as Annexure 1). Under this EU Falsified Medicines Directive, each shipment of active pharmaceutical ingredient (API) or drugs from India should be accompanied by a written confirmation which vouches that the quality of the exports conforms to EU standards. The legislation was adopted by the EU Council in May 2011 with the objective of preventing the entry of fake drugs. Failure to provide this “equivalence certificate” may result in loss of market-entry opportunities for Indian companies.

Indian drug regulatory authorities are required to certify that the products exported maintain quality standards and follow the GMPs prescribed by EU drug regulators. Domestic drug makers have opined that the Drugs Controller General of India is neither authorised under the law, nor conversant enough with the EU GMP Standards to issue such a certification. This effectively means that the Indian companies will have to produce such certificates even after their manufacturing facilities and products (meant for exports as stated above) get all regulatory clearances directly from the EU drug regulatory authorities.

The term “falsified medicinal product” in the European Commission’s directive itself is of particular concern in India owing to lacking defined contours thereby increasing the scope of its ambiguous application. The Pharmaceutical Associations in India believe that this EU initiative may be more protectionist in its objective than health-related and that this measure may result in protecting the EU bulk industry by citing safety and public health as reasons.

Future of Government Procurement in the US: The Federal Healthcare Legislation

On the other hand, the US Obama administration is attempting to introduce competition to the expensive drugs made by biotechnology companies. In the 2010, Federal Healthcare Legislation has incorporated a proposal to reduce the market exclusivity offered to brand-name biologic drugs from 12 to seven years. That would allow so-called generic versions of such drugs to reach the market sooner, saving an estimated US\$3.5bn in federal health spending over 10 years. This regulatory change is particularly important in view of technology transfer and in regards to the IP issues *vis-à-vis* Government Procurement market in the US.

India has a unique position among the countries in the developing world because of its strong generic pharmaceutical industry which provides medicines at an affordable price. This is particularly crucial given that the generic drugs market in the US is on the increase. The trigger for the development of the generics market in the US came in the form of legislative action initiated in the first half of the 1980s. The Drug Price Competition and Patent Restoration Act of 1984 popularly as “the Hatch-Waxman Act” created opportunities for marketing of generics or the so-called Abbreviated New Drug Applications (ANDAs).²²

Suggestions for Improving Opportunities in Government Procurement

A focus on making the system efficient, transparent and competitive must be introduced into the government procurement rules and procedures in order to encourage participation by foreign players.

While dealing with the participation of Indian players in the foreign Government Procurement markets, it is noted that owing to the economic slowdown, markets are shrinking and protectionist measures are being applied in view of the economic slowdown. The Indian pharmaceutical companies are increasingly experiencing stringent regulatory standards and procedural difficulty in entering/sustaining the other government procurement markets outside India for drugs. As described earlier, this is especially true in the EU, US and Japan. Attempts can be made to negotiate that an agreement on ‘equivalence’ need to be concluded so as to ensure that access to those markets is not denied to Indian producers.

In the favourable environment provided by the implementation of patent laws, spread of health insurance,

rising affluence etc., studies show that a critical mass for Indian pharmaceutical industry will emerge by 2020. This provides a positive ground to foster the growth of generics in the next five years. India's strength in the Over the Counter (OTC) segment generics, patented products and vaccines must be further strengthened for it to attain a key global-player position. All of these will be critical drivers which influence the exploitation of domestic and international GP markets in health by Indian players.

Keeping in mind then sizeable amount that is allocated for the purpose of medical expenditure, competitive bids for procuring bulk drugs coupled with streamlining the rational use of drugs would result in saving of the public money.

Considering the fact that countries are currently deploying various measures to restrict the market entry and consequent penetration through the introduction of regulatory roadblocks etc, it is also essential to take note of the possibilities of increased competition from countries like the US which, as noted above, are currently seeking to expand their generic industries.

The preference for branded generics has been highlighted before. This preference for branded generics should be eliminated through awareness dissemination programmes. This will result in cost-effective competition. Encouraging green field investment in the health sector may result in better technology transfer in this sector, thereby augmenting domestic production capabilities and improving participation of suppliers of unbranded generics in the domestic and foreign government procurement sector.

Considering that MNCs are better positioned to compete in the event of GP market liberalisation because they function on the principles of economies of scale, the following has to be taken note of. However, if the market is opened for foreign players, a large number of SMEs who also currently coexist in

the GP market in the pharmaceutical industry may not sustain the competition posed by other players in terms of costs of production because they do not operate per the principle of economies of scale. Hence, if India chooses to further liberalise the GP market by acceding to the GPA, a policy of augmenting the capacity of SMEs to enable them to compete in the government procurement landscape would be crucial.

Conclusion

Major concerns in the Indian government health procurement sector are the regulatory issues, the lack of infrastructure and trained skilled experts in procurement. Although, the Indian procurement regulations in the health sector provide for neutrality between foreign and Indian suppliers, procurement practices and procedural delays ingrained in the system discourage many suppliers whether Indian or foreign from participating in this market. Nonetheless, the new draft Public Procurement enactment of 2012, in its present form provides enough policy space to the government to give domestic preference in areas considered necessary on grounds of promotion of domestic industry, socio-economic policy and any other policy considered to be in the public interest.

Holistic improvements in the system could further prepare the Indian companies for competition with foreign companies. Any health system demands the timely supply of drugs, and good quality of the medical supplies and equipments. This depends on procurement as well as logistics management. Legal, policy and regulatory environment in this regards provide an important foundation for public procurement in the health sector. An efficient procurement policy should have an integrated approach starting from (i) preparation of an essential drugs list, (ii) assessment of the quantity of drugs needed,

(iii) quality assurance from suppliers, (iv) procurement process, (v) supply chain management, and (vi) prompt payment to suppliers.

Emphasis should be laid on effective logistic practices, to deliver drugs on time. A greater stress on quality standards is essential for both Indian and foreign suppliers. An effective, transparent and efficient procurement system for drugs and medical equipment would effectively address the gap between demand and supply of healthcare products/services in India.

The Public Procurement Bill 2012 is being considered to play a crucial role in tackling most of these critical concerns such as lack of transparency, increase in efficiency and the quest to provide best quality drugs. The Public Procurement Bill is expected to provide an effective redressal mechanism which would go long way in resolving the issue of long waiting periods for decisions/forum-shopping and would incentivise the industry to have enough transparency, stability and predictability.

The current system of procurement places a high premium on accessibility, cost-effectiveness and convenience. The system will have to be based out of public needs and be restructured accordingly rather than being a supplier-based system. This must be reformed to become a user-based system affording ready availability, quality and competitive cost of drugs, equipment and services thereof. This will result in an increase in the quantitative market available for Government Procurement and enable opportunities for transfer of technology to take place.

While dealing with the issue of feasibility of India's possible accession to the WTO, both the procurement legal framework and governance juxtaposed with market access opportunities in other government procurement are significant. The unilateral reform process of streamlining the procurement

system by way of introducing the Public procurement Bill, 2012 will definitely improvise the overall system.

However, the need at present is to put in place some complimentary policies on procurement system that will result in compliance with India's obligations under international law. This will provide an important signalling effect to foreign firms and investors about Indian government's commitment to the process of reform. Limited liberalisation at the Central Government level is unlikely to have a sizeable impact upon the general business environment, given that at present firms are able to bid for Central Government contracts under open competitive calls. It is perceived that further opening up would signal the government's willingness to support on-going reform processes through the draft bill, and by outlining an implicit commitment to reforming the current system.

Besides, the political economy of this decision, it is essential to consider the quantification of India's Market Access opportunities in this sector from a long-term perspective. It remains to be seen whether the Indian pharmaceutical industry attains a 'significant mass' in the next decade coupled with rapid improvements in R&D facilities resulting in buttressing its export competitiveness.

Endnotes

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Annexure 4.1

DIRECTIVE 2011/62/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2011

amending Directive 2001/83/EC on the Community code relating to medicinal products for human use, as regards the prevention of the entry into the legal supply chain of falsified medicinal products
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114, and point (c) of Article 168(4), thereof, Having regard to the proposal from the European Commission, Having regard to the opinion of the European Economic and Social Committee¹

Having regard to the opinion of the Committee of the Regions,²
Acting in accordance with the ordinary legislative procedure³

Whereas:

- (1) Directive 2001/83/EC of the European Parliament and of the Council⁴ lays down the rules for, *inter alia*, manufacturing, importing, placing on the market, and the wholesale distribution of medicinal products in the Union as well as rules relating to active substances.
- (2) There is an alarming increase of medicinal products detected in the Union which are falsified in relation to their identity, history or source. Those products usually contain sub-standard or falsified ingredients, or no ingredients or ingredients, including active substances, in the wrong dosage thus posing an important threat to public health.
- (3) Past experience shows that such falsified medicinal products do not reach patients only through illegal means, but via the legal

supply chain as well. This poses a particular threat to human health and may lead to a lack of trust of the patient also in the legal supply chain. Directive 2001/83/EC should be amended in order to respond to this increasing threat.

- (4) The threat to public health is also recognised by the World Health Organisation (WHO), which set up the International Medical Products Anti-Counterfeiting Taskforce ('IMPACT'). IMPACT developed Principles and Elements for National Legislation against Counterfeit Medical Products, which were endorsed by the IMPACT General Meeting in Lisbon on December 12, 2007. The Union participated actively in IMPACT.
- (5) A definition of 'falsified medicinal product' should be introduced in order to clearly distinguish falsified medicinal products from other illegal medicinal products, as well as from products infringing intellectual property rights. Furthermore, medicinal products with unintentional quality defects resulting from manufacturing or distribution errors should not be confused with falsified medicinal products. To ensure uniform application of this Directive, the terms 'active substance' and 'excipient' should also be defined. .
- (6) Persons procuring, holding, storing, supplying exporting medicinal products are only entitled pursue their activities if they meet the requirements for obtaining a wholesale distribution authorisation in accordance with Directive 2001/83/EC. However, today's distribution network for medicinal products is increasingly complex and involves many players who are not necessarily wholesale distributors as referred to in that Directive. In order to ensure the reliability of the supply chain, legislation in relation to medicinal products should address all actors in the supply chain. This includes not only wholesale distributors, whether not they physically handle the medicinal products, but also brokers who are involved in the sale or purchase of medicinal products without selling or purchasing those products themselves, and without owning and physically handling the medicinal products.
- (7) Falsified active substances and active substances that do not comply with applicable requirements of Directive 2001/83/EC pose serious risks to public health. Those risks should be addressed by strengthening the verification requirements applicable to the manufacturer of the medicinal product.

- (8) There is a range of different good manufacturing practices that are suitable for being applied to the manufacturing of excipients. In order to provide for a high level of protection of public health, the manufacturer of the medicinal product should assess the suitability of excipients on the basis of appropriate good manufacturing practices for excipients.
- (9) In order to facilitate enforcement of and control of compliance with Union rules relating to active substances, the manufacturers, importers or distributors of those substances should notify the competent authorities concerned of their activities.
- (10) Medicinal products may be introduced into the Union while not being intended to be imported, i.e. not intended to be released for free circulation. If those medicinal products are falsified they present a risk to public health within the Union. In addition, those falsified medicinal products may reach patients in third countries. Member States should take measures to prevent these falsified medicinal products, if introduced into the Union, from entering into circulation. When adopting provisions supplementing this obligation on Member States to take those measures, the Commission should take account of the administrative resources available and the practical implications, as well as the need to maintain swift trade flows for legitimate medicinal products. Those provisions should be without prejudice to customs legislation, to the distribution of competences between the Union and the Member States and to the distribution of responsibilities within Member States.
- (11) Safety features for medicinal products should be harmonised within the Union in order to take account of new risk profiles, while ensuring the functioning of the internal market for medicinal products. Those safety features should allow verification of the authenticity and identification of individual packs, and provide evidence of tampering. The scope of these safety features should take due account of the particularities of certain medicinal products or categories of medicinal products, such as generic medicinal products. Medicinal products subject to prescription should as a general rule bear the safety features. However, in view of the risk of falsification and the risk arising from falsification of medicinal products or categories of medicinal products there should be the possibility to exclude certain medicinal products or categories of medicinal products subject

to prescription from the requirement to bear the safety features by way of a delegated act, following a risk assessment. Safety features should not be introduced for medicinal products or categories of medicinal products not subject to prescription unless, by way of exception, an assessment shows the risk of falsification, which leads to serious consequences. Those medicinal products should accordingly be listed in a delegated act.

The risk assessments should consider aspects such as the price of the medicinal product; previous cases of falsified medicinal products being reported in the Union and in third countries; the implications of a falsification for public health, taking into account the specific characteristics of the products concerned; and the severity of the conditions intended to be treated. The safety features should allow the verification of each supplied pack of the medicinal products, regardless of how they are supplied including through sale at a distance. The unique identifier as well as the corresponding repositories system should apply without prejudice to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data⁵ and should retain clear and effective safeguards whenever personal data is processed. The repositories system containing information on safety features might include commercially sensitive information. This information must be appropriately protected. When introducing the obligatory safety features, due account should be taken of the particular characteristics of the supply chains in Member States.

- (12) Any actor in the supply chain who packages medicinal products has to be a holder of a manufacturing authorisation. In order for the safety features to be effective, a manufacturing authorisation holder who is not himself the original manufacturer of the medicinal product should only be permitted to remove, replace or cover those safety features under strict conditions. In particular, the safety features should be replaced in the case of repackaging by equivalent safety features. To this end, the meaning of the term 'equivalent' should be clearly specified. Those strict conditions should provide adequate safeguards against falsified medicinal products entering the supply chain, in order to protect

patients as well as the interests of marketing authorisation holders and manufacturers.

- (13) Manufacturing authorisation holders who repackage medicinal products should be liable for damages in the cases and under the conditions set out in Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products.⁶
- (14) In order to increase reliability in the supply chain, wholesale distributors should verify that their supplying wholesale distributors are holders of a wholesale distribution authorisation.
- (15) The provisions applicable to the export of medicinal products from the Union and those applicable to the introduction of medicinal products into the Union with the sole purpose of exporting them need to be clarified. Under Directive 2001/83/EC a person exporting medicinal products is a wholesale distributor. The provisions applicable to wholesale distributors as well as good distribution practices should apply to all those activities whenever they are performed on Union territory, including in areas such as free trade zones or free warehouses.
- (16) In order to ensure transparency, a list of wholesale distributors for whom it has been established that they comply with applicable Union legislation by means of an inspection by a competent authority of a Member State, should be published in a database that should be established at Union level.
- (17) The provisions on inspections and controls of all actors involved in the manufacturing and supply of medicinal products and their ingredients should be clarified and specific provisions should apply to different types of actors. This should not prevent Member States from performing additional inspections, where considered appropriate.
- (18) In order to ensure a similar level of protection of human health throughout the Union, and to avoid distortions in the internal market, the harmonised principles and guidelines for inspections of manufacturers and wholesale distributors of medicinal products as well as of active substances should be strengthened. Such harmonised principles and guidelines should also help to ensure the functioning of existing mutual recognition agreements with third countries whose application depends on efficient and comparable inspection and enforcement throughout the Union.

- (19) Manufacturing plants of active substances should be subject not only to inspections carried out on the grounds of suspected non-compliance but also on the basis of a risk-analysis.
- (20) The manufacture of active substances should be subject to good manufacturing practice regardless of whether those active substances are manufactured in the Union or imported. With regard to the manufacture of active substances in third countries, it should be ensured that the legislative provisions applicable to the manufacturing of active substances intended for export to the Union, as well as inspections of facilities and enforcement of the applicable provisions, provide for a level of protection of public health equivalent to that provided for by Union law.
- (21) The illegal sale of medicinal products to the public via the Internet is an important threat to public health as falsified medicinal products may reach the public in this way. It is necessary to address this threat. In doing so, account should be taken of the fact that specific conditions for retail supply of medicinal products to the public have not been harmonised at Union level and, therefore, Member States may impose conditions for supplying medicinal products to the public within the limits of the Treaty on the Functioning of the European Union (TFEU).
- (22) When examining the compatibility with Union law of the conditions for the retail supply of medicinal products, the Court of Justice of the European Union ('the Court of Justice') has recognised the very particular nature of medicinal products, whose therapeutic effects distinguish them substantially from other goods. The Court of Justice has also held that health and life of humans rank foremost among the assets and interests protected by the TFEU and that it is for Member States to determine the level of protection which they wish to afford to public health and the way in which that level has to be achieved. Since that level may vary from one Member State to another, Member States must be allowed discretion⁷ as regards the conditions for the supply on their territory of medicinal products to the public.
- (23) In particular, in the light of the risks to public health and given the power accorded to Member States to determine the level of protection of public health, the case-law of the Court of Justice has recognised that Member States may, in principle, restrict the retail sale of medicinal products to pharmacists alone.⁸

- (24) Therefore, and in the light of the case-law of the Court of Justice, Member States should be able to impose conditions justified by the protection of public health upon the retail supply of medicinal products offered for sale at a distance by means of information society services. Such conditions should not unduly restrict the functioning of the internal market.
- (25) The public should be assisted in identifying websites which are legally offering medicinal products for sale at a distance to the public. A common logo should be established, which is recognisable throughout the Union, while allowing for the identification of the Member State where the person offering medicinal products for sale at a distance is established. The Commission should develop the design for such a logo. Websites offering medicinal products for sale at a distance to the public should be linked to the website of the competent authority concerned. The websites of the competent authorities of Member States, as well as that of the European Medicines Agency ('the Agency'), should give an explanation of the use of the logo. All those websites should be linked in order to provide comprehensive information to the public.
- (26) In addition, the Commission should, in cooperation with the Agency and Member States, run awareness campaigns to warn of the risks of purchasing medicinal products from illegal sources via the Internet.
- (27) Member States should impose effective penalties for acts involving falsified medicinal products taking into account the threat to public health posed by those products.
- (28) The falsification of medicinal products is a global problem, requiring effective and enhanced international coordination and cooperation in order to ensure that anti-falsification strategies are more effective, in particular as regards sale of such products via the Internet. To that end, the Commission and the Member States should cooperate closely and support ongoing work in international fora on this subject, such as the Council of Europe, Europol and the United Nations. In addition, the Commission, working closely with Member States, should cooperate with the competent authorities of third countries with a view to effectively combating the trade in falsified medicinal products at a global level.

- (29) This Directive is without prejudice to provisions concerning intellectual property rights. It aims specifically to prevent falsified medicinal products from entering the legal supply chain.
- (30) The Commission should be empowered to adopt delegated acts in accordance with Article 290 TFEU in order to supplement the provisions of Directive 2001/83/EC, as amended by this Directive, concerning good manufacturing and distribution practices for active substances, concerning detailed rules for medicinal products introduced into the Union without being imported and concerning safety features. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.
- (31) In order to ensure uniform conditions for implementation, implementing powers should be conferred on the Commission as regards the adoption of measures for the assessment of the regulatory framework applicable to the manufacturing of active substances exported from third countries to the Union and as regards a common logo that identifies websites which are legally offering medicinal products for sale at a distance to the public. Those powers should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of February 16, 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.⁹
- (32) The safety features for medicinal products introduced under this Directive require substantial adaptations to manufacturing processes. In order to enable manufacturers to make those adaptations, the time limits for the application of the provisions on the safety features should be sufficiently long and should be calculated as from the date of publication in the *Official Journal of the European Union* of the delegated acts setting out detailed rules in relation to those safety features. It should also be taken into account that some Member States already have a national system in place. Those Member States should be granted an additional transitional period for adapting to the harmonised Union system.

- (33) Since the objective of this Directive, namely to safeguard the functioning of the internal market for medicinal products, whilst ensuring a high level of protection of public health against falsified medicinal products, cannot be sufficiently achieved by the Member States, and can, by reason of the scale of the measure, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (34) It is important that the competent authorities of the Member States, the Commission and the Agency cooperate to ensure the exchange of information on measures taken to combat the falsification of medicinal products and on the penalties systems that are in place. Currently, such exchange takes place through the Working Group of Enforcement Officers. Member States should ensure that patients' and consumers' organisations are kept informed about enforcement activities to the extent that this is compatible with operational needs.
- (35) In accordance with point 34 of the Interinstitutional Agreement on better law-making,¹⁰ Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.
- (36) Directive 2001/83/EC was recently amended by Directive 2010/84/EU¹¹ as regards pharmacovigilance. That Directive, *inter alia*, amended Article 111 with regard to inspections and Article 116 with regard to the suspension and revocation and variation of marketing authorisations under certain circumstances. Furthermore, it inserted provisions on delegated acts in Articles 121a, 121b and 121c of Directive 2001/83/EC. This Directive requires some further and complementary changes to those Articles of Directive 2001/83/EC.
- (37) Directive 2001/83/EC should be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2001/83/EC is hereby amended as follows:

(1) Article 1 is amended as follows:

- (a) the following points are inserted: ‘3a. Active substance:
Any substance or mixture of substances intended to be used in the manufacture of a medicinal product and that, when used in its production, becomes an active ingredient of that product intended to exert a pharmacological, immunological or metabolic action with a view to restoring, correcting or modifying physiological functions or to make a medical diagnosis.
- 3b. Excipient:
Any constituent of a medicinal product other than the active substance and the packaging material.’;
- (b) the following point is inserted:
‘17a. Brokering of medicinal products:

All activities in relation to the sale or purchase of medicinal products, except for wholesale distribution, that do not include physical handling and that consist of negotiating independently and on behalf of another legal or natural person.’;
- (c) the following point is added: ‘33. Falsified medicinal product:
Any medicinal product with a false representation of:
 - (a) its identity, including its packaging and labelling, its name or its composition as regards any of the ingredients including excipients and the strength of those ingredients;
 - (b) its source, including its manufacturer, its country of manufacturing, its country of origin or its marketing authorisation holder; or

- (c) its history, including the records and documents relating to the distribution channels used.

This definition does not include unintentional quality defects and is without prejudice to infringements of intellectual property rights.’;

- (2) in Article 2, paragraph 3 is replaced by the following:
‘3. Notwithstanding paragraph 1 of this Article and Article 3(4), Title IV of this Directive shall apply to the manufacture of medicinal products intended only for export and to intermediate products, active substances and excipients.
- 4. Paragraph 1 shall be without prejudice to Articles 52b and 85a.’;
- (3) in Article 8(3), the following point is inserted:
‘(ha) A written confirmation that the manufacturer of the medicinal product has verified compliance of the manufacturer of the active substance with principles and guidelines of good manufacturing practice by conducting audits, in accordance with point (f) of Article 46. The written confirmation shall contain a reference to the date of the audit and a declaration that the outcome of the audit confirms that the manufacturing complies with the principles and guidelines of good manufacturing practice.’;
- (4) in Article 40, paragraph 4 is replaced by the following:
‘4. Member States shall enter the information relating to the authorisation referred to in paragraph 1 of this Article in the Union database referred to in Article 111(6).’;
- (5) in Article 46, point (f) is replaced by the following:
‘(f) to comply with the principles and guidelines of good manufacturing practice for medicinal products and to use only active substances, which have been manufactured in accordance with good manufacturing practice for active substances and distributed in accordance with good distribution practices for active substances. To this end, the holder of the manufacturing authorisation shall verify compliance by the manufacturer and distributors of active substances with good manufacturing practice

and good distribution practices by conducting audits at the manufacturing and distribution sites of the manufacturer and distributors of active substances. The holder of the manufacturing authorisation shall verify such compliance either by himself or, without prejudice to his responsibility as provided for in this Directive, through an entity acting on his behalf under a contract.

The holder of the manufacturing authorisation shall ensure that the excipients are suitable for use in medicinal products by ascertaining what the appropriate good manufacturing practice is. This shall be ascertained on the basis of a formalised risk assessment in accordance with the applicable guidelines referred to in the fifth paragraph of Article 47. Such risk assessment shall take into account requirements under other appropriate quality systems as well as the source and intended use of the excipients and previous instances of quality defects. The holder of the manufacturing authorisation shall ensure that the appropriate good manufacturing practice so ascertained, is applied. The holder of the manufacturing authorisation shall document the measures taken under this paragraph;

- (g) to inform the competent authority and the marketing authorisation holder immediately if he obtains information that medicinal products which come under the scope of his manufacturing authorisation are, or are suspected of being, falsified irrespective of whether those medicinal products were distributed within the legal supply chain or by illegal means, including illegal sale by means of information society services;
- (h) to verify that the manufacturers, importers or distributors from whom he obtains active substances are registered with the competent authority of the Member State in which they are established;
- (i) to verify the authenticity and quality of the active substances and the excipients.’;

(6) the following Article is inserted:

‘Article 46b

1. Member States shall take appropriate measures to ensure that the manufacture, import and distribution on their territory of

active substances, including active substances that are intended for export, comply with good manufacturing practice and good distribution practices for active substances.

2. Active substances shall only be imported if the following conditions are fulfilled:
 - (a) the active substances have been manufactured in accordance with standards of good manufacturing practice at least equivalent to those laid down by the Union pursuant to the third paragraph of Article 47; and
 - (b) the active substances are accompanied by a written confirmation from the competent authority of the exporting third country of the following.

Endnotes

- 1 OJ C 317, 23.12.2009, p. 62.
- 2 OJ C 79, 27.3.2010, p. 50.
- 3 Position of the European Parliament of 16 February 2011 (not yet published in the Official Journal) and decision of the Council of 27 May 2011.
- 4 OJ L 311, 28.11.2001, p. 67.
- 5 OJ L 281, 23.11.1995, p. 31.
- 6 OJ L 210, 7.8.1985, p. 29.
- 7 Judgment of the Court of May 19, 2009 in Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others v Saarland* ECR [2009] I-4171, paragraphs 19 and 31.
- 8 Judgment of the Court of 19 May 2009 in Joined Cases C-171/07 and C-172/07 *Apothekerkammer des Saarlandes and Others v Saarland* ECR [2009] I-4171, paragraphs 34 and 35.
- 9 OJ L 55, 28.2.2011, p. 13.
- 10 OJ C 321, 31.12.2003, p. 1.
- 11 OJ L 348, 31.12.2010, p. 74.

5

Government Procurement Scenario in Indian Information Technology and Information Technology- Enabled Services

*Federico Lupo Pasini & Suresh P Singh**

Introduction

In recent times, government sector across the world has emerged as one of the largest spenders on information technology (IT). This trend is expected to continue in the future, making government procurement market in IT sector an important source of revenue for IT companies around the world. The fast growing ageing population in Europe, United States and Asia, the increasing complexity, and the request for better and cheaper public services forces the governments to modernise their administrative systems. In wake of these developments, the IT and IT-enabling services play an important role, as they are vital amongst other services and help increase the efficiency of the public sector with reduced

* Data analysis in the chapter was carried by Suresh P Singh.

costs. Today most governments are focusing on modernising and simplifying as well as increasing the efficiency and flexibility of their administrative structures. IT products and services are best suited to serve these goals.

With the advancement in technology, IT has become an important constituent of the infrastructure which facilitates the flow of information in the economy. Procurement in information technology includes procurement of goods, services and works. The costs and management responsibilities in relation to information technology procurement can be divided into two main components: (i) the costs of initially acquiring the components which constitute the system, and (ii) the costs of management, maintenance and upgradation of the system. A government entity has the options to either purchase the technology/software or get it built through a service provider. The government entity also has the option to create this information technology solution within the government itself.

Further, procurement of information technology and information technology-enabled services has a few features which are unique to it: (i) When a contract for IT services which is being procured by the government is cancelled, it cannot be sold elsewhere owing to the specific nature of the stipulations and the scale at which the production is done, which renders it difficult to implement; (ii) Sometimes the government may specify that certain products which are being specified by it are 'locked in' and cannot be sold to anyone else; and (iii) It is essential to include maintenance of what is procured as one of the critical terms in IT procurement – the conditions where a domestic supplier would be more suitable than an international supplier.

An efficient IT sector is one of the most important attributes of a competitive economy. Arguably, developed countries use information technology in their governance

activities in a more pervasive manner than the governments of developing countries. However, this notion is fast changing as developing countries are fast catching up and experts suggest that countries like Brazil and India will soon become very large users of Information Technology systems.

Currently, the Indian government has undertaken various initiatives to improvise the administrative set up across government activities by employing information technology for good governance. The year 2011 witnessed a wave of purported reforms dealing with the maintenance of records on the Indian population for effectively performing its welfare functions. The food distribution schemes, the right to education, the right to employment legislations, and financial inclusion will all find their effective implementation in accurate management of information.

Given the strategic role of IT in the functioning of the administrative system, and the parallel huge size of the Indian administrative system, it is evident that procurement of IT services in India offers an important source of revenue, labour and occupies a vast public space in transforming the country into one of the emerging economic powers. It, therefore, becomes inevitable to study the procurement of IT and ITeS by government and the policy thereof.

This chapter examines the current procurement system for IT in India, the unique characteristics of government procurement market and the possible scenarios in terms of future market opening in India and abroad. Considering the tenuous nature of procurement in information technology and information technology-enabled services, it is especially difficult to estimate the amount spent by government bodies on information technology-enabled services. This problem is exacerbated by the cross-cutting nature of IT procurement which is undertaken by different bodies (which may sometimes lead to a loss of consolidated procurements owing to lowering of costs).

Competitiveness and Market Size of the IT/ITeS Government Procurement Sector

Indian producers have relied on a business model of outsourcing of services which has allowed them to obtain economies of scale in a country where the costs of labour are lesser in comparison to most developed countries. The Information Technology (IT) and Information Technology-enabled services (ITeS) industry has been one of the key driving forces fuelling India's economic growth. The IT/ITeS sector's contribution has risen from 1.2 percent in 1997-98 to an estimated 7.5 percent in 2011-12. This sector further plays a vital role in driving growth of the economy in terms of employment, export promotion, revenue generation and standards of living. The IT industry relies on approximately a pool of 3.5 million young graduates,¹ a fairly good technology platform, constant yearly growth from 24 percent, as well as on 20 years of experience in delivering IT services. India has for a long time tried to establish itself as the premier area of excellence in IT, and it has been trying to get market access in other countries for both IT companies as well as IT consultants.

The sector offers a strategic importance for the Indian economy, not only in terms of revenue generation and employment but also in terms of industrial development. The total IT Software and Services employment was estimated to be 2.20 million workers in 2008-09. If compared with seven years earlier, when the workforce was of 0.52 million in 2001-02, the industry has grown by three times. In addition, this sector has generated 8.2 million jobs connected to collateral industries. This translates into a total of 10.4 million jobs opportunities attributed to the growth of this sector.² The sector generates huge revenues and is one of the fastest growing sectors of the Indian economy. Table 5.1 shows that export

market generates a great share of the revenues while the domestic market has grown in importance in recent years.

Table 5.1: IT Industry Revenue Trends

YEAR/ITEM	2001 -02	2002 -03	2003 -04	2004 -05	2005 -06	2006 -07	2007 -08	2008 -09	CAGR
EXPORT	7.6	9.5	12.9	17.7	23.6	31.1	40.4	46.3	28.6
DOMESTIC	2.6	3.0	3.8	4.8	6.7	8.2	11.7	12.4	22.2
TOTAL	10.2	12.5	16.7	22.5	30.3	39.3	52.0	58.7	26.9
<i>Source: Ministry of Communication and Information Technology, and Nasscom³</i>									

Regarding the procurement of IT/ITeS, recent years have witnessed that governments across the globe have emerged as one of the biggest spenders on information technology which essentially indicates an increase in procurement of IT and ITeS. The importance of IT/ITeS in procurement attains different meaning for different countries. In developed world, countries are increasingly spending on account of national security and also due to demographic changes while in developing countries, including India, are still building up their IT infrastructure, e-governance projects, document management, etc. There is also a growing interest worldwide in new initiatives such as cloud computing and green procurement among others. Also, governments are looking to improve their productivity and deliver goods and services as per the expectation of the taxpayers/citizens.

The domestic IT market in India is in its transition phase, driven by rapidly growing ICT infrastructure, increasing customer awareness, rising spending capabilities of consumers and acceptance of technology as a business enabler. The structure of the Indian service sector has dramatically changed after the advent and increasing integration of IT/ITeS with

the Indian economy. IT/ITeS industry now contributes significantly to the economic growth; it accounts for around 5.6 percent of the country's GDP and provides direct employment to about 2.3 million people and indirect employment to many more. Its consistent growth during the preceding decade (the sector grew at a compounded annual growth rate (CAGR) of over 24 percent) is indicative of its potential and scope in the coming periods. One of the main drivers of growth is the increased need of the public sector to rely on ITC platforms and services to increase the efficiency of the public administration. This section will look at the current market for IT procurement and at the status of the Indian IT industry.

Growing Demand in India for IT

According to a study by NASSCOM, the total aggregated domestic Indian IT industry produced around 1,321bn crores in 2011. The market is dominated by hardware and IT software services, which jointly contribute to nearly 78 percent of the total revenue. The hardware market grew at 15.8 percent in 2011, while the IT service market grew by 16.8 percent. Both markets are driven by increased spending of Indian consumers, increased use of digitalisation by manufacturing, and telecom industries, and continued investment by the government for the modernisation of its IT apparatus.⁴

One of the most important factors behind the growth of the IT industry is the role of the Indian government as a key consumer of IT services in the country. The government, at all levels, is employing IT for its programmes such as National e-Governance Plan, Unique Identification, Restructured Accelerated Power Development and Reforms Programmes (R-APDRP).⁵

In the next part, the structure of the procurement market for IT and its estimated market size is examined.

Procurement Market Size, Structure, and Composition

Information on market size of public procurement in information technology is extremely limited. The official data is almost scarce or insufficient to calculate the market size. As in other cases (health and railways covered in the present study), one has to rely on estimates. Even though some data is available at organisational level, it is difficult to project this information at the macro level.

Keeping these issues in view and assuming consistency with available literature in public domain, the present estimate is based on the criteria of 50 percent of budget (departmental), as referred by the CVC in its report.⁶ However, using 50 percent criterion does not appear to be a panacea for this study as there are limitations to this and it may result in misleading readers. Besides, a number of organisations are managed by the Department of Information Technology (DIT), government of India (see Box 4.1) performs its own procurement activities which makes the exercise of estimating the size complicated. Procurement of products pertaining to information-technology and information-technology enabled services is an essential component of the procurement activity undertaken by many ministries and departments at the Central, state and local government levels. Use of information technology is also common across public sector units at the central and state levels.

The estimate cannot be considered exhaustive because it excludes public sector organisations managed by the concerned departments. Additionally, it does not cover expenditure (procurement) incurred on cross cutting NeGP programmes introduced in India through 27 Mission Mode Projects (MMPs) amidst discussions of a projected investment of over ₹36,000 crores.⁷ Each MMP involves substantial ICT infrastructure and applications development. Presently,

procurement is conducted individually for each MMP separately.

From the information available on organisation-wise procurement, it can be said that the inclusion of public sector organisations in procurement estimates could further inflate the total procurement substantially. And that will be truly reflective of the real market size of public procurement under the Ministry of Communications and Information Technology.

Box 5.1: DIT Organisations

- Controller of Certifying Authorities (CCA)
- Centre for Development of Advanced Computing (C-DAC)
- Indian Computer Emergency Response Team (ICERT)
- Centre for Materials for Electronics Technology (C-MET)
- Cyber Appellate Tribunal (CAT)
- Education & Research in Computer Networking (ERNET)
- Electronics and Computer Software Export Promotion Council (ESC)
- Media Lab Asia
- National Informatics Centre (NIC)
- National Informatics Centre Services Inc. (NICSI)
- National Institute of Electronics and Information Technology (NIELIT, Formerly DOEACC Society)
- National Internet Exchange of India (NIXI)
- .in Registry (official .IN Domain name registry)
- Society for Applied Microwave Electronics Engineering and Research (SAMEER)
- Software Technology Parks of India (STPI)
- Standardisation Testing and Quality Certification (STQC)
- Semiconductor Integrated Circuits Layout Design Registry (SICLDR)

Source: Ministry of Communications and Information Technology, Government of India, available at <http://deity.gov.in/content/dit-organisations>.

As procurement by the department is tied to its annual budget, a proportional increment in procurement is observed over the eight year period from 2002-03 to 2010-11. Total expenditure on procurement by the department is estimated at ₹1788 crores in 2010-11. It realised a compound annual growth of nearly 29 percent in the nine year period since 2002-03, and increased by about 7 times during the period.

Box 5.2: Procurement Estimate (Rs. crores)	
<i>Year</i>	<i>Rs. in crore</i>
2002-2003	235
2003-2004	252
2004-2005	343
2005-2006	458
2006-2007	563
2007-2008	649
2008-2009	748
2009-2010	876
2010-2011	1788
<i>Source: Based on various Budget Documents and Estimates</i>	

In the recent years, government focus on IT and ITeS has got a boost with the introduction of the National e-Governance Programme (NeGP) in India (see Box 5.3)⁸ which makes the estimation further challenging. Therefore, using 50 percent criterion is not likely to yield any exhaustive estimates on government procurement under this department. However, for the sake of consistency and in absence of any other existing methods, the indicated criterion of 50 percent of the budget

has been used to generate a base figure. The estimate is confined to a period of 8 years (starting 2002-03 to 2010-11), considering that the DIT came into existence in early 2000.

Box 5.3: NeGP Mission Mode Projects (MMPs)		
<i>Central</i>	<i>State</i>	<i>Integrated</i>
1. Banking 2. Central Excise & Customs 3. Income Tax (IT) 4. Insurance 5. MCA21* 6. National Citizen Database ⁹ 7. Passport 8. Immigration, Visa and Foreigners Registration & Tracking 9. Pension 10. e-Office	1. Agriculture 2. Commercial Taxes 3. e-District 4. Employment Exchange 5. Land Records 6. Municipalities 7. Gram Panchayats 8. Police 9. Road Transport 10. Treasuries	1. Common Service Centre (CSC) 2. e-Biz (Government to business services) 3. e-Courts 4. e-Procurement 5. Electronic Data Interchange (EDI) For eTrade 6. National e-governance Service Delivery Gateway 7. India Portal
*Ministry of Corporate Affairs project Source: http://www.mit.gov.in/		

An example of a procurement activity by the Department of Post provides an indication on the total quantum of procurement arising out of a single IT modernisation policy (Box 5.4). Large IT companies like Infosys, TCS and HCL are some of the competitors for these contracts.

Box 5.4: Postal tech upgrade to create ₹5,000 crores scope for IT firms

The Department of Post (DoP) has initiated its IT modernisation process under the 'India Post 2011' plan to improve its customer service, deliver new services and improve operational efficiencies. The DoP presently has the largest postal network in the world with 155,669 offices of which 89 percent are in rural areas. But only 12,604 head post offices and sub-post offices have been computerised so far. By the end of 2012, the department wants to computerise all post offices and that would help it offer services seamlessly. The postal department's drive for IT modernisation is expected to create opportunities worth ₹5,000 crore for information technology (IT) companies, making it one of the biggest IT outsourcing contracts in the domestic market in recent years. The DoP has split the project into eight components and has invited bidders. The department has issued Requests For Proposals (RFPs) for six contracts, while the remaining two are expected to be issued in the near future. Out of the six RFPs already issued, identification of the core system integrator is said to be the biggest one with a contract value of over ₹1,000 crore. Most leading IT firms, including domestic companies like Infosys, TCS and HCL and global majors like HP and IBM are understood to be participating in the bidding.

Source: Business Standard, June 09, 2011, 'Postal tech upgrade to create Rs 5,000-cr scope for IT firms' accessed on March 22, 2012, at <http://business-standard.com/india/news/postal-tech-upgrade-to-create-rs-5000-cr-scope-for-it-firms/438491/>

Emerging Scenario and SLOT Analysis of Indian ITC Industry

Information technology has evolved and attained a stage where it influences the entire economy of India. It has penetrated to all sectors and key economic activities, including banking, financial services, retail and distribution, and manufacturing. It also facilitates services and customer-interaction services such as data search, research, consultancy, and software products, and others. With these developments,

the sector has emerged as one of the most important industries in Indian economy, contributing significantly to the growth of the economy. It is expected that in the coming periods, the penetration will become more pervasive and inclusive.

Table 5.2: SLOT Analysis		
Internal Factors	Strengths	Limitations
	<ul style="list-style-type: none"> • Vast market with huge potential to grow • Good and cost-competitive manufacturing base • Availability of Specialised personnel • Good technological skills 	<ul style="list-style-type: none"> • Poor Regulatory Framework • Lack of competition in certain Procurement sectors • No strong IT manufacturing industry
External Factors	Opportunities	Threats
	<ul style="list-style-type: none"> • Growing market worldwide Potential; availability of European, US, and other developed markets. • Possibility of FDI inflows in the IT industry 	<ul style="list-style-type: none"> • Presence of strict regulatory standards in many foreign markets

Current Government Procurement System in Information Technology

The legal framework governing government procurement is dispersed in various sources. This chapter makes references to the GFR, the CVC guidelines, and a few procurement related policies. However, individual contracts between governments and suppliers are governed by standard form contracts – a few deficiencies in those contracts have been

noted for the purpose of incorporating some positive alterations into the enforcement regime.

The Legal Framework

There is an absence of a comprehensive legal framework regulating procurement of IT goods and services. The reason for the absence of a specific discipline is due to the nature of the product, which is sold to and purchased by all public agencies. Unlike other sectors, IT goods and services are not procured only by one specific ministry, as in the case of railways supply, or defence material which can be bought only by a single buyer. Given the importance of IT products in the management of the public sector, the procurement of IT products is carried out by each ministry separately, and according to their specific guidelines. This makes it practically difficult to crystallise the regulatory framework and to identify consistent procurement practices for IT in India.

The procurement of IT is governed by different sources. At the union government level, the most referred and important regulations that are generally used are the GFR, and the guidelines of the CVC, which applies to all procurements. Both instruments set out general rules that must be taken into account in all stages of the procurement process. Besides the general rules, each ministry or agency sets out its own procurement guidelines, which complement the general rules. Accordingly, the procurement of IT products made by the Ministry of Transport will be in principle subject to different procurement procedures than those applied for the purchase of the same product by the Ministry of Defence.

General Financial Rules

The GFR 2005, which were promulgated by the Ministry of Finance, contains a compendium of rules and guidelines for the expenditure of the Government of India. The GFR set out precise rules and principles for each procurement method and they include specific guidelines for the procurement of works, goods and services. Due to the specificity of ITC products, the procurement of IT goods and services is subject to various set of rules, which encompass procurement in goods (Chapter 6.1), procurement in services (chapter 6.2), and works (chapter 5).

Procurement of IT Goods

Rule 137 of the GFR is the cornerstone of public procurement law, as it provides the basic criteria that any public procurement procedure must conform to.

- The specifications in terms of quality, type etc., as also quantity of goods to be procured, should be clearly spelt out keeping in view the specific needs of the procuring organisations. The specifications so worked out should meet the basic needs of the organisation without including superfluous and non-essential features, which may result in unwarranted expenditure.
- Offers should be made following a fair, transparent and reasonable procedure.
- The procuring authority should be satisfied that the selected offer adequately meets the requirement in all respects;
- The procuring authority should satisfy itself that the price of the selected offer is reasonable and consistent with the quality required; and
- At each stage of procurement, the concerned procuring authority must place on record, in precise terms, the factors,

taken into consideration for arriving at the procurement decision.

According to Rule 140, each ministry or departments can make its own arrangement for the procurement of goods. However, if a ministry or department does not have the required expertise, it is required to communicate its intent to the Central Purchase Organisation. The Central Purchase Organisation (e.g. DGS&D) shall conclude rate contracts with the registered suppliers, for goods and items of standard types, which are identified as common user items and are needed on recurring basis by various central government ministries or departments. The Central Purchase Organisation will furnish in its website the rate contracts, which shall be followed by all other ministries or departments. Moreover, the Central Purchase Organisation is required to maintain a list of all the eligible suppliers.

Procurement Related Issues

An analysis of the above mentioned rules identifies the shortcomings in the existing IT goods procurement which is based on the rate contract system used to purchase IT products.

1. With the advancement of technology and innovation in this sector, the products (particularly hardware) is subject to continuous upgradation. As the market share/competition increases, the costs of the same declines.
2. The rate contract system also errs by not taking into account that many products in this sector become obsolete or the versions (hardware or software) also changes or gets upgraded. It is argued that many a times upgrades to products and new versions and releases may be unique to one or a few vendors. In view of this, a rate contract system may need to specifically factor continuous revision, if not upgradation.

3. Moreover, in this sector, a number of variations in type of features and prices are observed within similar categories of products but from different manufacturers. Most of the hardware and software such as Commercial Off the Shelf (COTS) operating systems and databases are usually configurations and offerings which are unique to a vendor, with specific features and enhancements. Hence, having a standardised rate contract for a similar category of IT product from different vendors is a challenging task.
4. DGS&D rate contracts further do not incorporate the concept of a committed volume of procurement, which usually determines volume pricing.
5. It is worth noting that most of the e-governance and IT services projects do not procure 'goods' in isolation, which provides a rate contract with a Central Purchasing Organisation, or a central IT nodal agency in the state, a limited applicability.
6. The GFR also states that a minimum of three weeks should be given for bid submission, and four weeks for global bids. For a complex IT procurement tender, this time period has been indicated by many companies as less so as to ensure that all eligible bidders can participate.

Procurement of IT Services

The procurement of IT services essentially consists of procuring consulting services by IT experts, which would elaborate and develop programs and software. The most important rules on the procurement of services are therefore those that deal with procurement of consulting services. The chapter dealing with services in the GFR 2005 is relatively simpler than the goods chapter and does not contain rules which may be applicable to IT services, which in turn poses some specific problems especially in the projects related to e-

governance, which should be subject to specific rules, argue some IT procurement experts.

Execution of Works

The execution of works is covered in Chapter 5 of the GFR and deals with the execution of construction or maintenance works. Nonetheless, it has relevance for IT procurement, as most e-governance projects consist in maintaining and upgrading IT systems. The most important rules for IT projects are contained in Rule 129, which prescribes that “No works shall be commenced or liability incurred in connection with it until:

- i. Administrative approval has been obtained from the appropriate authority in each case;
- ii. Sanction to incur expenditure has been obtained from the competent authority;
- iii. A properly detailed design has been sanctioned;
- iv. Estimates containing the detailed specifications and quantities of various items have been prepared on the basis of the Schedule of Rates maintained by CPWD or other Public Works Organisations and sanctioned;
- v. Funds to cover the charge during the year have been provided by competent authority;
- vi. Tenders invited and processed in accordance with rules;
- vii. A Work Order issued.”

Central Vigilance Commission Guidelines

The Central Vigilance Commission (CVC) is the agency that is endorsed with the responsibility to oversee the promotion of good governance. In its capacity the CVC has examined public procurement practices and consequently has issued circulars to further improve these practices. Some studies by sectoral associations of these CVC circulars provide

insights into government procurement of IT goods and services, including e-procurement.

The CVC in its circular 12-02-1-CTE-6 contains outlines of the pre-qualification criteria. These include the scope and nature of work, experience of organisation in similar field of work and the financial soundness of organisations. The organisations need to ensure that the pre-qualification criteria is set so as to allow fair competition. It is further mandated that the pre-qualification and evaluation criteria to be incorporated in the bid document should be clear and unambiguous so as to make the process more transparent, they should be mentioned before the bidding explicitly.

Box 5.5: Analysis of Relevant CVC Guidelines for IT Procurement

1. Whenever required the departments/organisations need to follow two-bid system, i.e. technical bid and price bid. The price bids should be opened only for those vendors, who were technically qualified.
2. It is mandated that the criteria for evaluation for pre-qualification and bid evaluation is required to be explicit and should not be decided post facto i.e. after the opening of the tenders.
3. It is necessary that the department should go for techno commercial evaluation to ensure that bidders are qualified technically prior to the opening of the technical bids.
4. Mandates that due process of tendering need to be followed, commercial bids of only those organisations to be opened who meet the eligibility criteria and qualify in technical evaluation.
5. There should not be any mentioning or referencing of brand name or multinational brands.

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6. No negotiation with L1 bidder on price, it also clarifies that there cannot be any negotiation with the L2, L3 or any other bidder.
7. Requires publishing of tender awards onto the website of the organisation and also other details like estimated date of completion, progress of the work.
8. Prohibits consultants from undertaking downstream work and for bidders for downstream work to provide consultancy services.
9. Mandates time bound finalisation of tenders.
10. Discusses the practice of short-term tenders where newspaper advertisements are not published, however, CVC mandates publishing short-term tender on the departmental website.
11. Widest possible publicity to be given to tender documents including the uploading of the tender document on to the website of the organisation.
12. Clarifies that works cannot be automatically awarded to public sector organisations on a nomination, without a tendering process.
13. Discusses the practice of PSU's obtaining work (construction works) without tender and thereafter sub-contracting 100 percent of the work. The circular prescribes practices for transparency in the process of sub-contracting of work by PSU and such open tenders to be invited for selection of sub-contractors as far as possible
14. Regarding splitting of work, CVC states that in case the quantity for supply exceeds the capacity of the L1 tenderer, the balance can be distributed to other suppliers
15. Observes practice of adding unnecessary and miscellaneous components in case of procurement of turnkey contracts (specifically for networking). Advises departments to take an independent third party view about the scope of turnkey projects so that the tendency to include unrelated products as part of the turnkey project is avoided.
16. In case of presence of clauses in tender documents such as 'Tender Inviting Authority can reject tender applications without assigning any reason', such clauses should not

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promote arbitrary behaviour, and clear logical reasons for rejecting any tender application should be provided.

17. Commenting on a complaint on procuring textiles and clothing, raises a specific issue of submission of tender samples, in spite of detailed specifications for items, and samples being rejected on subjective basis. The guideline advises government departments to consider the procurement of items on the basis of detailed specifications, and if required, provide for submission of an advance sample by successful bidder. This guideline is also relevant in the context of tender samples for IT equipment and hardware.
18. Some additional guidelines are also been provided which deal with operation of procurements such as reverse auctions should be conducted in a fair and transparent manner, appointment of consultants for contracts above 5 crore, measures to help organisations against counterfeit and refurbished IT products and counterfeit software, mitigating problems of vendors submitting forged/false bank guarantees, by adopting a best practice recommended by Canara Bank and so on.

Source: Adopted from NASSCOM study, 'E-Governance and IT Services Procurement: Issues, Challenges. Recommendations', NASSCOM 2010

Procurement Methods

The procurement of IT goods and services does not rely on one single method. On the contrary, methods vary among various ministries according to the size and nature of the projects. The most common methods are: (i) outright procurement; (ii) turnkey contracts; (iii) and public private partnerships.¹⁰

- Outright procurement of IT goods and services is usually used when the government needs to develop a software solution, or supply of hardware. Most procurements have

a clause related to maintenance of the software application or IT equipment which is paid for separately.

- In Turnkey contracts, the vendor transfers the operations to the government or a designated government agency or to an alternate vendor selected by the government. Turnkey contracts are used for more complex projects, which require a different set of services, such as application solution development, supply, installation of hardware, and system integration. In some cases, the project can require also IT collateral service, such as training for government officers, implementation support comprising staff augmentation of operators. The term of such comprehensive turnkey contracts normally range from 3-7 years.
- Public Private Partnerships (PPPs) are government service or private business ventures that are funded and operated through a partnership of government and one or more private sector companies. The time period for operations of such PPP projects are normally 5-7 years and the vendor would mostly transfer the assets and project operations to the government or another identified vendor. PPP projects may be Build Own Operate Transfer (BOOT) or Build Own Operate (BOO).

Issues related to Standard Form Contracts between Suppliers and the government procuring entity

Considering a large number of IT procurement contracts are governed by the law of contract, following a discussion with industry participants, an understanding on certain terms in Information Technology contracts has been collated and which have found reflection in the Model RFP template which was circulated by the Department of Information Technology:

- *Limitation of Liability for Contractual Breaches:* Earlier there was no cap present for direct damages. If such a

cap was specified, it was subject to wide exclusions. While industry participants submitted that the liability for direct damages should not exceed the contract value, the understanding reflected in the Model RFP template was that the aggregate liability cap would not exceed twice the annual revenue of the contract;

- *Client Dependency*: The earlier system failed to account for the role of the Purchaser in perpetuating a delay: currently the RFP template embodies detailed roles and responsibilities for the Purchaser.
- *Subcontracting*: Earlier agreements prohibited the practice of subcontracting – currently the RFP template permits subcontracting to a limited extent. It is posited that approval for subcontracting could be obtained, and if the subcontracting is for non-core services, the disclosure has to be made at the time of the bidding itself.

The following observations and subsequent comments deal with certain terms in standard form contracts which create room for conflicts between the supplier and the procurer.

- Generally the title in the goods passes to the purchaser only following the acceptance of the complete system/project. Hence the risk inherent in the goods remains with the provider through the entire review of the product which has been accepted. Some industry participants have suggested that this term which is commonly reflected in standard form contracts be amended to reflect that the Title will pass to the Purchase on delivery.
- Sometimes the service provider is prohibited from divulging any information under the contract. This results in the service provider being unable to evidence the work experience in the contract. As per industry participants,

the terms on confidentiality need to be amended to reflect this flexibility to a limited extent.

- Similarly, if the parties to the contract seek to exit, there are misunderstandings on whether the contract will be paid for till the extent to which the work is completed, or the extent to which the milestones have been identified in the contract specifications. Industry participants believe that some clarity on these provisions could be of help.
- Another area of contention is the instances which warrant the forfeiture of the Earnest Money Deposit. The current conditions mention that the Earnest Money Deposit can be forfeited in cases where the service provider fails to sign the contract as per the terms in the Request for Proposal. Industry participants suggested that non-acceptance by the Purchaser should not be read into this clause to justify the forfeiture of Earnest Money Deposit.

Procurement Policies

Other than the offsets to MSMEs and PSEs, there are currently no preferential policies in government procurement applicable to all sectors which give any special treatment to domestic over foreign suppliers. A new sectoral policy by the Department of Information Technology announced in February, 2012 (Annexure 2.2 in Chapter 2), provides preferential treatment to domestically manufactured electronic products, specifically in the procurement of those products which have security implications for the country and are being procured by the government for its own use and not with a view to commercial resale or with a view to the production of goods for commercial sale.

The electronic products which would pose security implications and the agencies deploying them would be notified

by the concerned ministry/department. The notified agency would be required to procure the specified electronic products from a domestic manufacturer to the extent prescribed.

The generic products which are procured across sectors, such as computers, communication equipment etc. would be notified by the Department of Information Technology/Telecommunications.¹¹

There is an ongoing debate about the compatibility of this proposal of the Department of Information Technology from the perspective of India's commitments to WTO. Since India is not a member of the plurilateral Agreement on Government Procurement, it is no doubt free to follow its own GP policy, provided, of course, it is sure that the procurement by government fulfils the norms provided under Paragraph 8 (a) of Article III of GATT, 1994. The said provision exempts from the application of national treatment "all laws, regulations or requirements governing the procurement by government agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale or resale." The stipulation "*not procured with a view to commercial sale or resale or for use in the production or supply of goods or services for commercial sale or resale*" is repeated in the definition of "covered procurement" in Para 2, clause (a)(ii), of Article II of the GPA.

An item for which domestic preference is applicable is actually not meant for commercial resale or for producing goods and services for commercial sale, such as telephony or telecommunication services for which the public is charged at commercial rates. Otherwise, the national treatment provisions of Article III of WTO would apply, allowing no special preference to domestic suppliers over foreign suppliers.

A few areas which may witness possible conflicts are the essential need to prioritise the need for security in the products

which are being used by the government as a storehouse or repository of highly confidential information. America's State Department had refused to use 16,000 computers purchased from Lenovo for sensitive work because of a significant Chinese stake in the procurement (the Chinese Academy of Sciences owned 27 percent in Lenovo – this was despite the fact that Lenovo was based in New York and has an American Chief Executive.¹²

If the procurement of Information Technology/electronic products by government is not covered by the provisions of Para 8 (a) of Article III of GATT, 1994, then the suitability of invoking the security exception to the WTO provisions of national treatment and most favoured nation provided under Art. XX of GATT 1994 has to be explored. The proposal of Department of Information Technology is, *inter alia*, to give preference to domestically manufactured electronic products, in procurement of those electronic products which have security implications for the country. There is some debate as to whether the proposal of the Department of Information Technology is in tune with the provisions of Article XX of GATT 1994. The graded domestic value-addition norm for electronic products to qualify as being domestically manufactured seemed to indicate that domestic procurement preference was being invoked for a different purpose. The graded value-addition norm for electronic products to qualify as being domestically manufactured is described in table 5.3.

The graded value addition of domestic content in the DIT proposal ranges from 25 percent domestic value-addition in the first year to 45 percent in the fifth year. If it were a purely security concern, there would be an outright ban on procurement of certain security-related items from the very beginning of the coming into force of the Government decision. A phased increase of the domestic content component may

not be considered as fulfilling the requirements under security concerns.

Table 5.3: Bill of Material	
Year	Percentage domestic value-addition in terms of Bill of Material (BOM)
Year 1	25%
Year 2	30%
Year 3	35%
Year 4	40%
Year 5	45%
<i>Source: Notification dated 10 February, 2012, Ministry of Communications and Information Technology, Government of India, New Delhi</i>	

It appears, from the phased-in programme of increase in domestic content of electronic items being procured by the Government for Information Technology and Telecommunications, that this is a trade-related measure to promote gradual building up of domestic capacity in telecom and electronic equipment and trade preference to domestic industry in a field which had recently been swamped by competitive foreign bidders since the dismantling of tariff barriers with India's accession to the Information Technology Agreement (ITA) – I in 1996. The rules accompanying the new public procurement legislation in India need to be disclosed, stating the offset/preference policy of government, to make any final comment on the compatibility of the same with the provisions for offsets allowed to developing countries under the GPA.

Box 5.6: The Opinion of US ITC Firms on Accessing the Indian Procurement Market for ITC

Concerns were expressed that preferences allocated to local firms in government procurement across several sectors were intended to spur local industry and employment. For example, India's procurement of telecommunications stipulates a 30 percent domestic content quota as mentioned above. The information technology industry also has a domestic content quota. These quotas are applicable to all government licensees, including foreign firms that are manufacturing products in India. Foreign firms have no option but to partner with a local supplier. In response to these concerns, it was pointed out that the telecommunications legislation has been overhauled and regulations reformulated; but the regulations applicable to electronics and information technology sectors are still pending.

India is now interested in implementing mandatory manufacturing testing in India for security reasons. It was mentioned that India is citing security concerns as a reason for the domestic content requirements in its procurement of telecommunications, information technology and electronics products. This is of concern for US manufacturers in India as India does not have the capacity to implement such testing measures. India lacks the infrastructure, the resources, training or facilities to implement such testings domestically. So it will be impossible for companies to comply. Such a policy is only increasing the transactions costs of companies who believe they will be unable to comply through no fault of their own.

Given these new policies and regulations, US telecommunications, information technology and electronics manufacturers are less than enthusiastic about the procurement market in India. They are already facing similar problems in the private market in India and believe that entering the procurement market will entail even greater obstacles and challenges. Despite the potential size of the opportunities in procurement, they believe the operating and regulatory environment as well as corruption will negate much of the potential gains.

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Another concern of the US telecommunications, information technology and electronics manufacturers operating in India is the difficulty they encounter juggling the bureaucratic policies and regulations of multiple government agencies. The US telecommunications industry believes that including competition policy in the draft government procurement law is positive development, which will help facilitate technology transfer, reduce prices and improve quality. These are significant issues that will affect the strategic decision making of US firms operating in India. The issues India faces in creating and retaining employment while trying to encourage FDI and economic growth are typical of the growing pains in economic development. Further opening up will provide stimulus for overall growth but reform is essential. Indian companies and industries must learn innovating more, become more efficient and more competitive.

Source: From the interview with relevant stakeholders in the US

Suggestions for Improvement

As noted above, the current regulatory and policy framework for IT/ITeS procurement experiences a few deficiencies. Following are some suggestions which may help improve and facilitate the participation of companies in the procurement market.

One of the most relevant issues today, as came out from the stakeholders' interviews, is the capacity of procurement personnel to conduct e-governance procurement projects. E-governance has a profound impact on the functioning of the public administration, and e-procurement is one of the most important tools for an efficient procurement system, as recognised by the Draft Procurement Bill 2012. According to a NASSCOM report,¹³ the large procurement personnel does not have enough capacity to design, conceptualise, and perform e-governance projects. It would be important to increase the skill set of procurement personnel on this subject.

Moreover, it would be important to set up a specialised task force for the e-governance project that would operate across ministries. In order to facilitate the adoption of good e-governance systems in all sectors of public administration, sharing of best practices would need to be facilitated. For instance, a repository of e-governance solutions should be checked, where best practices in e-procurement could be shown. This would allow agencies and ministries to draw from the experience of other public administrations in designing and implementing e-governance projects. In order to offset the deficiencies of the current system it would be important to create an empowered Procurement Management Unit with decision making authority that could handle the project design and execution in a specialised manner.

The experience of specialised personnel is an issue which gains importance at the dispute settlement phase as well. An experienced personnel who possesses relevant subject-matter expertise has become an urgent requirement in arbitration proceedings for IT projects disputes. So far, the lack of thorough knowledge on the side of both the arbitrators and the government officials has been felt. However, while dealing with e-Governance contracts, it was felt that both the arbitrator and the Government advocate many a times have limited understanding of e-governance contracts, SLAs in information technology solutions. NASSCOM in its study has recommended setting up a panel of retired government officers with knowledge of IT projects implementation that could judge procurement cases on IT projects.¹⁴

Another important aspect is the conceptualisation of the projects, as structured in the tender. In many cases the government departments are unclear about requirements and outcomes and they tend to make the scope of work open ended. Specifications could be prepared in a manner such that only the essential features regarding any equipment could be

mentioned, because over specification leads to a limited choice of suppliers. The department heads are mostly guided in deciding the pre-qualification based on their past experience. Some officers do have a good experience with large SIs and some with small SIs and these perceptions sometimes help guide framing of the pre-qualification criteria. Given that most IT projects are different, it is difficult to standardise eligibility criteria. However, it should be ensured that CVC guidelines are followed to ensure fairness.

In the tender evaluation stage of the project, many procurements are decided by officials only on the basis of costs of the procurement and they avoid making an analysis of the quality component resulting in non-consideration of certain vendors.

This is particularly important for e-Governance tenders that have a software solution development component- a high technical score should be kept for qualifying bidders and thereafter selection should be made on the basis of least cost.

Another issue that came out in the discussion with procurement personnel and also reported in the NASSCOM study is the considerable difference in rates of the winning L1 bidder and other bidders which could be the result of either a market strategy or improper due diligence and cost estimations in the making of the offer.

In some cases, the bids revealed were too low to be implemented, which negatively affected the quality of the deliverables and sometimes led to contract termination and litigation. Some officers suggested that the use of base costing for every project and the establishment of a floor price would aid in fostering of these solutions.

Market Access Opportunities in Foreign Procurement Markets

The IT and IT-enabling services sector is one of the most lucrative sectors for Indian companies wishing to export abroad. Indian companies have been offshoring IT services for the last two decades and have progressively acquired a reputation for its competence and cost-effectiveness. The global market of government procurement of IT services can be roughly divided into two major groups. On one side there are developing country governments, which constitute around 10-15 percent of the market. Developing countries are usually not “big purchasers”, as they do not rely on IT as much as the developed countries do.

Nonetheless, with the passage of time, the share of developing countries in the market of IT services will also eventually increase. Examples are Brazil, China, and South Africa, which are more and more focused on the modernisation of their administrative facilities. On the other side, there are developed countries. According to a report, only 9 countries (namely the US, the UK, Japan, Germany, France, Italy, The Netherlands, Canada and Australia) account for over 80 percent of the global IT spending by Governments. All these countries are members of the WTO and signatories of the Government Procurement Agreement.¹⁵

As per this report, currently the total spending of European Union governments and US is around US\$180-200bn and currently the focus of these governments is on increasing efficiency and cost optimisation. Therefore, it is expected that the market for IT outsourcing will grow at a 6 percent rate annually, and reach the peak of US\$350bn by 2020. Most of the outsourcing, around 60 percent of the total amount is focused on IT services, while IT-enabling services account only for a smaller share. The reason is the concern of

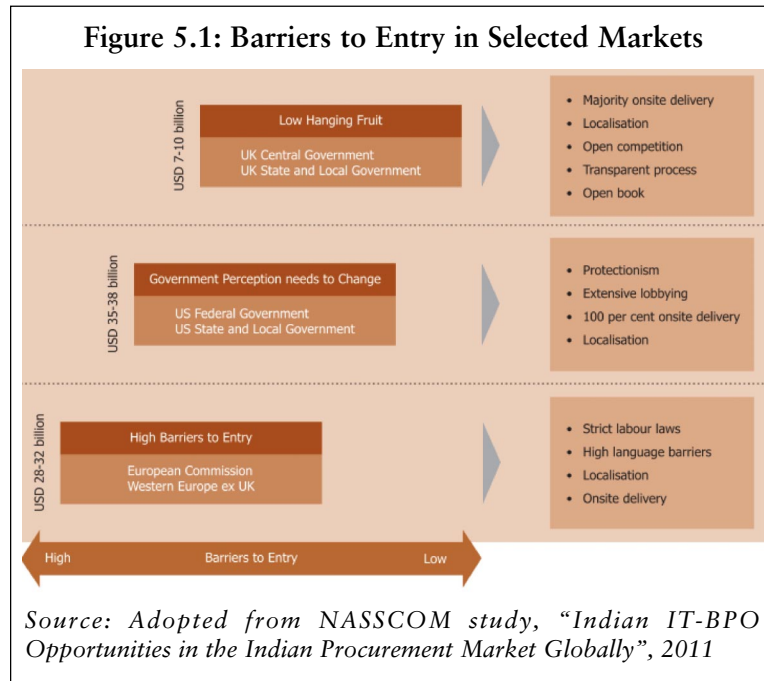
government on privacy and security issues, which renders such services ill-suited for governments.

This chapter focuses its analysis only on the market of a few GPA Members. At the outset it must be said that unlike other sectors, IT and especially IT-enabling services are highly susceptible to language barriers. Indian IT providers mostly supply English language products owing to which the analysis will be limited to Europe, US, and Canada.

Barriers to Entry in Foreign Procurement Markets

Indian players currently do not enjoy free access to international government procurement markets. Nonetheless, the accession of India to the GPA may provide an opportunity to Indian companies to avail market access rights to the procurement markets of 42 Members of the GPA. Having said that, it is important to note that the accession to the GPA will not ensure the removal of all barriers to government procurement – a few examples of barriers which impede Indian service providers from accessing international government procurement markets are:

- i. visa restrictions which impede the entry of IT consultants into the different territories all over;
- ii. preference policies favouring small and medium sized enterprises in certain countries; and
- iii. requiring presence in the country where the product is to be supplied, amongst others.



The European Union

The European Union has a potential market of 27 States. Of these, Indian companies can successfully target only a handful of them. UK, Malta and Ireland are the three countries where English is the official language. Among them, the UK is the most promising target. Indeed, the UK Government has adopted a policy that tries to match increased efficiency with reduced budget spending. In doing so, it chose to focus on offshoring as the main tool to achieve this goal. The procurement system in UK is very transparent and it ensures free competition between foreign and European service providers, although the government has sometimes adopted protectionist policies to cope with the high unemployment rate. According to the requirements posed by UK legislation,

ITC suppliers must maintain full transparency of their accounts in order to disclose their margins, subcontractors and also components of the projects, among other things.

Table 5.4: Thresholds for the European Union			
COUNTRY	TYPE OF ENTITY	GOODS	SERVICES
EUROPEAN UNION	Central Government	130.000 SDR	130.000 SDR
	Sub-Central Government Entities	200.000 SDR	200.000 SDR
	Government Enterprises	400.000 SDR	400.000 SDR
	Annex 4 Services Covered	Telecommunication Services 752 (except 7524, 7525, 7526) Computer and Related Services	
Source: Thresholds in Annexes 1,2 and 3 of Appendix 1 of the Government Procurement Agreement (expressed in SDR), available online at http://www.wto.org/english/tratop_e/gproc_e/thresh_e.htm .			

The UK market still presents a few barriers to entry revealed by some of the IT/BPO firms in the stakeholders interviews, such as a recent explicit cap set by the UK government on the total amount of outsourced work for a single enterprise. The rationale is to reduce overdependence on a single service provider and encourage subcontracting to ensure growth of the SMEs in the market. The contract is often subject to the condition that local presence is required for the delivery – this is a condition which is commonly inscribed in contracts with the government in many countries. This means that Indian companies will not be able to offer services on a cross-border basis. This is particularly relevant for IT-enabling services, which are often offered through such business models. It is important that Indian companies acquire a commercial presence in UK.

The rest of the European market, with the exception of Malta and Ireland, is more difficult to penetrate. As it was said before, the language is the most difficult barrier to overcome, together with the requirement of the physical presence on site. Moreover, most European countries apply strict labour laws which require the hiring of locals and the compliance with strict labour requirements, which could inhibit the offering of outsourced services, especially on a cross-border basis.

North America

The United States is a challenging market for government procurement, and especially for off-shored services. In 2007, the US government spent US\$65mn in procurement of IT goods. It is estimated that 11 percent of all purchases of computers is made by governments.¹⁶ Overall, there is less favourable attitude of the US central and sub-central administrations towards offshoring, which culminated in the US Border Security Bill and 9/11 Responders Bill, which added barriers to the entry of such services. The State of Ohio, for instance, banned outsourcing of Government IT and IT-enabling services to offshore locations, such as India, in order to favour local service suppliers.¹⁷

The US does not present language barriers, nonetheless from a regulatory point of view, government procurement is fragmented in different sub-markets, as it is regulated independently by each State. Moreover, if a contract has received mixed funding from the state and federal, the service provider needs to comply with regulations of both the state and federal government. Visa policies are a particularly burdensome requirement for Indian professionals, and they could severely inhibit the provision of the service (on site). From May 31, 2011, the US government has amended the Federal Acquisition Regulations to exempt ITC products and

Table 5.5: Thresholds for the US			
COUNTRY	TYPE OF ENTITY	GOODS	SERVICES
UNITED STATES	Central Government	130.000 SDR	130.000 SDR
	Sub-Central Government Entities	355.000 SDR	355.000 SDR
	Government Enterprises	400.000 SDR	400.000 SDR
	Annex 4 Services Covered	Consultancy services related to the installation of computer hardware; Software implementation services, including systems and software consulting services, system analysis, design, programming and maintenance services; Data processing services, including processing, tabulation and facilities management services; Data base services; Maintenance and repair services of office machinery and equipment including computers; Other computer services;	
Source: Thresholds in Annexes 1, 2 and 3 of Appendix 1 of the Government Procurement Agreement (expressed in SDR), available online at http://www.wto.org/english/tratop_elgproc_el/thresh_e.htm .			

services from the strict requirement of the Buy American Act, 1933.¹⁸

Canada has a more liberal government procurement regime for IT, as it does not have the complexity of its southern neighbour. Nonetheless, the value of the Canadian market is much more limited compared to that of Europe or the US.

Table 5.6: Thresholds for Canada			
COUNTRY	TYPE OF ENTITY	GOODS	SERVICES
CANADA	Central Government	130.000 SDR	130.000 SDR
	Sub-Central Government Entities	355.000 SDR	355.000 SDR
	Government Enterprises	355.000 SDR	355.000 SDR
	Annex 4 Services Covered	Consultancy services related to the installation of computer hardware; Software implementation services, including systems and software consulting services, system analysis, design, programming and maintenance services; Data processing services, including processing, tabulation and facilities management services; Data base services; Maintenance and repair services of office machinery and equipment including computers; Other computer services;	
Source: Thresholds in Annexes 1, 2 and 3 of Appendix 1 of the Government Procurement Agreement (expressed in SDR), available online at: www.wto.org/english/tratop_elgproc_el/thresh_e.htm .			

Conclusion and the Way Forward

The conclusion deals with two components: (i) the barriers faced by Indian IT solutions-providers in international government procurement markets, and (ii) the considerations which the Indian government may be required to take care of while engaging in government procurement.

A study by NASSCOM, India's apex conglomerate of the software industries, indicates that out of the total IT/BPO government spend by the US and West Europe, the addressable market for the Indian IT/BPO industry is approximately US\$20bn which is likely to grow to US\$70-US\$80bn by 2020. However, so far, India has been able to harness only 2 percent of the total addressable market (US\$0.5bn) in 2010, due to existence of regulatory barriers, such as visa restrictions, language barriers, lack of experience of Indian companies in lobbying EU or US governments, discouraging effect of provenness clause etc.

As highlighted in the study, though India may be able to avail of at least 10 percent of the addressable market by 2020, it will still not be substantial for it to emerge as a major player in the market. Nonetheless, Indian companies can improve their business model to make it more competitive for government procurement markets. While dealing with India's capacity as a participant in international government procurement markets, it is essential to consider the following:

- The information technology sector is one of the potential sectors, especially the software services segment, where India may have an offensive interest and that it can attempt to penetrate further in foreign procurement markets. However, India would still need to strengthen other segments of the IT such as the hardware development and related R&D so as to attain export competitiveness and benefit from it before it enters into any bilateral or Plurilateral trade arrangement
- As noted above, there are a few restrictions and barriers prevailing in other country markets in general and in procurement which will require systematic and coherent negotiation strategy. It is also important to note that information technology enabled services fall within the scope of services. This requires the application of the

provisions of the GATS agreement and subsequent reflection of having altered the market access conditions and the national treatment specifications in the Offers of all the countries.

Secondly, as noted before, from the point of view of the Indian government engaging in procurement activity, it is essential to keep in mind the following notions:

- i. One of the most crucial requirements to effectively conduct Information Technology procurement includes the formulation of a 'statement of requirements' which formalises the exact need of the department. It may be helpful to categorise the features which are included as essential/non-essential, but preferable and so on so as to be able to effectively negotiate and arrive at appropriate costing system;
- ii. Some of the other specific facets of information technology which influence procurement in information technology are that it is essential for governments to ensure 'interoperability' of the systems which have been in place. This is in order to ensure that information management is smooth and can withstand technological developments over a period of time. It is critical to test the delivered products against the earlier defined requirements in order to determine whether the newly procured items actually fulfil the initial requirement; and
- iii. It is important to regard security elements while engaging in information technology procurement considering the vulnerability that information stored on the internet faces; and
- iv. The government bodies could explore the option of engaging in consolidated purchase of hardware or

software in order to ensure that some cost advantages are realised.

A few strategies which can be considered for the purposes of enhancing market penetration in the other members' government procurement markets are as follows:

- Visa requirements and procedures are the major barriers for the provision of IT services, as they de facto impede the entry of foreign professionals in EU and North American markets are not addressed by the GPA, and may possibly be removed through bilateral negotiations. India has long been pursuing negotiations on mode-4 liberalisation under the GATS regime with major trading partners and also attempting to ensure preferential access for certain categories, including IT specialised personnel.
- Labour laws often provide cumbersome requirements, such as minimum standards, and employment of local personnel. Such barriers are difficult to remove, even at the bilateral level, as they are often the result of internal political pressure. India could try to negotiate the removal of these barriers through bilateral/plurilateral agreements. .
- Commercial presence on site for the delivery of the service is a requirement posed by many governments internationally. This could be one of the strongest barriers for Indian companies. India has so far relied on a business model for outsourcing of services, which envisages the cross border delivery of the service (mode-1). The presence of the service supplier in India allowed economies of scales and reduced prices, which are the two main drivers of the development of the Indian IT sectors and the roots of its competitiveness. The Indian government may pursue the matter and exchange market access opening on mode-1 of GATS and obtain concessions from the Indian side.

- Language barriers, particularly evident in major government procurement markets, such as continental Europe, Japan, Korea and Taiwan.
- On site delivery requirements which requires the commercial presence of Indian companies, and render impossible the provision of cross-border services, such as IT-enabling services.
- Regulatory asymmetries among sub-central entities within a country or between countries that impede achieving economies of scale. These are particularly strong among EU countries and within US.
- Lack of confidence of governments in granting off-shoring consulting services (especially with regard to foreign companies).
- Lack of experience of Indian companies in lobbying EU or US governments: for example, most of the larger American and British players in this market dedicate their few resources for advising and consulting various government departments on various IT needs for a couple of years and absolutely free of charge.

Endnotes

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16 Simo, M, J. Pastor and R. Macao, (2008), '*Public Procurement of IS/ IT Services, Past Research and Future Challenges*', chapter in *Open IT-Based Innovation: Moving Towards Cooperative IT Transfer and Knowledge Diffusion* p. 444

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18 Article 2.101 of the Federal Acquisition Regulations defines "information technology" as follows: "[A]ny equipment or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency."

The term "information technology" includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources. The term does not include any equipment that:

1. is acquired by a contractor incidental to a contract; or
2. contains imbedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.

For example, medical equipment, where the information technology is integral to its operation, would not be considered commercial information technology exempt under the rule".

Note: Even though section 604(k) and section 1605(d) of the Buy American legislation provides that the section would be applied in a manner which is consistent with US obligations under international agreements, the actual extent, and scope of actual application of this saving provisions to parties of the GPA, or those who enter into FTAs with the US is not conclusively registered.

6

Government Procurement: The Case of Indian Railways

*Federico Lupo Pasini & Suresh P Singh**

Introduction

The Indian Railways is the biggest state-owned enterprise and the largest procurer in India. It performs an important function because an efficient transport system is of vital importance to the economic development and social welfare of a country. It performs the fundamental function of stimulating the development of the national economy by transporting goods and passengers at economical/minimum cost. The rail transport industry in India is of utmost importance for the economic development of the country.

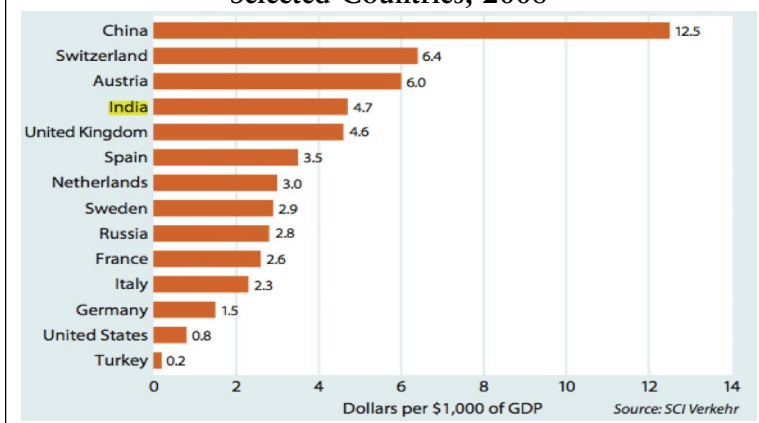
The railway services not only aid in transporting goods and people across the country but also contribute immensely in employment creation. The Indian Railways employs around 1.4 million.¹ With US\$4.7bn of investment in rail infrastructures, the India railway system is amongst the largest and busiest rail networks in the world in terms of investment.² The Indian railways operates on three gauges: (i) the broad

* Data analysis in the chapter was carried by Suresh P Singh.

gauge (1676 mm), which constitutes 72 percent of the route also contains the double/multiple track sections – 35 percent of the broad gauge network on the Indian Railways is electrified (ii) the meter gauge (1000 mm); and the narrow gauge (762 and 610 mm). These different types of railways gauges present opportunities for a variety of investments to be undertaken in developing the infrastructure in this segment.

Furthermore, the Indian Railways has 1,19,984 bridges. Of these bridges, 9792 are major bridges. The Xth Plan in the year 2002-2007 had aimed to undertake the following measures: make high density network investment to increase capacity; make technological upgradation of asset to increase the speed of trains; to effectively utilise information technology; and to improve the safety of operations by the replacement of over-aged assets by using the Special Railway Safety Fund. In order to create alternative routes in ‘congested corridors’, the conversion of meter gauge tracks to broad gauge was envisaged as a suitable solution.³ Considering the amount invested into the sector to ensure the maintenance of a vast railway-equipment supply industry, this industry clearly has a large capacity to generate demand for procurement activities.

Figure 6.1: National Investment in Rail Infrastructure, Selected Countries, 2008



In India, departments like Defence, Railways and Telecom allocate approximately 50 percent of their budget to procurement of goods and services. Public procurement in these sectors has a major impact on national security, safety of passengers and quality of infrastructure and services. Given the strategic and economic importance of railways in a country, procurement by government in railway sector is crucial. An efficient procurement system can reduce costs and increase the quality of the service, as well as enhance the opportunities for business. Table 6.1 indicates the amount of spending allocated in the different countries for rolling stock orders in the domestic rail market.

In this chapter, an attempt is made to estimate the size of government procurement in this sector. It discusses the structure, extant policy and practises related to procurement in the railways from the perspective of transparency, efficiency and competition. It also looks into the procurement practises adopted by railways and if these practises constitute hindrances to the effective conduct of procurement system – this aspect of the chapter lists some debilitating practices, which should be eliminated in order to add stability to the activity of government procurement in the railways sector. It also throws light on procurement practices in the urban transport sector in other countries (particularly in the railways sector) to enable an estimation of the possible market access opportunities available to domestic producers.

Competitiveness and Market Size of the Indian Railway Public Procurement Sector

a) Market size, Structure, and Composition

The size of procurement by the Indian Railways can be gleaned from its size and asset base. The Indian railways is the third largest railway network in the world with 7,083

Table 6.1: Annual Rolling Stock Markets by Region, Current and Projections to 2016			
<i>billion dollars</i>			
Region	2008-09	2011-13	2014-16
Europe	12.9	14.0	14.8
China	11.6	11.5	9.2
North America	3.7	3.8	4.6
CIS, including Russia	2.5	3.7	4.7
Latin America	1.8	1.0	1.4
India	1.4	1.9	2.3
Asia-acifit*	1.8	2.3	2.5
<i>Source: Global Competitiveness in the Rail and Transit Industry, 2010⁴</i>			

railway stations, 1,31,205 railway bridges, 9,000 locomotives, 51,030 passenger coaches, 2,19,931 freight cars and 63,974 route kilometres.⁵ It is responsible for transporting 2.65 million tonnes of freight traffic and 23 million passengers per day. Most of the assets possessed by the Indian Railways have been acquired through procurement, and the act of procurement is critical to the smooth functioning of the system.

Railways procurement is estimated at over ₹25,000 crores annually for goods and works.⁶ Another source places the figure at ₹27,000 crores.⁷ However, lack of clarity on methodology of estimation makes it difficult to use or comment on the size of the procurement. Given that there is an absolute lack of published data on procurement and there is no fool proof/accepted methodology to estimate procurement, the present study uses the criterion of 50 percent of the budget for estimating procurement by the Indian Railways.

Linking railways procurement with its departmental budget and using 50 percent of the budget criterion has both its advantages and disadvantages: There are a few government

papers/reports (mentioned in Chapter 2), which maintain this figure (50 percent of budget) as procurement by railways. However, a major disadvantage with this is that it generates an approximate figure and might not be as pragmatic as one based on tender documents. As per this proposed criterion, total procurement amounted to ₹381 crores in 1980-81. In the later periods, it increased with increase in the size of annual budgets. It increased by nearly five times in the decade to reach ₹1873 crores in 1990-91; and by another three times to reach Rs. 5163 crores in 2000-01.

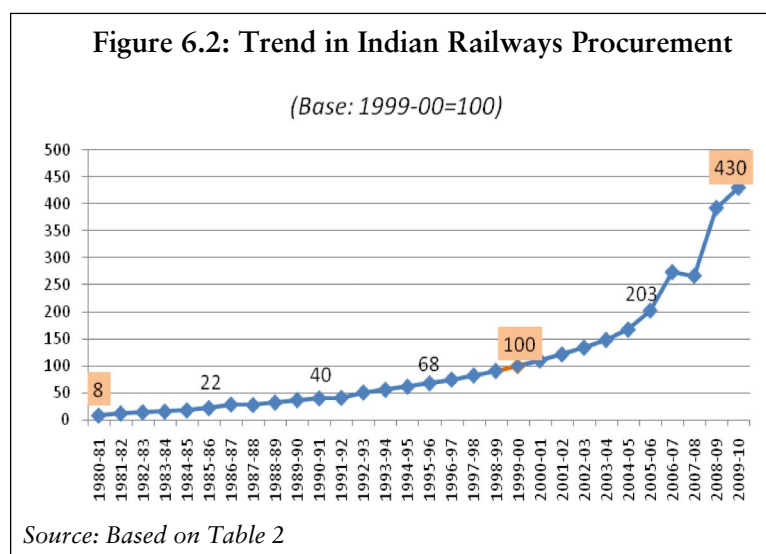
Total procurement which includes goods, services and works by the Indian Railways increased by about four times in the next decade (2000-01 to 2009-10), and achieved a market size of over ₹20000 crores. Considering the three decades period from 1980-81 to 2009-10, total procurement is observed to have increased by over 52 times.

Table 6.2: Procurement including goods, services and works by Indian Railways Increased Manifold Since 1980s

<i>Year</i>	Procurement Estimates (Rs. Crores)	<i>Year</i>	Procurement Estimates (Rs. Crores)	<i>Year</i>	Procurement Estimates (Rs. Crores)
1980-81	381	1990-91	1873	2000-01	5163
1981-82	569	1991-92	1913	2001-02	5690
1982-83	666	1992-93	2374	2002-03	6270
1983-84	721	1993-94	2616	2003-04	6944
1984-85	825	1994-95	2883	2004-05	7837
1985-86	1025	1995-96	3177	2005-06	9488
1986-87	1338	1996-97	3501	2006-07	12823
1987-88	1290	1997-98	3858	2007-08	12501
1988-89	1508	1998-99	4252	2008-09	18387
1989-90	1725	1999-00	4685	2009-10	20145

Source: Various Indian Railways Budget Documents

The drastic increase in procurement is clearly demonstrated by Figure 6.2. While it took about two decades for procurement to reach the 100 mark, it increased by nearly four hundred percent to reach the level of 430 in the next one decade.



Different types of organisations share the total procurement market of Indian Railways, with large private firms accounting for nearly three-fifth of the total number. The share of different types of organisations in railways procurement is indicated below.

Box 6.1: Share of Different Types of Organisations in Railways Procurement	
• Share of Public sector Units:	34%
• Large Private Industry:	60%
• S.S.I and rural sector:	06%
Source: E-Procurement on Indian Railways: Strategy, Scope and Issues, Presentation by AK Goel accessed on April 20, 2012	

b. Foreign Investment in Railways and Railway Equipment

From a trade policy perspective, the railways is a partially closed sector divided between sub-sectors monopolised by public companies, sectors open to domestic private participation, and sectors open to international competition. FDI is disallowed in passenger and freight transportation, and pushing and towing services.

The railway-related components industry is opened to 100 percent FDI. It received 1,058.18 crores of FDI inflows as per the latest updates. The percentage contribution of this, however, is only 0.15 of the total FDI inflows into the country.⁸ This sector provides components to the Indian Railways and exports abroad. It has grown over the last few years due to the several incentives that have been provided by the government of India. The component industry produces and supplies various kinds of products, such as locomotives lights, signals, slack adjusters, track fittings, round shaft chisels, and braking systems. The maintenance and repair of rail transport equipment and supporting services, and railway-related components, warehousing and freight corridors are also activities, which allow FDI inflows.

In order to attract more foreign investment in this sector various tax incentives and other indirect subsidies are granted. These have ultimately increased the competitiveness of the industry. Indeed, according to the Department of Industrial Policy and Promotion (DIPP), a total of approximately US\$223.28 of FDI inflows were channelised into railway-related components industry from April 2000-August 2011. Together with new capital, some experts argue that this investment has also been able to bring with it some transfer of technology, which has led to an improvement in the quality of the railway system in India.

The Railways Ministry recently acknowledged that its unilateral attempts to improve connectivity to the mining and

industry sectors in India had not been very successful. The poor response of the industry to initiatives such as the Railway Infrastructure Investment Initiative, specifically draw attention to this fact. The Railways Ministry has recently proposed that foreign direct investment be allowed into the core business of laying tracks, running trains and to build lines which will be dedicated to providing inputs for industries. The lines which are created for industries will be classified as ‘non-government railway for public carriage of goods’ as per the media reports of the Cabinet Note.⁹

It remains to be seen if the government will facilitate the entry of FDI, and the transfer of technology beyond the railway-components industry. This is specifically important keeping in mind the paucity of funds to connect industries with the raw materials required for their effective functioning.

c. Emerging Scenario and Future Requirements

The Ministry of Railways since the launch of economic reforms and liberalisation programmes has taken a policy decision to expand and improve the infrastructure and amenities on trains, railway stations and other railway premises for passengers and other users. A major focus of these initiatives is to promote integrated materials management, strategic and operational aspects of outsourcing and procurement, the interface of materials management and supply chain management through adoption of latest techniques of cost control and optimisation by leveraging information technology tools. The focus of the initiatives also includes use of public procurement platforms in the most efficient manner.

Box 6.2: Indian Railways Procurement System: An Example of the Metro Railway, Kolkata

Procurement activity is performed throughout the year through advertised tenders. The preference policy is as follows: First preference is given to items manufactured and sold in India; the second preference is given to imported items or items made from imported raw materials if available in India through an authorised stockiest. For items in which the first two preferences are not applicable, preference is given to import, but this is rare.

The power to make procurements is delegated rank wise to officers. The procurement of major items like complete train rakes, rail engines etc. is carried by the Ministry of Railways, Government of India.

Source: Metro Railway Kolkata, http://www.mtp.indianrailways.gov.in/view_section.jsp?lang=0&id=0,1,304,386,387

The initiatives have led to significant growth and improvement in the execution of activities. With sustained drive for modernisation of Indian Railways, the trend is expected to continue in the coming period. According to the report¹⁰ submitted by the expert group, the modernisation of Indian Railways will require an investment of ₹5,60,000 crores (more than US\$100bn) in the next five years. Out of the 15 recommendations made by the Committee, some focus on the procurement component (see Box 6.3).

These, in fact, will shape and give direction to railways procurement system in India. Further, it can be expected that the focus of these investments may lead to introduction and strengthening of the implementation of concepts like green procurement, e-procurement, e-payments, reverse auction, eco-friendly disposal systems and integrating these with the railways procurement system. The new direction could result in the creation of opportunities in new sectors encouraging increased participation in domestic procurement for both domestic and international participants. Some indicators of progress of work have been provided in Box 6.4.

Box 6.3: Factors that will shape future procurements by the Indian Railways

I. Track & Bridges: ₹33,046 crores and should be completed in five years

- Modernising 19,000 kms of existing tracks
- Elimination of level crossings and providing fencing alongside tracks
- Strengthening of 11,250 bridges to sustain higher loads at higher speeds
- Providing 100 percent Mechanised track maintenance on Routes A (which allow for speeds up to 160km/h) and B (which allow for speeds up to 130km/h)

II. Signalling: ₹25,000 crores in five years

- Implementation of Automatic Block Signalling
- Providing communication based train control like Moving Block System
- Deploying on-board train protection system with cab signalling
- Introducing GSM-based mobile train control communication systems
- Establishing Centralised Maintenance Control Centres

III. Rolling-stock: ₹72,571 crores in five years

- New generation locomotives:
 - Electric locomotives (9,000 & 12,000 HP)
 - High horse power diesel locomotives (5,500 HP)
- Traction development for improvement in fuel efficiency, emission & reliability
- High speed potential LHB coaches* (160/200 kmph)
- Upgraded suburban coaches
- Train sets for high speed inter-city travel
- Modern high pay to tare ratio wagons
- Green toilets on all passenger trains
- Heavy haul freight bogies

IV. Stations & Terminals: ₹127,000 crores in five years

- Modernisation of 100 major stations out of the total 7083 stations immediately

Contd...

- Developing 34 multi-modal logistics parks to provide integrated transport infrastructure facilities
- Modernisation of existing Railway Freight Terminals
- Enhancing customer amenities and services at stations and on trains

V. High Speed Passenger Train Corridors ₹60,000 crore

Construction of a High Speed railway line: Ahmedabad & Mumbai with speed of 350 kmph.

VI. Information and Communication Technology (ICT): ₹1,315 crores in 1 to 4 years

- Setting up Real Time Information Systems (RTIS) to provide real time information at stations and on running trains
- Setting up Radio Frequency Identification (RFID) tracking system for wagons, coaches and locomotives to enhance wagon management and real time monitoring
- Providing Internet access at 342 railway stations immediately
- Establishing unified IP-based ICT platform for 6000 railway stations
- Review CRIS and integrate into IP-based ICT agenda
- Leveraging and expand Railtel optical fibre network
- Use of ICT to modernise Organisation, Management, Development, Finance, Project Management, Research, Procurement, Payment etc.
- Introduction of e-file to computerise railway files and expedite decision making
- Introduction of mobile ticketing & commerce for a variety of railway applications
- Upgrading and Integration of Railway websites and use of social media for customer feedback, consumer education and social messages

* LBH coaches, designed for an operating speed up to 160 km/h, have been developed by Linke-Hofmann-Busch (Germany, now part of Alstom). These are produced by Rail Coach Factory in Kapurthala, India.

Source: Compiled from Report of the Expert Group for Modernisation of Indian Railways, Ministry of Railways, Government of India, February 2012.

Box 6.4: Some Indicators of Progress of Work

- E-procurement started (by N. Rly) from May 05;
- More than 1200 E-tenders uploaded and 800 tenders opened electronically;
- 500 E-tenders decided through e-procurement; and
- EPS to begin for Works and Engineering track supply tenders.

d. SWOT Analysis of Railway Supply Industry

Table 6.3 presents a diagrammatic representation of the strengths-limitations-opportunities and threats for the railway supply industry. Of specific interest is the fact that the markets in certain countries like Japan are closed. This has been covered in greater detail in the chapter.

Table 6.3: SWOT Analysis of Railway Supply Industry

	STRENGTH	LIMITATIONS
INTERNAL FACTORS	<ul style="list-style-type: none"> • Vast market with huge potential to grow • Good and cost-competitive manufacturing base • Availability of specialised personnel • Good technological skills 	<ul style="list-style-type: none"> • Poor regulatory framework • Murky bureaucracy • Transport and logistics costs
	OPPORTUNITIES	THREATS
EXTERNAL FACTOR	<ul style="list-style-type: none"> • Potential availability of European market, as well as of other markets. • Possibility of FDI inflows in the railway supply industry • Reduces procurement costs and increased transparency 	<ul style="list-style-type: none"> • Rising competition of other emerging Asian powers (China, Korea) • Presence of strict regulatory standards in many foreign markets • Closed markets in North America and Japan

The Public Procurement System for Railways in India

a. Structure and Regulatory Framework

The planning, management and the other administrative operations of the complex Indian railway system are governed by the Railway Act, 1989. The Industrial Policy Resolution, 1991 reserves railway transportation for the public sector owing to which operation of trains is undertaken by the public sector, while all other activities such as design, construction, financing and maintenance may be undertaken through private participation. The private participation is possible only after due diligence and after the receipt of concessions from the Government of India.

The railway system is organised into zones and divisions i.e. into 17 zones, which are further divided into 67 operating divisions. The production units, which manufacture rolling stock, wheels and other important components, are directly under the Ministry of Railways, and their management reports to the Railway Board. Nine subsidiary organisations under the Ministry of Railways viz. IRCON, RITES, CONCOR, RCIL RVNL, MRVC, IRFC, and KRCL undertake work of a specific nature.

Currently, the Ministry of Railways is in charge of coordinating and managing the Indian railway system. As per the provisions of the Railway Act, the Railway Board is the organ responsible for the management and coordination of the railways system at the national level, and for coordination of the seventeen zonal railways and the metro railway.¹¹ The Railway Board is headed by a Chairman, five Commissioners, and a Financial Commissioner. The Railway Board controls and also manages the production units the construction units and other railway establishments.

The Functioning of the Procurement System

The Indian Railways procures goods and services for a variety of reasons. The main items which are procured include fuel, track material, rolling stocks, ITC, repairs and maintenance services. It also uses the services of consultants, although it ensures that the intellectual property rights remain with the railways. Indian Railways is one of the largest government agencies in terms of its size of procurement. It annually settles more than 2 lakh purchases, undertaken through the process of competitive bidding by 25 decentralised units.

Until 2001, the procurement was centralised, while this function is now shared between: (1) the Railway Board, which procures the most expensive items; and (2) the Zonal Railways through its General Managers procures lower-value items for the zonal railways and railways production units under their competence. In some cases, the DGS&D is also involved in procurement of railway equipment.

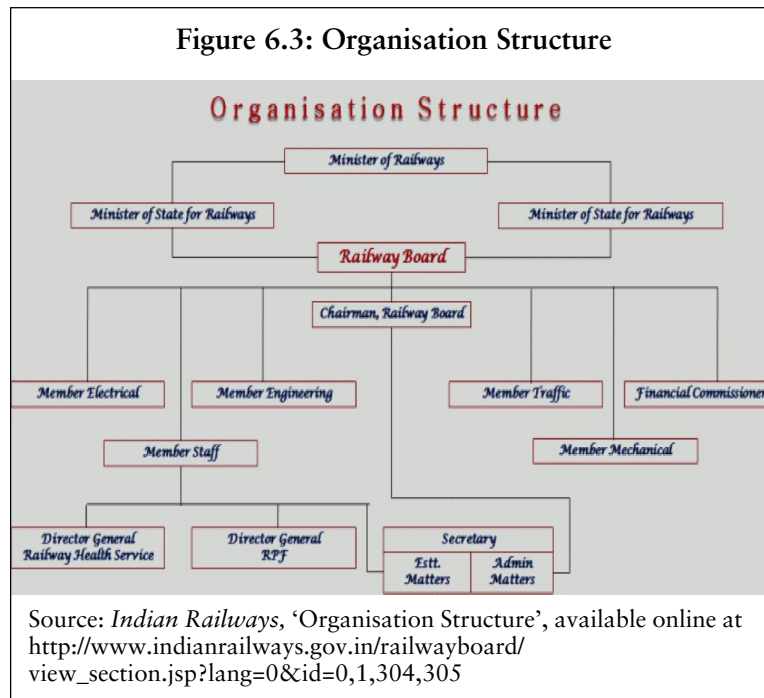
The Railway Board procures its items through the Member Mechanical (evident from the organisational structure) and is assisted by Additional Member/ Railway Stores. Each of the ten directorates of Indian Railways is involved in the procurement process by overseeing the procurement of the items under its competence. Besides the Railway Board and the Zonal Railways through the General Managers, the procurement system of Indian railways also relies on the Research and Design Standards Organisation (RDSO), which operates as an advisor to the Railway Board, zonal railways and RPU.

The RDSO's primary function is research development and standard setting. The duties of RDSO consist of developing standards, conducting technical investigations, testing and inspecting items to ensure the safety of the system. The most

important function is aiding in drafting the specification of the tenders to ensure the quality of the vendors. Indeed, before selling an item to the Indian Railways it is important to ensure that the items are approved and inspected and approved by the RDSO.

The Indian Railways Stores Service (IRSS), a cadre of the Government of India, manages procurement, logistics and transportation of material.¹² The IRSS also plans and maintains warehousing with automated storage and retrieval systems. This department is organised in three tiers: the top tier at the Railway Board level; the second tier at the zonal railway level; and the third tier at the divisional or the district level. This Department is headed by Member Mechanical, who also represents the department at the Railway Board level.

Figure 6.3: Organisation Structure



The Indian Railways adopts three different procurement systems:

- (i) The open tender system: The tender notice is given due publicity through prescribed channels/media. Anyone (any individual or firm) who is desirous of taking up the contract is eligible to bid for the work.
- (ii) The limited tender system: Tender notices are issued only to select firms/entities which are short-listed in advance on the basis of their credentials, expertise and specialisation *vis-à-vis* the kind of work in question. This system is used for tenders below or up to ₹40 lakhs in open-line railways; and
- (iii) The single tender system: Used only for emergency situations and for proprietary items.¹³

According to a study of the Central Vigilance Commission, the Indian Railways adopts well-defined procedures governing the open tender and limited tender systems. Nonetheless, even if the procedures satisfy the main rules of transparency, it still does not overrule the possibility of tweaking the system in favour a particular supplier. Amongst the three different systems, the limited tender is the one that presents the most irregularities.

Allegedly, at present, Indian Railways spends about Rs. 16,400 crore annually via non-competitive bidding, around 80 percent of the overall budget.¹⁴ The non-competitive bid system clearly favours select firms over others, and may result in the creation of cartels and other irregularities. With a view to increasing transparency, the Indian Railways has adopted e-procurement for many tenders and comparative bids of different bidders are instantly published online.

b. Procurement Practices in Indian Railways vis-a-vis Procurement Essentials of Transparency, Competition, Efficiency and Economy

A review of procurement practices followed in Indian Railways through the qualitative field research via interviews with a cross-section of relevant stakeholders was performed for this study. It reveals that some of the procurement practices are not in conformity with the basic principles of procurement i.e. transparency, efficiency, competition and economy. Majority of the procurement activity for railways relies on local suppliers.

Indeed, according to field interviews with stakeholders of Indian Railways, approximately 5 percent of the total supplies are open for foreign sources. The main imports are said to be coming from China, East European countries like Poland and Romania and US (where Electro Motive Diesel supplies about 35 percent in the manufacture of diesel locomotives works of Varanasi).

However, the data mentioned earlier does not capture for whether local manufacturers purchase raw materials or other items (which are assembled) and hence does not reflect the extent to which this sector is opened. However, the field interviews indicate that foreign suppliers are hesitant to participate in the Indian market. Foreign enterprises participate in bids only in sectors where Indian companies lack sufficient technical capabilities.

The procurement of Indian Railways is coordinated and managed by the RDSO in order to ensure that the procured items are in compliance with safety norms. Only those suppliers that are listed in a pre-approved list of RDSO are eligible to tender and only 5 percent of the overall procurement is conducted outside such list. These practices subsist in other countries as well, for instance in the Association of American Railroads in the US follows similar practice. Consistent prior

performance determines if future orders will be given to a vendor.

Stakeholder interviews with the Indian Railways indicated that the need for the prior-registration requirement arises so as to ensure a consistent supply of materials which meet quality specifications in a short period of time. It is opined by stakeholders that maintaining a list of vendors does not distort competition per se and also does not constitute an unjustifiable market access restriction which distorts competition. However, several reports such as TERI Report titled 'Competition Issues in regulated Industries: Case of Indian Transport – Railway and Ports' argue that the system of registration discourages potential bidders from participation in the bidding process and reduces their chances of market entry.¹⁵ Some critics have argued that the pre-registered vendor policy leads to cartelisation.¹⁶

This situation is the result of the specific structure of the market, whereby many vendors have only one possible buyer. In order to ensure a constant flow of orders, companies may form cartels that would distribute orders amongst themselves. Whenever Indian railways tried to disqualify a cartel member, the other member of the cartel has often responded by boycotting the tender. If the practices seemed to indicate that the cartelisation was with the intention of raising prices in an unjustified manner, those were being referred to the CCI.

While there is a pronounced need to meet the safety standards stipulated by the Indian Railways, it is also important to note that such registration of pre-qualified bidders may result in preclusion of foreign bidders. Though the registration practice appears to be in conformity with Rule 142 (i) and Rule 151 of the GFR, it still cannot be termed as an open bidding system with only 5 percent of supplies being open for unregistered vendors. The practice appears to disallow a

competent bidder because the bidder may not be on the approved list of RDSO or in another case a supplier is not on the list of registered suppliers of DGS&D. This has a restricting effect on the number of potential suppliers of products to Railways and other government departments. Such a practice restricts competition and enhances the possibilities of formation of a cartel. This practice may result in some negative externalities like lower quality, increased price, and increase in malpractice. Furthermore, these practices could be considered as restrictive and may come under the scanner of abuse of dominance.

Some argue that RDSO consumes large amount of time prior to giving approval to a new technology, while the procurement procedures are often long and burdensome. Many reports demonstrate that the specifications required by the RDSO contain cumbersome details such as market experience, financial capability etc., which may not always be pertinent to the procurement activity being undertaken.

The Indian Railways is also engaged in Vendor Development. Unlike other national railways companies, which allocate contracts of 3-5 years duration to offset the investment costs sometimes associated with large procurement contracts, the Indian railways can only procure on an annual budget basis. In order to address this constraint, usually the vendor is offered the order of supply from other railway zones.

The primary function of the RDSO is to engage in research, development and standard setting. However, the practises point out that RDSO focusses on vendor approval even though this is not its specific responsibility. Further, it is argued by many stakeholders' that this practice creates a disconnect between the authorities that any flaw in procurement does not make the RDSO liable resulting in a lack of accountability.

Furthermore, there exists a tendency among public procurers to limit participation to the big and reputed. This is

adopted with a view to reduce the cost of evaluating bids or to ensure the stability and quality of supply. However this tendency has a potential to raise high entry barriers for new entrants.

Interviews with stakeholders suggest that Indian Railways procures high value traction equipment items for well known public sector enterprises and other companies on annual basis, by operating their price list without adhering to the normal tendering process. This is in dissonance with the spirit of competitive neutrality, a concept which describes the aim of a level playing field in mixed public/private markets, where state owned or quasi-public bodies line up to compete with private sector companies. These markets tend to be distorted as a result of structural advantages enjoyed by public providers and a failure by public buyers to ensure fair process.

Procurement from Public Sector Enterprises

The Indian Railways procures 65 percent of its items from the private sector. The remaining is purchased from Public Sector Units (about 30 percent) which mainly supply fuel, some electronic parts from BHEL, some heavy engineered items from HEC Ranchi, crank shafts etc from defence PSUs, and from small scale sector/khadi and village industry corporation (5 percent), as required by the relevant policy and legislation. Some studies focussed on wagon procurement¹⁷ showed that the discriminatory policy of Indian Railways ultimately has led to an overall decrease of quality and a shortage in critical areas of operations. Indeed, by reducing voluntarily the level of competition among suppliers, neither public units (which do not face any competition) nor private companies (which are left outside the wagon market) have an incentive to increase the quality of their products and to reduce the price.

Transparency and Malpractices

Lack of transparency and malpractices is often considered one of the most pressing problems of public procurement. The CVC is the agency entrusted with the responsibility of ensuring the compliance of procurement rules and practices. Several reports from the CVC and the CAG indicate lack of transparency and corruption in the procurement system of Indian Railways. In 2001, the Commission issued a study which is still relevant. It analysed malpractices in the Indian Railways with regard to procurement policies in the previous year.¹⁸

The common allegations/irregularities observed in the cases relating to award of contracts for execution of works for procurement of materials etc. were as follows:

- (i) Award of contracts at exorbitant rates;
- (ii) Execution of sub-standard works;
- (iii) Acceptance of sub-standard supplies;
- (iv) Over-payments – i.e. payments made for works not executed;
- (v) Failure to carry out quality-checks;
- (vi) Misappropriation of materials by contractors and/or officials, in conspiracy with each other; and
- (vii) Manipulations at the tender – processing stage with a view to favour a particular contractor and/or to eliminate a more deserving/eligible one. The above mentioned issues occur after award of contract.

There have also been incidences pointed out which raise concerns pertaining to transparency and competition issues in or before the bid process. For instance, in the budget in 2007-08, it was announced that a new factory will be set up in Bihar to manufacture diesel locomotive with latest technology in partnership with private enterprise and the

process will be through an open international competitive bidding.¹⁹ The project has not been concluded because the due diligence of the bidding documents has not been completed. Even though General Electric (GE), a formidable participant from the United States is the lowest bidder, as per media reports, this contract has not been awarded to it because Electro Motive Diesel (EMD) may lose its monopoly if this contract is granted to GE.²⁰ Such news reports present a discouraging picture on probity, transparency, and competition issues related to procurement.

Common Irregularities in the Tender Committee

The CVC study reports that most of the irregularities and manipulations are found in the work of the Tender Committee (TC), which is the body that issues the specifications of the tenders. The Tender Committee recommends to the competent authority the most suitable bidder. The authority that accepts the tender has limited power, as it cannot refuse the Tender Committee recommendations when they are unanimous or when the project in question does not fall within the discipline of the tender accepting authority. Hence, the possibility of favouring a particular bidder is high.

According to the CVC report the most common tactics used to “twist” a bid are:

- “(a) Exaggerating the ‘track record’ of the ‘favourite’ bidder;
- (b) Suppressing and/or downplaying his past failures;
- (c) Exaggerating the past failures of his main rival;
- (d) Ignoring/suppressing the otherwise satisfactory credentials of the main rival;
- (e) Projecting, falsely, that the lower rates offered by them in rival are “unworkable” on the basis of the estimated cost which, in the first place, was exaggerated deliberately;

- (f) Projecting undue/artificial “urgency” and then by-passing the lower offer on the ground that the party already has some works on hand and that, therefore, it may not be trusted to complete the subject-work within the stipulated time-frame. In reality, it has been observed, once the tender is awarded to the other party on these premises, the party is merrily granted extension after extension (of time) either with token penalties or no penalties;
- (g) Certifying, falsely, that the quality of the product/material offered by the ‘favourite’ contractor is admissible (*vis-à-vis* the specifications);
- (h) Painting the quality of the product offered by the better-placed bidder (who has quoted lower rates) as unsatisfactory/unsuitable; and
- (i) Exaggerating the capacity/resources of a preferred contractor and down-playing that of his rival (lower bidder).”²¹

Some of the other common irregularities noted, by the CVC report, in the processing and finalisation of tender cases and contracts are as follows:

Hiking the estimates

In the Notice Inviting Tender (NIT), the Tender Committee has the responsibility of estimating the costs of the project for which purpose the TC collects the relevant data and provides a rough estimation. In some occasions, the estimated value of the project is raised artificially through various methods that alter the methodology used to estimate the value of the project. Such methods rely on (a) “selective comparison” of different works in order to choose the most expensive one, and (ii) artificial raise of the estimated costs of inputs to production, such as labour, transport, raw material etc.²²

Stage Management of briefing notes for the Tender Committee

Another way adopted to strategise the bidding process is to prepare ‘doctored’ briefing notes or comparative statements for the use of the Tender Committee (TC). In this case, it is found that the simplified offer to the TC is tailor-made by preparing a briefing note where bidders have been compared which may not appear *prima facie* out of place but do provide a room to manoeuvre for providing preference to a particular bidder over another by giving limited information required for the project technical conditions that are necessary.²³

Manoeuvring of the Technical Committee

Given that the tender accepting authority often simply ratifies the technical committee decision, the technical committee (TC) becomes the *dominus* of the tender procedure. The Committee is made of three members, and in several incidences, these TC members have diverging views on the outcome of a particular tender. The CVC Report further specifies that when the recommendations are unanimous, as observed in many cases, it may be an indication of “unholy nexus” and that such a unanimity is attributable, many a time, to various reasons such as “meeting of minds” amongst the TC members or due to the absence of independent views.²⁴

Manoeuvring of the Tender Accepting Authorities (TAA)

In view of the peripheral role of the tender accepting authorities in the process of public procurement, it is often the case that the TAA cannot overturn the outcome of a particular bid. In case of irregularities being detected in the award of a tender, the unanimous recommendation by the TC renders it difficult for the TAA to not to approve, in good faith, the unanimous recommendation of the TC. Nonetheless, the tender accepting authority has the power to re-evaluate a tender, even in presence of unanimous recommendations from

the TC. More precisely, the tender accepting authority is also empowered to seek further explanations of the outcome of the tender. However, as observed by the CVC that the possibility of manoeuvring by the TAA can also not be fully ignored in the bidding process so as to prefer a particular bidder, by reversing/modifying the TC's recommendations.

Lack of Specification of the Quantity to be purchased

Sometimes it is impossible to define *a priori* the quantity to be purchased, especially in big contracts. The CVC report further indicates that in such cases the quantity is indicated as 'approximate' and the tendering authority often splits the quantity among different bidders at the lowest rate quoted by the bidders, without providing reasons for doing so. The result is that only when the tender is concluded, the winning bidders are informed that they can get order for a certain percentage of the contract and not the entire contract. This practice may not only discourage bidders to apply for future contracts but may also result in disputes/litigations, and the tenderer might even withdraw its offer.²⁵

Local Purchases

The most common irregularities in 'Local Purchases' are: (i) Creation of artificial 'demand' for materials to justify purchases; (ii) Splitting up of demands/quantities with a view to bringing each case under the financial powers of the local purchase officer etc; (iii) Projecting artificial urgency to the purchase although no such urgency actually exists; (iv) Obtaining "supporting quotations" from fictitious/non-existent entities where the quoted rates are invariably higher *vis-à-vis* the rates of the pre-determined supplier; and (v) Effecting redundant purchases at exorbitant rates.²⁶

Market Access Opportunities in Foreign Government Procurement Markets

The market access opportunities for railway procurement differs from market to market in different countries keeping in view the level of investment injected into the modernisation of the railways, and more generally, into the transport sector. According to the SCI Verkehr, a consulting firm's, report the total market for railways equipment was US\$590bn in 2008, while a report from Roland Berger, another consulting firm, estimated a much smaller size for this segment around US\$169bn. As per the study entitled 'Global Competitiveness in the Rail and Transit Industry', "In 2009, the US was the single largest national rail market with 15 percent of the global market, followed by China (11 percent), Russia (8 percent), Germany (7 percent), and France and India (5 percent each)".²⁷

Table 6.4: Global Passenger and Freight Rail Market, by Region and Major Industry Segment, 2005-2007 Average

Region	Infrastructure	Rolling Stock	Rail Control	Services	Accessible Market	Total Market
<i>billion dollars</i>						
Western Europe	8.1	13.8	5.9	9.9	37	50
Asia/Pacific	3.5	10.7	2.8	6.5	23	39
NAFTA*	7.4	6.8	1.4	11.2	27	31
CIS†	0.8	3.2	0.5	1.6	8	18
Eastern Europe	1.3	2.1	0.8	2.7	7	9
Africa/Middle East	0.8	2.7	0.6	0.4	5	7
Rest of Americas	0.3	1.0	0.3	1.9	4	5
Accessible	22	40	13	35	111	—
Total	28	48	13	68	—	159

Note: Numbers may not add up due to rounding.

* North American Free Trade Agreement

† Commonwealth of Independent States

Source: Renner and Gardner, 2010

The railways supply industry is on the rise in many countries, spurred by the increase demand for new metro and railways systems all over the world. According to a study from Renner and Gartner,²⁸ at present there are around 400 light rail systems functioning worldwide, while another 60 systems or so are under construction, and more than 200 are in the planning stage. While Europe and North America have the highest density, Asia and the Pacific is the region with the fastest growth. By 2015, the number of train sets in operation worldwide is expected to increase to 3,725 which is a seventy percent increase. The main procurement markets include China, Spain, France, Japan, Turkey, Germany, Italy, Poland, Portugal, the United States, Sweden, Morocco, Russia, Saudi Arabia, Brazil, India, Iran, South Korea, Argentina, Belgium, the Netherlands, the UK, and Switzerland.

The study further points out that two-thirds of the market volume is considered liberalised, in the sense that international suppliers are allowed to bid in these markets. This result is in contrast with the results of the interviews conducted in India and elsewhere, as well with the qualitative analysis conducted on major European and American procurement systems. According to the present study, most of the procurement market is closed to competition, except to an extent in the EU. However, the European Union resorts to the use of the reciprocity requirement in its application of the benefits under the Agreement on Government Procurement. Some of the main procurement markets are being discussed below:

European Union

Since the early eighties, the European Commission has been taking efforts to increase the competitiveness of the sector. The European railways system is considered to be amongst the most liberalised in terms of public procurement. At present,

the public procurement for railway services in the European Union is regulated by two different sets of legislation: The regulation from 1969 concerning public service contracts for public transport, and the public procurement legislation from the 1990s.²⁹ The regulation in 1969 deals with the discipline of the provision of subsidies to entities which provide public services. The public procurement regulation, on the other hand, states that the invitation to tender should expostulate on the evaluation process, wherein in the absence of an evaluation process, the lowest bid must win. In 2004, the Commission issued a proposal aimed at liberalising the international rail passenger services within the EU no later than January 01, 2010.

The European public procurement system for railways is fairly open to competition. Indeed, there are a high number of private firms participating to public contract and most of the purchases are carried out through competitive tendering. The liberalisation policy enacted at the EU level is supposed to have encouraged the birth of new companies, which compete with each other in all segments of the railway business.

Among the most important players in the European railway market are French, German, British, and Swedish firms. While German and Swedish firms are less active outside Europe, French and British firms are active also in the North-American and Asian markets. Such firms not only compete at the European level, but have begun to export their product and services abroad. Indeed, at present, European railway supply companies enjoy 60 percent of the overall market share of railway equipment.

The EU is in the process of introducing a bill which would impose restrictions on participants from China, Russia, Brazil and other countries who do not open their own state-run projects to the EU. It already does not extend the benefits of the Agreement on Government Procurement to suppliers and

service providers of Canada, Japan, Korea and the US.³⁰ The sectors envisaged to be covered under this bill include public transport, railways, medical equipment and IT services. The threshold of the projects, which are applicable to this project, are those which are valued at more than •5mn.³¹ This reciprocity requirement may influence the extent to which domestic goods can penetrate the market in the EU.

United States

The US public procurement market for railways transport and equipment is subject to strict limitations with regards to tendering from non-US supplier to promote the development of local industries, as expressed in the Buy American Act. Overall, the US public procurement market for railways is not as open as the European markets and foreign suppliers are often discriminated against.

Around 80 percent of state and local transportation projects are fully funded by Central departments or Federal agencies. Public Procurement project for railways comprises not only construction of regional or inter-state railways, but also construction of subways systems, procurement of ferries, and supply of railway-related equipment. The procurement project is funded in US by the Federal Transit Administration, through a specifically dedicated fund called “Safe, Accountable, Flexible, Efficient, Transportation Equity Act”. The Act subjects the award of the contract to multiple Buy American restrictions that aim at protecting the American steel and manufacturing industries. According to the Act, all steel and iron manufacturing processes must take place in the US, except metallurgical processes involving refinement of steel additives, and all components must be of US origin.

Most requirements are indicated in the Federal Transit Administration Circular 4220, and in Title 49 of the Code of Federal Regulations. The Buy American requirements for

rolling stocks are stringent with regard to local production content. Indeed, the cost of components produced in the US must be more than 60 percent of the overall cost and the final assembly must take place in the US. Nonetheless, the US Federal Transit Administration often grants waivers to allow the use of foreign produced material when (i) the use of US materials would be inconsistent with the public interest; (ii) or when materials are not produced in the US in sufficient and reasonably available quantities of a satisfactory quality; (iii) or when US materials cost significantly more (i.e. 25 percent) than foreign products.

When a local authority responsible to manage the project receives funds from the US Department of Transport, it is required to ensure that each contractor meets the requirements of Buy American Act, with the limited possibility of waivers (except for microprocessors and software). Local contractors that sub-contract the project to foreign suppliers which use foreign material without proper waivers are subject to severe penalties and are liable for having committed an act of fraud.

Canada

Canada carves out from the WTO GPA and the NAFTA all procurements in respect of “urban rail and urban transportation equipment, system, components and materials incorporated therein, as well as all project-related material of iron and steel”.³² Further, all procurement of urban rail and urban transportation equipment systems, components and materials incorporated therein as well as all project related materials of iron and steel are excluded from the scope of what is procurable.³³ Hence, this market amounts to a completely closed market currently.” It remains to be seen whether Canada will open up these sectors in the future.

Japan and South Korea

The Operational Safety exemption or exclusion founded in public interest allowable under the Agreement on Government Procurement is generally limited to the cases where the specific safety equipment (in this case, for the railways system) in a country requires extremely high safety standards which may not be met by foreign suppliers.³⁴ However, Japan and Korea use the “Operational safety clause” (OSC), to exclude most, if not all public contracts for railways on “safety” grounds. This can be said to stretch the intended scope of the Operational Safety Clause.

However, disallowing all international tenders (as is done by Japan and Korea) for the entire railways sector without conducting any technical assessment of the offerings of the participants of other countries would result in excluding the access to this market for all international suppliers. This would indicate that these markets are unavailable for the purpose of facilitating the participation of Indian suppliers in Asian markets.

Conclusion

Railway procurement is entwined with steel production and with other sensitive industries in a country. Therefore, other GPA members tend to protect their own market from foreign competition in order to retain their right to use railway procurement as an industrial policy tool. With the exception of the EU and (to a limited extent) the US, all the most important procurement markets are essentially closed to foreign competition. Even in the EU it would be difficult to predict whether Indian manufacturers could achieve the technical standards required by European authorities (which is often been alleged to be a protectionist measure in favour of domestic industry) and compete with experienced European manufacturers.

As noted earlier, the reciprocity requirement which is being posited by the EU may also significantly influence the extent to which Indian producers can participate in the procurement activities in the EU. With regard to the market access possibility through possible accession of India to the GPA, it does seem likely that India may not enjoy benefits in terms of market access in other GPA member countries such as the US, EU, and Japan.

With the exception of the European market, there is limited opportunity for Indian railway manufacturers in GPA Members' markets. Further, the interpretation of the 'Operational Safety Clause' in the Government Procurement Agreement by a dispute resolution panel in the future, or a concretisation of the term in the other PTAs may increase the possibility of the opening up of the sector to Indian participants.

It is a positive indicator that FDI in the railway sector in India has resulted in the transfer of technology to India. However, the current procurement system is marred by various shortcomings in transparency and competition issues. Overall, the Indian procurement system for railways will benefit from the unilateral procedural streamlining of procurement system. Increased market access opportunities abroad through international obligations such as the WTO GPA can further augment this objective. As noted above, it remains to be seen if the policy on allowing foreign investment in creating transport lines which specifically cater to the needs of transportation to the industry will be accepted by the government. In the event it is, the procedures will have to be revamped significantly to ensure that there is little scope for malpractices in the system in order to invite foreign investment into the country.

While the existing structure and regulatory system comply with the international regulatory standards, the flaw is in the implementation stage of the procurement. Malpractices and

lack of accountability have been widely considered the main problems of railways procurement. Various government-funded studies as well as independent newspaper investigations have indicated the ways in which malpractices take place at various stages of the procurement process, despite vigilance from the competent authorities. Therefore, the need of the hour is to put in place a transparent and competitive procurement system for the benefit of all. Such a system will ensure efficiency of the system and further contribute in providing value for money to the taxpayers.

In order to enhance predictability and competition in the system, the railways may need to engage in time-bound programmes with rigidity. This will go a long way in encouraging investment in the sector by the government agencies or may even have a possibility of public private participation wherever feasible.

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Annexure 6.1

Indian Railways Code for the Engineering Department

Chapter XII: Contracts for Works*

1211. Circumstances when tenders need not be called for:-Except where for reasons which should be in public interest, the General Manager decides that it is not practicable or advantageous to call for tenders, all contracts over ₹25,000 in value should be placed after tenders have been called for in the most open and public manner possible and with adequate notice. For works contracts based on Schedule of Rates in force on the Railway, calling of tenders up to ₹50,000 can be dispensed with by the General Manager without recording reasons for doing so. In all other cases where it is decided not to call for tenders, the reasons should be recorded and financial concurrence obtained.

Should the General Manager's powers of decision under the preceding sub-para be delegated to a lower authority (who will exercise it subject to the same proviso) and should the Account Officer consider the reasons adduced by such authority to be insufficient or other than in public interest, he should represent his views to the higher authority concerned and, if necessary, consult the General Manager."

Note:- General Manager may delegate powers to dispense with calling of tenders for works up to ₹50,000 each in value in consultation with the Associate Finance at the stage of acceptance of offer, subject to the following stipulations:

(i) Normally powers to dispense with calling of tenders should be exercised sparingly. However, in special cases, where it is felt necessary to do so, reasons for taking such decision should be recorded by the competent authority in each case viz. JA Grade officer up to ₹40,000 each and Senior Admn. Grade Officer up to ₹50,000 each subject to an annual limit of ₹4,00,000 per officer.

* Indian Railways Code for the Engineering Department, available online at <http://www.indianrailways.gov.in/railwayboard/uploads/codesmanual/EngCode/chapter-xii.htm>

- (ii) The work should not be split up for the purpose of bringing it within the ambit of this dispensation;
- (iii) The reasonableness of rates should be gone into objectively by the accepting authority;
- (iv) Quotations should not be for items which can be executed through the existing contracts including zonal contracts;
- (v) Quotations should not be for fancy (expensive but of low utility) items;
- (vi) Quotations should only be for works which are urgent in nature;
- (vii) Quotations should normally be invited from at least 3 contractors working in that area. At least two of them should be from the approved list of the Division;
- (viii) Accepting Authority must take precautions to see that the quotations are from genuine firms (and not from fictitious firms); and
- (ix) A Register showing full particulars of works authorised will be maintained by each officer and this should be open to verification by Accounts while passing the bills. DRM/ADRM should have a monthly review as a matter of control.¹²¹² Classes of Tenders.-The following are amongst the different methods of obtaining tenders that may be adopted:

- (i) By advertisement (“Open” tenders);
- (ii) By direct invitation to a limited number of firms/contractors (“Limited” tenders); and
- (iii) By invitation to one firm/contractor only (“Single” tenders). (c.f. para 323-S and 603-F).

1213. Open Tender System:-The system of invitation to tender by public advertisement in the most open public manner possible should be used as a general rule and must be adopted, subject to the exceptions noted in paragraphs 1211 and 1214.

1214. Limited Tender System:

- (i) Where for reasons which should be in the public interest, it is considered not practical or advantageous to call for open tenders, limited tenders may be invited with the concurrence of the Financial Adviser and Chief Accounts Officer, and approval of the competent authority. The reasons for inviting limited tenders from firms/contractors should be kept on record while approaching finance for concurrence.
- (ii) In open line railways, the systems of inviting tenders for works costing up to ₹40 lakhs each from amongst the contractors borne on the approved list may also be adopted when it is considered advantageous to do so, provided the number of contractors borne on the approved list for the particular type of work is not less than 10.
- (iii) Some percentage of the tenders which would normally be finalised by calling limited tenders, be finalised by calling open tenders so as to test the market rates periodically.
- (iv) Notice for 'Limited Tenders' be sent to all eligible contractors borne on the approved list.

Note: Notwithstanding the provision contained in para 1214 (ii) above, the Railways may invite open tenders in the following circumstances:-

- (a) In the event of insufficient response to the tender from the contractors borne on the approved list;
- (b) When the work is of special nature and contractors with requisite experience are not available on the approved list; and
- (c) When ring formation is suspected.

1214-A Single tender can be awarded under following situation such as:

(1) EMERGENT SITUATION:

- (a) Accidents, breaches involving dislocation to traffic.
 - (b) Works of specialised nature to be personally approved by the GM/CAO (C) with prior/concurrence of the FA & CAO. This power is not to be delegated to any other authority.
 - (c) Any other situation where General Manager personally considers it inescapable to call for single tenders subject to this power can be exercised by GM only with prior concurrence of Finance.
- (2) Annual Maintenance Contract for equipment can be placed on single tender basis on authorised dealers with approval of Additional General Managers of Railways.

NOTE.—These powers may be delegated by the General Managers in consultation with FA & CAOs to PHODs/DRMs up to a maximum of Rs 5 lakh per item per annum. On re-delegation, these powers would be exercised by PHODs/DRMs in consultation with associate finance.

1215. List of Approved Contractors: No work or supply should ordinarily be entrusted, for execution to a contractor whose capability and financial status has not been investigated beforehand and found satisfactory. For this purpose, a list of approved contractors may be maintained in the headquarters and Divisional Offices of the Railway. Other contractors who have done satisfactory work on the Railways or outside the Railways may be added to the list, in consultation with the Financial Adviser and Chief Accounts Officer, or Divisional Accounts Officer.

1216. The list of approved contractors be prepared and maintained in Headquarter and Divisional offices of Railway, where the intending contractors would undertake to execute railway works, by observing the under-noted procedure.

- (i) Once a year, by giving wide publicity through advertisements etc., intending contractors may be invited to register themselves for different classes. Contractors already on the “Approved List” and

those who have executed/done satisfactory work on the railways, thereby qualifying themselves to be relied upon for allotment of works/ assignments in future, should also be invited to get themselves registered.

(ii) The basic requirements for registration as circulated vide Board's letter No. 85/W.I/CT/23- GCC dated 31-1 86 should be spelt out and made well known in order to reduce discretion and arbitrariness in the selection for registration.

(iii) Where required, capacity of the intending contractors to execute works satisfactorily as an independent and competent agency, their financial capability for satisfactory execution of railway works, field of specialisation, past experience, ability to supervise the works personally or through competent and qualified/authorised engineers/supervisors, be examined and investigated expeditiously prior to their enlistment.

(iv) An annual fee of ₹1,000 should be charged from such registered contractors to cover the cost of sending notices to them and clerkage for tenders etc.

(v) The selection of Contractors for enlistment in the "Approved List" should be done by a Committee for different value slabs, and accepted by the Accepting authority. The composition of the Committee and the authority for acceptance shall be as prescribed by the Railway Board from time to time.

(vi) The "List of Approved Contractors" be treated as confidential office record and individual names of contractors on the list should not be made known to other contractors. It should be maintained up to date in a neat and unambiguous manner.

Prospects for India in joining the Government Procurement Agreement *An Assessment*

Bulbul Sen & Archana Jatkar

As is well known, some of India's major trading partners, like the European Union and Japan, are interested to include government procurement in their bilateral free trade agreements with India. Indications from the WTO Secretariat are also in favour of India joining the WTO Plurilateral Agreement on Government Procurement.

In India there is a general consensus that the public procurement system needs revamping. Not only should the procurement system be transparent *per se*, it should also be seen to be transparent. The role of government procurement in stimulating the domestic economy is being recognised in India and also globally, as would be evident especially from the US and the EU examples of increased protectionism in government procurement. The question for India is whether it should revamp its public procurement system unilaterally, or as some say, it should go for international obligations which would force it to improve the system.

This Chapter addresses this issue in the light of the discussions in the previous chapters on the characteristics of the Public Procurement Bill, 2012, the readiness of specific sectors for further opening up, the present market openness of the public procurement system domestically and globally, the thrust of current domestic economic policy, the advocacy by the WTO Secretariat in favour of India joining the WTO GPA, the usefulness of the GPA's legal framework as regards India's priorities and India's export competitiveness and its future policy goals.

Advocacy by the WTO Secretariat

To examine this matter, it would be worthwhile to go through what, according to some major trading partners of India, the accession to the WTO GPA has to offer to India. At a recent conference on 'Emerging trade policy issues and good governance: International Conference on Government Procurement & Customs Valuation', organised by ASSOCHAM (Associated Chambers of Commerce & Industry of India – an apex body of business groups) in New Delhi on July 13, 2012, a representative from the WTO Secretariat, *inter alia*, mentioned the following advantages which are likely to accrue to India from its joining of the WTO GPA:

- The eight well known characteristics of good governance – that it is participatory, consensus oriented, accountable, transparent, responsive, effective, efficient, equitable, inclusive and follows the rule of law – are embodied in the WTO GPA. Therefore, it is desirable that countries join the WTO GPA so as to internalise these characteristics in their public procurement system. The 2012 revised text of the WTO GPA, embodying new obligations to eschew conflict of interest, corruption, etc in the procurement process offers further new dimensions which would be attractive for government procurement systems across the world, including India.

- There is no doubt that India's Public Procurement Bill, 2012 also embraces these good governance principles, especially in its Section 5, embodying the basic norms of public procurement. However, India's joining the WTO GPA is likely to send a credible signal regarding its commitment in addressing good governance issues.
- Accession to the WTO GPA would help India in benchmarking its laws and procedures against global good practices in public procurement.
- It would provide predictability to international suppliers and a measure against protectionism and thereby increase India's market access substantially.
- WTO GPA membership would also provide India with the possibility to influence developments within the GPA membership. Since the future work programme of the WTO GPA would focus on increasing access to government procurement by small scale industry and ways to make public procurement environment-friendly, but without posing trade barriers, and since these are concerns which India shares, it would be beneficial for India to influence that work programme from inside.

A further elaboration was followed from another representative from the WTO Secretariat. It was mainly on improved market access prospects for a country joining the WTO GPA. In case of India, especially, the prospect of curtailment of market access of Indian exporters by India staying outside the WTO GPA was highlighted. The risk of protectionism around the globe was growing in the context of the lingering economic crisis. Recent monitoring reports by the WTO Secretariat and others have confirmed this fact.

It was indicated that the 'Buy American' provisions which are part of the US stimulus legislation (the American Recovery and Reinvestment Act, 2009) would not be allowed to

undermine the US obligations on market access under the WTO GPA. Similarly, the proposed 'Reciprocity Initiative' by the European Union, though it may involve assuming of new authority by the European Commission to limit access to its government procurement markets by suppliers whose home countries do not provide access to EU suppliers, would have to respect the rights of WTO GPA member countries.

He argued that the WTO GPA is both a legal guarantee of market access rights and a signal that the parties have committed themselves to good governance. He felt that the importance of WTO GPA membership has been enhanced by the recent successful conclusion of re-negotiation of the Agreement in 2011 and through the gradual increase in membership of the Agreement.

The membership of the WTO GPA was not an assurance of instant success, but the benefits of accession, although they should not be over-estimated, should be assessed in a dynamic context, taking due account of India's ongoing internal initiatives to improve governance, its growing market competitiveness and related factors.

Some of the theoretical benefits of joining the WTO GPA, as assessed from trade policy perspective, are available in a presentation made by the WTO Secretariat at a Seminar on WTO Agreement on Government Procurement, held in New Delhi on 22 March, 2011. An extract of the same is annexed to this Chapter.¹

Government Perspective

In the same conference, the representative of the Government of India observed that India subscribed to the good governance aspects of the WTO GPA. But there was also the question of market access, which India would have to yield if accession to the WTO GPA was contemplated. While wholeheartedly ascribing to the principles of good governance,

the question was posed as to whether these impulses towards good governance should arise because India had taken on certain international obligations or should they be based on internal needs of the country?

Unilateral/autonomous reforms are likely to give India policy space and flexibility within the parameters laid down for good procurement principles. Active public opinion, in the form of a vigilant judiciary and media, active oversight bodies, like the Office of the CAG of India and the CVC and a proactive civil society are sufficient to ensure that the government adequately addresses the lacunae in the current procurement regime.

It was observed that the WTO GPA is based on reciprocity and one would gain market access only to the extent that one gives it. Although India keeps its government procurement market sufficiently open, it has never really received reciprocity from the WTO GPA members. It was observed that in all high value procurement, such in as power, telecom, civil aviation, defence, global tendering was the norm in India.

In fact, Indian industry has started complaining that the Indian public procurement market was too open, which is adversely affecting growth of the domestic industry. India also has certain social sector obligations, such as to micro, small and medium enterprises, which had to be assured a preference in public procurement, in view of the disadvantages suffered by them in terms of access to capital, credit, technology, infrastructure, etc and in view of their huge employment potential. Such socio-economic concerns could be reflected adequately through autonomous public procurement policy.

The GoI representative wondered if GPA really is about good governance only, why it was not multilateralised. This indicated that market access is a key component of the WTO GPA, and it is not just about good governance. According to him, the WTO GPA is an exclusive club, which excludes those who, like India, have kept their markets open voluntarily.

Recent studies have shown that market access available to foreign suppliers is only 3 percent of the total market of the members of the WTO GPA.

In the US, only as much as 6.77 percent of the market is contestable and in the EU, the government procurement market contestable by non-EU suppliers is only about 1 percent. The bulk of foreign participation, it would be seen, was in the services sector in so far as government procurement market is concerned.

What is the reason for India's low participation in the services market? Is it because of the fact that India is not a member of the WTO GPA or is it attributable to the fact that India faces problems in movement of natural persons, including its skilled professionals, under the WTO regime?

The GoI representative rejected the idea that India is sending out a negative signal on its commitment to good governance by not joining the WTO GPA. Whether India would join the GPA or not has to be a demand-driven exercise. It depends on an assessment as to whether India is missing significant business opportunities from not joining the WTO GPA. Till now, there is no clamour from Indian business and industry for joining the WTO GPA.

Legal Perspective

A legal perspective on the text of the WTO GPA was provided at the said conference by an eminent trade practitioner. The ambiguity of certain terms used in the text of the WTO GPA was highlighted. For instance, Article II on the 'Scope and Coverage', *inter alia*, defined 'covered procurement' for the purposes of the Agreement to mean 'procurement for governmental purposes' and 'not procured with a view to commercial sale or resale or for use in the production or supply of goods or services for commercial sale or resale' {Art II Para 2a (ii)}.

It was contended that though a generalised definition of the term ‘commercial’ had been given in Article I (a) the term was not unambiguously defined in the international trade policy usage. For example, as regards state utilities, although they carried out commercial functions, the EU, for example, covered them under its public procurement law, while major emerging economies, like Brazil and Mexico, tended to keep them out of public procurement disciplines, on the ground that they were commercial entities. Also, the term ‘governmental purposes’ has not been defined.

Some ambiguities in Paragraph 6 of Article II, regarding the estimated value of procurement were also highlighted. Paragraph 6 (a) prohibits a procuring entity to divide its procurement into separate procurements/use particular valuation methods ‘with the intention of totally or partially excluding it from the application of this Agreement.’ In this connection, doubts were raised as to how ‘intentions’ could be established or proved. Article II 6(b), which mandates the procuring entity to include ‘the estimated maximum total value of the procurement over its entire duration’ for the purpose of valuation of the procurement, contains ambiguity in the sense that ‘entire duration’ did not refer to any particular project/period/contract.

The most contentious clauses as to their interpretation involved those contained in Article V, supposed to extend ‘special consideration to the development, financial and trade needs and circumstances of developing countries and least developed countries’ (Para. 1, Art. V).

First, Special and Differential treatment would be extended only ‘on request’. Secondly, for a developing country, S&DT would be available ‘where and to the extent that this S&DT meets its development needs’. Thirdly, upon accession, a developing country is entitled, as a rule to Most-Favoured-

Nation treatment, like any other Party. Only as a special case, S&DT could be extended to the developing country based on the terms negotiated between it and other Parties to the GPA, and that, too, in such a way as 'to maintain an appropriate balance of opportunities under this Agreement'. The next conditionality relates to the fact that S&DT could be availed of only as a 'transitional measure', generally for up to three years for a developing country and up to five years for least developed countries after their accession to the Agreement, although 'on request' there is provision for extension of the transition period by the WTO Committee on Government Procurement.

Another conditionality is that the price preference available to the developing country is to be extended 'only for the part of the tender incorporating goods or services originating in the developing country applying the preference' or 'to goods or services originating in other developing countries in respect of which the developing country applying the preference has an obligation to provide national treatment under a preferential agreement'.

It was highlighted that if Special & Differential Treatment provisions, as reflected in the revised text of the WTO GPA, are hedged by so many conditionalities and subjected to so many riders, they may not be useful for actual implementation.

In short, the S&DT clauses under the WTO GPA are not actually giving preferential market access to developing countries, but only a right to the same, which had to be negotiated and navigated through a confusing set of conditionalities and riders. To be really valuable to the developing countries, S&DT clauses should have contained provisions to the effect that if two tenders were equal, a certain preference – say a percentage of the contract value – should have been assured to the bidder from the developing country.

Way Forward

Both the WTO and the Government of India perspectives have merit in regard to India's possible accession to the WTO GPA. However, it is a question of short term versus long term perspectives. In the immediate time frame, it appears that the apprehensions voiced by the GoI and other Indian analysts on the subject of India's accession to the WTO are valid. However, if assessed in a dynamic, long term context, taking due account of India's ongoing internal initiatives to improve governance, its growing market competitiveness and related factors, accession to the WTO GPA may be considered.

In view of this, the following are some major questions:

- India's positioning in the world economy
- Market access in government procurement which India can offer to other countries
- Market access available to India in government procurement in other countries and its capacity to avail the same
- Increasing asymmetry in the legal framework of the WTO GPA
- Opportunity costs in case of no accession to the WTO GPA

India's Growth Story

India may be considered as the tenth biggest economy in the world in terms of purchasing power parity and predicted to become the fifth largest economy by 2020. Its growth rates, averaging 8-9 percent of GDP per annum in the recent past (except 2008-2009 and the current year's sluggish growth predicted at 5-6 percent) may be considered impressive. Its export growth rate at 16.1 percent in 2011 may be considered the fastest among major traders. However, its story is one of skewed growth, marked by sharp income disparities, huge

untapped employment potential and need to improve access to basic public facilities in terms of health, education and food security parameters.

The Membership of the WTO GPA has a predominantly developed country profile. Even those countries that are negotiating to join this Agreement, except China, are not low income developing countries, like India. On the other hand, developed countries, such as Australia and New Zealand, have remained as 'Observer' for long. The chronological statement showing membership and observership and those in the process of negotiating accession is annexed with this Chapter. Even China, with a much higher level of gross domestic product, greater per capita income, good manufacturing base and export competitiveness compared to India and which is committed to negotiate accession to the WTO GPA (as a part of its conditions for being granted accession to the WTO) is lingering in the process since 2001. India's profile at this point of time does not appear to be such as to enable it to take on additional obligations entailed in accession to the WTO GPA.

Market Access Accorded by India

The Indian procurement regulations are marked by their neutrality between foreign and Indian suppliers, a feature which is reflected in the Public Procurement Bill, 2012, which, however, provides enough policy space to the government to give domestic preference in areas considered necessary on grounds of promotion of domestic industry, socio-economic policy and any other policy considered to be in public interest.

The actual openness of the Indian procurement market can be seen from the fact that during its Fifth Trade Policy Review at the WTO in 2011, India explained 'the procurement of hi-tech items and hi-value tenders, above US\$50,000, is generally open to international bidders'. The relevant provision of the GFR, 2005, which is the existing policy on public procurement,

allows global tendering in case ‘goods of the required quality for which and specifications are not available in the country or it is necessary to look for suitable competitive offers from abroad.’

The new National Manufacturing Policy, unveiled in 2011,² echoes the approach of the Public Procurement Bill, 2012, as it seeks to maintain a balance between global openness and promotion of domestic industry. Paragraph 1.22 of the National Manufacturing Policy clearly gives a policy formulation to the effect that “while India would continue to integrate itself with the global economy, the government would also consider the use of public procurement in specified sectors with stipulation of local value addition in areas of critical technologies, thereby leveraging procurement as an engine of growth in manufacturing.”

The rationale for this policy of leveraging public procurement for stimulating domestic manufacturing grows out of a realisation that for India to attain its full economic potential, the share of manufacturing in GDP, which is stagnating at 15-16 percent since the 1980s, has to be enhanced to at least 25 percent of GDP within a decade, in the process creating approximately 100 million jobs. The sectors in which domestic manufacturing capabilities are sought to be created, *inter alia* by stipulation of local value addition, include critical technological areas like LED, solar energy equipment, IT hardware and IT-based security systems and fuel efficient transport equipment, such as hybrid and electric automobiles. Similar steps would also be taken in respect to infrastructure sectors, viz. power, roads and highways, railways, aviation and ports.

In pursuance of the NMP, certain policies have already been put in place. For example, under the National Solar Energy Mission, in Phase-I of the project culminating in 2012-13, the developers are required to procure their project components

from domestic manufacturers, as far as possible. However, it is mandatory for projects based on crystalline silicon technology to use the modules manufactured in India. Further, in Phase-II, it will be mandatory for all the projects to use cells and modules manufactured in India.³

Similarly, the National Electronics Policy provides preferential market access for domestically manufactured electronic products, including mobile devices, SIM cards with enhanced features, etc with special emphasis on Indian products for which intellectual property rights reside in India to address strategic and security concerns of the Government, consistent with international obligations in procurement.⁴

The procurement policy in information technology and electronics is undergoing a change through the government's decision dated February 02, 2012, whereby preferential treatment in procurement is being extended to domestically manufactured electronic products, which have security implications for the country or are being procured by the government for its own use and not with a view to commercial sale/resale *or* with a view to the production of goods for commercial sale/resale. The domestic content is to be phased in over a period of five years.⁵

India is also committed to use its public procurement policy for fulfilling certain socio-economic goals. This flexibility, available in the current General Financial Rules, is carried forward in the Public Procurement Bill, 2012, through some provisions, specifically of Section 11(2) of the Bill.

To give effect to this, and keeping in mind the disadvantaged position of small business in India and their considerable employment potential, a new policy initiative has been launched. Its objective is to increase the penetration of small business in government procurement, currently at the level of 5 percent to 20 percent in the immediate future.⁶

Commencing from April 01, 2012, every Central Ministry/ Public Sector Undertaking will have to set an annual goal for procurement from the micro, small and medium enterprises sector at the beginning of the year, with the objective of achieving an overall procurement goal of minimum 20 percent of the total annual purchases of the products or services produced or rendered by this sector.

This would become a mandatory requirement from April 01, 2015. Out of 20 percent target of annual procurement from this sector, a sub-target of 4 percent will be earmarked for procurement from enterprises owned by the most disadvantaged sections of the society.⁷

Other than these areas of critical technology and socio-economic sensitivity, the Indian procurement market would remain accessible to global suppliers in a new public procurement regime likely to be ushered in through the new procurement legislation.

Market Access Available to India

Amongst India's main export markets comprising of the WTO GPA members are the EU, the US and Japan. Another major destination is China, which is negotiating its accession to the WTO GPA.

According to the EU report on Trade and Investment Barriers, 2011,⁸ the low level of openness of US government procurement markets to foreign suppliers arises partly from the limited scope of the WTO GPA commitments made by the US, which cover only 3.2 percent of the US public procurement market. This illustrates that even those countries that have signed the WTO GPA have negotiated important limits to their market opening commitments, in the form of minimum thresholds or exclusions of sectors or entities (such as at the sub-federal level).

A study by the Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi of 2012 estimates the size of the Indian government procurement market at around US\$150 billion, while the estimated size of the US market at the federal level and the EU market are around US\$600bn and US\$2.500tn, respectively. The said report estimated the market access opportunities in India's main export markets as presented below.⁹

- In the US federal procurement from non-US sources, the overall size of the market is approximately 7 percent in 2009 – that is, US\$30bn out of which 1 percent is against IT/ITeS procurement, whereas, the procurement by the US federal government from India is around US\$3mn in 2009, which is barely 0.0007 percent of its total government procurement market. It is estimated that post WTO GPA accession, the figure of US federal procurement from India is likely to go up to US\$500mn.
- In the EU public procurement market, the overall procurement from non EU sources is 0.003 percent in 2009 – that is, approximately US\$400mn in the UK and none in Germany, though, procurement against IT/ITeS is around 0.02 percent in 2009 for in the UK and 0.01percent in Germany. On the other hand, procurement from India is around US\$3mn which is approximately 0.007 percent in the UK and none in Germany. It is estimated that post WTO GPA accession, public procurement in the EU may go up to US\$10mn.

As explained in Chapter 3, the regulations in the main export markets of India pose significant barriers for participation in their government procurement markets by non WTO GPA members. *Inter alia*, the US, through Section 1605 of the American Recovery and Reinvestment Act, 2009, prohibits use of recovery funds for projects of works unless

all iron, steel and manufactured goods used in the project are manufactured in the US.

Another marked instance of growing protectionism in the US is in the form of imposition of the 9/11 Health and Compensation Act of 2010. The law states that 2 percent excise tax is applied to foreign persons that receive federal procurement payments pursuant to a contract with the Government of the US for the provision of goods, if such goods are manufactured or produced in a 'covered country' or for the provision of services if those services are provided in a 'covered country'.¹⁰

A further US initiative to limit access to its government procurement market concerns the increase of access to its small business by 'unbundling of contracts', such that larger contracts are broken up into 'smaller bundles' for which US small business is entitled to bid. This effectively forecloses a part of the US government procurement market from being contested by global suppliers.

A new tool for obtaining reciprocity in market access from third countries has recently been proposed by the EU, as is reported in the media and confirmed by the Department of Commerce, GoI. The draft regulation applies to above threshold public contracts, utilities contracts and concessions with regard to countries which do not offer reciprocal market access to the EU in public procurement. Defence and security public contracts are not included.¹¹

The proposed directive gives new powers to the Commission (with regard to third countries which do not offer reciprocal market access to the EU in public procurement) which include:

- Excluding tenders which have more than 50 percent third country content
- Imposing a mandatory price penalty on the tender value of the third country content

Contracts awarded in breach of exclusion measures adopted by the European Commission are to be declared ineffective. With the recent economic recession and the challenges thrown up by it, the EU has reportedly reduced the minimum mandatory time limits for notification of public tenders and increased the maximum thresholds for restricted (limited) tendering, with the result that foreign bidders effectively get less time and opportunities within which to file meaningful bids.

Furthermore, under the EU Directive on Falsified Medicines, which will be effective from January 02, 2012,¹² each shipment of active pharmaceutical ingredients or drug raw materials from countries like India should be accompanied with a written confirmation, vouching that the quality of the exports conforms to EU standards. Domestic drug makers of India say the Drugs Controller General of India is neither authorised under the law nor conversant enough with the EU Good Manufacturing Practice standards to issue such a certification.

As regards China's already protected government procurement market, a new concern has arisen from its 'indigenous innovation' policy as far as intellectual property rights are concerned, which is aimed at supporting Chinese firms moving up the value chain. This is a serious concern for global companies wanting to enter the Chinese procurement market or already operating in China.

In the past, this policy has severely hampered access to Chinese procurement market in a large number of innovative sectors, from green technology to telecommunications, with the requirement that foreign companies register their IPR in China. Draft rules also require applicants to disclose commercially sensitive information related to innovation and IPR.¹³

Similarly, the EU report on Trade and Investment Barriers, 2012 further points out that China has adopted a domestically-based approach to standards setting and technical requirements due to national security concerns. This approach is clumsy and burdensome, creating barriers to market access despite it being touted to be high in ambitions.¹⁴

Coming to India's capacity to avail of market access, the few sectors where India displays a certain degree of competitiveness are as follows:

- **Health:** The estimated government procurement market, as per the WTO estimate¹⁵ is US\$96bn in major export markets available to India – US: US\$79bn (2008); EU: US\$15bn (2007); Japan: US\$1.5bn (2007).
- **Computer and related services:** The estimated government procurement market, as per the WTO estimate is US\$50bn in major export markets available to India – EU: US\$48bn (2007); Japan: US\$2bn (2007).

However, the results of another study¹⁶ show that India has still to attain global competitiveness in these sectors. Though India has an impressive market share in branded generics, its strength in the Over-the-Counter segment, non-branded generics, patented products and vaccines would have to grow before it can be considered a key world player. The study shows that a critical mass in pharmaceutical sector is expected to be reached by the year 2020.

As regards the IT and IT enabled services sector, software and IT services are definitely areas of strength for Indian companies. However, out of the total spending on the IT/BPO sector by the US and Europe, the addressable market for the Indian IT/BPO industry, as per estimates of NASSCOM, India's apex body of the software industry, is approximately US\$20bn and this is likely to increase to US\$70bn to US\$80bn by 2020. India has so far been able to avail only 2 percent of the total

addressable market (US\$0.5bn) in 2010. This is mainly due to the existence of regulatory barriers, such as visa restrictions, language barriers, lack of experience of Indian companies in lobbying EU or US governments, etc. However, it is expected that by 2020 at least 10 per cent of the addressable market would be availed by Indian service providers. This is still much below the expected potential for India to be a major player in the market.

A consultation held by CUTS with Indian stakeholders in New Delhi on July 11, 2012, reveals that most of the industry participants derive their major government procurement contracts from non WTO GPA member countries. They feel that it will be more useful to deepen their export markets in these countries rather than to pursue the elusive markets of the WTO GPA member countries, which are hedged in by entry barriers of different kinds.

It was also felt by experts that for India to make commitments under the WTO GPA with regard to any sector, it should have adequate global competitiveness in that sector, which would come from having at least 2.5 percent global market share in the said sector. Thus, the critical mass for India in those sectors where it is competitive is likely to need further time to be achieved.¹⁷

Increasing Asymmetry in the WTO GPA

As highlighted by Indian legal experts, the revised WTO GPA text of 2011 dilutes the S&DT clauses originally available in the 1994 version of the WTO GPA to such an extent, that virtually no concession is available to a developing country, like India. The S&DT, allowing offsets for domestic content requirement, etc is available only subject to negotiations and that, too, only as a transitional measure for just three years to a developing country.

The other conditions for availing of S&DT are so onerous that it appears that these provisions can hardly be implemented. Thus, if very few concessions are to be made available to India through the legal framework of the WTO GPA, it decreases its incentive to accede to the Agreement.

Joining the WTO GPA would also involve the risk of being subjected to the tough dispute settlement mechanism of the WTO, with its provisions for cross-retaliation across sectors in case of disagreement with other Parties to the GPA.

Opportunity Costs in case of No Accession to the WTO GPA

As noted in this Chapter, it has been argued by some representatives of the WTO Secretariat that the opportunity costs to India by staying out of the WTO GPA may be the loss of existing government procurement markets due to growth of protectionism, triggered by the current global recession.

However, this claim of keeping public procurement markets open through the membership of the WTO GPA, which supposedly guarantees Most-Favoured-Nation and National treatment to its members, is belied by the fact that these legal guarantees have not been able to curtail the onslaught of protectionist measures in government procurement, which are being invoked by some major trading partners of India, as recovery from recession is still underway.

Even some of the WTO GPA members, in their respective internal reports, like the 'Trade and Investment Barriers Report, 2011' of the EU, appear to acknowledge helplessness against the growing tide of protectionist measures in the markets of WTO GPA countries and potential member countries, like China. This current scenario hardly inspires confidence among non WTO GPA members, like India, that accession to the WTO GPA is likely to assure them market access in the WTO GPA member countries.

Thus, no case appears to be tenable as regards lost opportunity costs in not joining the WTO GPA at this stage.

Short term vs Long term Perspectives

At this point of time, unilateral reform to streamline and rationalise India's public procurement regime seems a more advisable alternative than bringing about reforms in the sector through the undertaking of international obligations under the WTO GPA. One step which is recommended is to immediately bring out a policy on public procurement (which will complement the Public Procurement Bill, 2012). This strategic document would lay down the current work programme and the future road map of public procurement policy in India, thereby stimulating the growth of a coherent and cohesive plan of action for all procuring departments of the government and the Indian industry as a whole.

The WTO GPA does not have much to offer to India at this point of time, either in terms of an encouraging legal framework or market access prospects, given the current play of market forces in the global economy, which are clouded by protectionist impulses that even the Doha Round of negotiations by the WTO members is at a standstill.

Moreover, India's own competencies and competitiveness in manufacturing, services and trade, have to grow for it to become a sufficiently influential player in the global government procurement market. Only when such a level of competitiveness is reached, will India be able to effectively negotiate its own offensive and defensive interests to achieve benefits out of its accession to the WTO GPA.

However, in the long term and as an emerging economy with global potential, India would need to continue to assess, in a dynamic context and taking due account of its own ongoing internal initiatives to improve its governance of public

procurement, its growing market competitiveness and related factors, the pros and cons of its accession to the WTO GPA. India's decision to become an Observer to the WTO GPA in 2010 appears to indicate that intention.

Endnotes

- 1 Excerpts from the presentation on 'Assessing the Potential Benefits and Costs of GPA Accession for India: An Analytical Approach', Seminar on WTO Agreement on Government Procurement, 22 March 2011, New Delhi, India.
- 2 National Manufacturing Policy, 2011, Planning Commission of India http://commerce.nic.in/whatsnew/whatsnew_detail.asp?id=35
- 3 National Solar Mission Policy, Ministry of New and Renewable Energy, GoI, www.mnre.gov.in. Also refer the coverage on the issue at <http://www.hindustantimes.com/India-news/NewDelhi/Grant-to-boost-solar-energy/Article1-834046.aspx>
- 4 National Policy on Electronics 2011, <http://india.gov.in/allimpfrms/alldocs/16392.pdf>
- 5 The Preferential Market Access notification of the Department of Information Technology, GoI, http://deity.gov.in/sites/upload_files/dit/files/Preferential_Market_Access_Notification_1232012.pdf
- 6 Notification by Ministry of MSME, GoI of 23.03.2012 <http://eprocure.gov.in>
- 7 i.e. Scheduled castes and scheduled Tribes notified by Central and state government
- 8 The EU report on Trade and Investment Barriers, 2011 http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147629.pdf
- 9 'Market Access and Government Procurement : A Tentative Overview of Access Issues in International Public Procurement Regimes', presentation by Sandeep Verma in the International Conference on Government Procurement & Customs Valuation', organised by ASSOCHAM on 13th July, 2012 in New Delhi

- 10 Federal Register Volume 77, Number 35 – according to the Act, ‘Covered country’ means a country that is not a party to an international procurement agreement with the United States and ‘Foreign person’ means any person (including any individual, partnership, corporation, or other form of association) other than a United States person.
- 11 http://trade.ec.europa.eu/doclib/docs/2012/march/tradoc_149243.pdf
- 12 Directive 2011/62/EU, http://ec.europa.eu/health/files/eudralex/vol-1/dir_2011_62/dir_2011_62_en.pdf
- 13 *Op. Cit.* 8
- 14 *Ibid*
- 15 As stated by a representative from the WTO Secretariat at the Seminar on WTO Agreement on Government Procurement, held in New Delhi on 22nd March, 2011
- 16 Confederation of Indian Industry-Pricewaterhouse Coopers Study titled ‘India Pharma Inc.: Capitalizing on India’s Growth Potential’, 2010, www.pwc.com/india
- 17 This criterion was derived from the WTO Agreement on Subsidies and Countervailing Measures, and was also cited by one of the legal experts in the ASSOCHAM Conference on Government Procurement & Customs Valuation held in New Delhi on July 13, 2012.

Annexure 7.1

Excerpts from the Presentation on ‘Assessing the potential benefits and costs of GPA accession for India: An Analytical Approach’

Seminar on the WTO Agreement on Government Procurement, New Delhi, March 22, 2011

Potential benefits of GPA accession for India: presenter’s perspective*

- Potential trade gains from assured access to other Parties’ procurement markets and insulation from possible protectionist measures
- A trigger for reforms aimed at entrenching good governance principles/reducing “leakages”/achieving enhanced value for money in the country’s own procurement systems.
- Potentially increased incentives for inbound foreign direct investment
- Opportunity to influence the terms of other Parties’ accessions (potentially very significant)
- Opportunity to influence the future evolution of the Agreement (a needed voice – for example, regarding the future work programme of the WTO Committee on Government Procurement)

** It is recognised that each acceding WTO Member must ultimately assess these for itself.*

Some additional considerations regarding the impact on domestic industry and employment*

- Beach-head effect: foreign firms selling to government typically require extensive collaboration from domestic sub-contractors

- Spillover effect: domestic firms exposed to new technology/become more competitive: sell at lower prices to both government and other private firms
- Thresholds that exclude smaller procurements, anyway (basic threshold for central government procurements: approximately US\$200,000)
- Possibility of negotiated exclusions from coverage for sensitive sectors/other transitional measures to shield local suppliers (that is, transitional measures available under revised GPA text)

** It is recognised that each acceding WTO Member must ultimately assess these possible effects for itself.*

Annexure 7.2

Parties and Observers to the GPA¹

The WTO Committee on Government Procurement comprises of Parties to the Agreement as well as Observers.

Most Parties have been bound by the Agreement since its entry into force on 1 January 1996. For some, it entered into force at a later date. Some Parties have joined the Agreement by way of accession.

Party	Date of entry into force/accession
Armenia	15 September 2011
Canada	1 January 1996
European Union with regard to its 27 member States:	
Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, the Netherlands, Portugal, Spain, Sweden and the UK	1 January 1996
Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic and Slovenia	1 May 2004
Bulgaria and Romania	1 January 2007
Hong Kong , China	19 June 1997
Iceland	28 April 2001
Israel	1 January 1996
Japan	1 January 1996
Korea	1 January 1997
Liechtenstein	18 September 1997
The Netherlands with respect to Aruba	25 October 1996
Norway	1 January 1996

¹ http://wto.org/english/tratop_e/gproc_e/memobs_e.htm

Singapore	20 October 1997
Switzerland	1 January 1996
Chinese Taipei	15 July 2009
United States of America	1 January 1996

Observers – WTO Members

Observer	Date of acceptance by the Committee as Observers
Albania*	2 October 2001
Argentina	24 February 1997
Australia	4 June 1996
Bahrain	9 December 2008
Cameroon	3 May 2001
Chile	29 September 1997
China*	21 February 2002
Colombia	27 February 1996
Croatia	5 October 1999
Georgia*	5 October 1999
India	10 February 2010
Jordan*	8 March 2000
Kyrgyz Republic*	5 October 1999
Moldova*	29 September 2000
Mongolia	23 February 1999
New Zealand	9 December 2008
Oman*	3 May 2001
Panama*	29 September 1997
Saudi Arabia	13 December 2007
Sri Lanka	23 April 2003
Turkey	4 June 1996
Ukraine*	25 February 2009
* Negotiating accession	

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About the Project

India, currently, holds an observer status to the WTO Plurilateral Agreement on Government Procurement. Government Procurement is also included in the recently-signed India-Japan free trade agreement and is being discussed as part of negotiations on EU-India FTA. However, there is little understanding about opportunities and challenges in regard to multilateral/bilateral obligations with respect to transparency, efficiency and market access aspects of government procurement that India will have to adhere to, particularly among stakeholders such as industry associations, civil society organisations, businesses. Furthermore, the importance and relevance of this subject has increased with a greater focus today on good economic governance post financial crisis.

It is in this context, CUTS Centre for International Trade, Economics & Environment is implementing a project entitled "Government Procurement – An emerging tool of global integration and good governance in India." It is supported by the British High Commission in New Delhi under the Prosperity Fund of the United Kingdom's Foreign and Commonwealth Office. The long term objective of this project is to explore a more efficient government procurement system in India with greater transparency, efficiency and good governance for both domestic and foreign enterprises.

Activities under the project are designed to involve the relevant stakeholders so as to generate their interest on this subject. Therefore, it is expected that the project outputs will continue to draw interest from all concerned stakeholders.

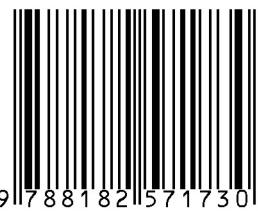
About CUTS

With its headquarters and three programme centres in Jaipur, India, one in Chittorgarh, India, a liaison office in New Delhi, India and resource centres in Calcutta, India; Lusaka, Zambia; Nairobi, Kenya; Hanoi, Vietnam and in Geneva, Switzerland the organisation has established its relevance and impact in the policy-making circles and among the larger development community in the developing world and at the international level.



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