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Caroline Collingwood
Rachel Williams

CEO
Dror Levy

Group Consulting Editor
Alan Falach

Publisher
Rory Smith

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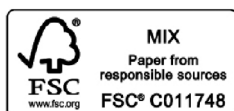
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General Chapter:

1	EU Public Procurement Rules – Euan Burrows & Edward McNeill, Ashurst LLP	1
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Country Question and Answer Chapters:

2	Australia	Holding Redlich: Andrew Hynd & Olivia Fielding	9
3	Belgium	Stibbe: David D’Hooghe & Arne Carton	16
4	Brazil	Pinheiro Neto Advogados: Ricardo Pagliari Levy & Heloisa Figueiredo Ferraz	23
5	Canada	Blake, Cassels & Graydon LLP: Clémentine Sallée & Marianne Smith	29
6	Denmark	Gorrissen Federspiel: Erik Kjær-Hansen & Marie Berg Simonsen	36
7	England & Wales	Ashurst LLP: Euan Burrows & Edward McNeill	43
8	Finland	Borenus Attorneys Ltd: Ilkka Aalto-Setälä & Henrik Koivuniemi	55
9	France	BIGNON LEBRAY AVOCATS: Kévin Holterbach & Jean-Baptiste Dubrulle	63
10	Germany	BLOMSTEIN: Dr. Pascal Friton & Rita Zuppke	71
11	Greece	Michailopoulos & Associates: Greg Michailopoulos & Marios Markatos	78
12	India	BTG Legal: Prashant Mara & Devina Ramakant Deshpande	88
13	Indonesia	Assegaf Hamzah & Partners: Farid Fauzi Nasution & Berla Wahyu Pratama	97
14	Ireland	A&L Goodbody: Anna-Marie Curran & Jessica Egan	103
15	Italy	Legance Avvocati Associati: Filippo Pacciani & Ada Esposito	117
16	Japan	Anderson Mōri & Tomotsune: Reiji Takahashi & Makoto Terazaki	130
17	Luxembourg	Stibbe: Benjamin Marthoz	138
18	Malta	Mamo TCV Advocates: Dr. Joseph Camilleri & Dr. Matthew Cutajar	146
19	Nigeria	Tunde & Adisa Legal Practitioners: Ayobami Tunde & Ifeoluwa Gbarada	155
20	Norway	Wikborg Rein Advokatfirma AS: Alf Amund Gulsvik & Hanne Zimmer	162
21	Panama	ALFARO, FERRER & RAMIREZ: Annette Bárcenas Olivardía & Paulette Michineau	168
22	Poland	Wolf Theiss: Peter Daszkowski & Marcin Rudnik	174
23	Portugal	Morais Leitão, Galvão Teles, Soares da Silva & Associados: Margarida Olazabal Cabral & Ana Robin de Andrade	181
24	Romania	VASS Lawyers: Iulia Vass & Bianca Bello	190
25	Singapore	Allen & Gledhill: Kelvin Wong & Tan Wee Meng	202
26	South Africa	Fasken: Lara Bezuidenhout & Bontle Pilane	210
27	Spain	Ramón y Cajal Abogados, S.L.P.: Pablo Silván Ochoa & Carlos Melón Pardo	217
28	Sweden	Mannheimer Swartling Advokatbyrå AB: Johan Carle & Sven Vaxenbäck	223
29	Switzerland	Lenz & Staehelin: Astrid Waser & Benoît Merkt	229
30	USA	Fried, Frank, Harris, Shriver & Jacobson LLP: James J. McCullough & Michael J. Anstett	236

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India

Prashant Mara



Devina Ramakant Deshpande



BTG Legal

1 Relevant Legislation

1.1 What is the relevant legislation and in outline what does each piece of legislation cover?

The legal and regulatory public procurement framework in India broadly comprises the following elements:

- (i) **Constitutional provisions:** The Constitution of India authorises the Central and State Governments to contract for goods and services in the name of the President of India or the Governor of the State (respectively), and directs autonomy in public spending. However, it does not stipulate any procurement policies or procedures.
- (ii) **Legislative provisions:**
 - There is no comprehensive central legislation exclusively governing public procurement. Nonetheless, various procurement rules and policies (see below) are guided by central legislations such as the Contract Act 1872, Sale of Goods Act 1930, Prevention of Corruption Act 1988, Arbitration and Conciliation Act 1996, etc.
 - In addition, certain states, like Tamil Nadu, Karnataka, Andhra Pradesh, Assam and Rajasthan have enacted state-specific legislation such as the Tamil Nadu Transparency in Tenders Act, 1998, Karnataka Transparency in Public Procurement Act, 1999, the Rajasthan Transparency in Public Procurement Act, 2012, etc., that govern procedure for procurement in these states.
- (iii) **Administrative guidelines:**
 - Comprehensive administrative rules and directives on financial management and procedures for government procurement are contained in the General Financial Rules (“GFR”) initially implemented in 1947 and last modified in 2017. All government purchases must strictly adhere to the principles outlined in the GFR, which include specific rules on procurement of goods and services and contract management.
 - In addition, the Manual for Procurement of Goods, 2017 (“MPG”) contains guidelines for the purchase of goods, and the Delegation of Financial Powers Rules, 1978 (“DFPR”) delegate the government’s financial powers to various ministries and subordinate authorities.
 - This is supplemented by: (a) manuals and policies governing procurement by individual ministries/departments such as defence and railways (see question 1.3 below); (b) guidelines issued by the Directorate General of Supplies and Disposals (“DGS&D”), the central purchase organisation which undertakes

procurement on behalf of ministries/departments that lack the expertise to undertake procurement themselves.

- In 2017, the government issued the Public Procurement (Preference to Make in India) Order 2017 which grants purchase preference to local suppliers based on certain conditions so as to promote manufacturing and production of goods and services in India.
- (iv) **Overseers:** The framework is bolstered by authorities including: (a) the Central Vigilance Commission (“CVC”) tasked with increasing transparency and objectivity in public procurement; (b) the Competition Commission of India (“CCI”) which checks anti-competitive elements; and (c) the Central Bureau of Investigation (“CBI”) engaged for investigation and prosecution of the criminal activities in the procurement process such as probity issues.

In summary, a public procurement process must adhere to: (i) GFR and MPG; (ii) sector-specific procurement rules contained in manuals published by the relevant ministry; and (iii) state-specific legislation on transparency in procurement. As between the procurer and the supplier, these rules above flow down via a tender award and a contract.

1.2 What are the basic underlying principles of the regime (e.g. value for money, equal treatment, transparency) and are these principles relevant to the interpretation of the legislation?

India’s regulatory and institutional framework seeks to ensure responsibility, accountability and efficiency in the public procurement regime. The underlying principle is to procure materials/services of specified quality at the most competitive prices in a transparent and non-arbitrary manner.

This is evident in the GFR which declares that all authorities delegated with the financial powers of procuring goods in public interest will be responsible and accountable to ensure efficiency, economy and transparency, fair and equitable treatment of suppliers, and the promotion of competition in public procurement. To this end, specific measures have been set out under the GFR including requirements pertaining to contents of the bidding documents, description of the subject matter, quality and quantity specifications, preparation of an annual procurement plan by all ministries/departments, adherence to a code of integrity to address probity issues, etc.

Further, the Supreme Court of India has recognised that while the government must have freedom of contract:

- (i) all contracts by the State should only be granted by public auction/tenders to ensure complete transparency and provide all eligible persons with the opportunity to participate in the auction;

- (ii) all official acts must be actuated by public interest, and should inspire public confidence;
- (iii) generally, the State should not grant contracts by private negotiation (subject to certain exceptions based on the nature of the trade, emergency circumstances, single source supply, etc.); and
- (iv) appearance of public justice is as important as doing justice (i.e. government actions should not only be fair but should also be seen to be fair, and nothing should be done which gives an impression of bias, favouritism or nepotism).

1.3 Are there special rules in relation to procurement in specific sectors or areas?

- (i) **Defence:** Governed by the Defence Procurement Procedure, 2016 (“DPP”) and the Defence Procurement Manual 2009 (as amended from time to time) which envisage various modes of procurement including indigenous, capital, local purchase, etc.
- (ii) **Railways:** Governed by a number of specific laws and uses the Indian Railway e-Procurement Systems (“IREPS”) for procurement.
- (iii) **Energy:** New Exploration Licensing Policy (“NELP”) under the Petroleum and Natural Gas Regulatory Act, 2006, provides for the evaluation of bids according to a quantitative bid evaluation criteria.
- (iv) **Electronics:** The Preference for Domestically Manufactured Electronic Products Policy (2013) applies to all ministries/departments (except the Ministry of Defence) for electronic product procurement for government purposes.
- (v) **Electricity:** Electricity Act, 2003 provides for the determination of tariffs through bidding processes by distribution licensees for the procurement of power.
- (vi) **Telecoms:** Guided by the National Telecom Policy (currently in the process of being re-worked to transition from physical to digital infrastructure. See question 8.1 below).
- (vii) **Renewables:** The Ministry of New & Renewable Energy has released a National Policy on Biofuels and a Strategic Plan for New and Renewable Energy Sector. In 2017, the government issued guidelines for wind power procurement to enable the distribution licensees to procure wind power at competitive rates in a cost-effective manner.
- (viii) **Micro, small and medium-sized enterprises (“MSMEs”):** Under the Public Procurement Policy for Micro and Small Enterprises Order 2012, a minimum of 20% of annual value of goods/services of the Central Government and public sector undertakings (“PSUs”) must be procured from micro and small enterprises (with further reservation of 4% in favour of MSMEs owned by ‘backward classes’).
- (ix) **Pharmaceuticals:** Pharmaceutical Purchase Policy 2013 reserves the procurement of certain medicines from Central Public Sector Enterprises.
- (x) **DGS&D:** Procurement of stores for the Central Government is undertaken pursuant to the manual of the DGS&D, which is the relevant authority in respect of such procurements.

1.4 Are there other areas of national law, such as government transparency rules, that are relevant to public procurement?

Transparency, competition and curbing of probity issues is further ensured through:

- (i) **Competition Act, 2002:** Penalises anti-competitive activities such as bid rigging, collusive bidding, cartelisation, and abuse of dominance.

- (ii) **Right to Information Act, 2005:** Promotes transparency in government dealings by entitling Indian citizens to expeditiously procure information from the government through a “right to information” application.
- (iii) **Integrity pact under the GFR and CVC guidelines:** Addresses probity in procurement activities including through the appointment of an external monitor to mitigate corruption and ethical risks.
- (iv) **Prevention of Corruption Act, 1988 and Prevention of Money Laundering Act, 2002:** Penalise bribery and money-laundering and provide for confiscation of property derived from money-laundering and other illicit activities.

1.5 How does the regime relate to supra-national regimes including the GPA, EU rules and other international agreements?

Although India has not acceded to the GPA, it became an Observer State in 2010.

2 Application of the Law to Entities and Contracts

2.1 Which categories/types of entities are covered by the relevant legislation as purchasers?

Government and government agencies, or entities otherwise deemed to be ‘state entities’ for the purposes of the Constitution will be governed by the procurement framework. The concept of ‘state entities’ has been expanded through judicial review to include all ministries and departments of the Central and State Governments, corporate entities owned/controlled by central or state governments, public authorities exercising statutory powers, statutory authorities and non-statutory authorities exercising public functions, or otherwise under the direct or indirect control of the aforementioned ‘state entities’.

Further, autonomous bodies that are created or owned by, or receive grants from, the Government, and entities whose services are being utilised by the entities mentioned above or to whom the procurement process has been outsourced (such as procurement support agencies or procurement agents) will also be covered.

2.2 Which types of contracts are covered?

The regulatory framework covers all contracts offered by the government at the central, state or local level. Examples of types of contracts covered include PPP contracts, concession agreements, operation and maintenance contracts, engineering procurement and construction contracts, supply of equipment, supply of services, transfer of technology, etc.

2.3 Are there financial thresholds for determining individual contract coverage?

While the GFR applies to all instances of procurement of goods required for public sector use regardless of the value of the goods, monetary thresholds are involved in the following instances under the GFR:

- (i) Purchases of up to INR 250,000 can be made at the discretion of the ministry/department by issuing purchase orders containing basic terms and conditions.

- (ii) For works contracts valued at: (a) INR 100,000 – INR 1,000,000, the letter of acceptance will result in a binding contract (subject to certain conditions of contract being included in the tender document); and (b) INR 1,000,000 and above, a contract must be executed (which can be a “simple one page contract” where preceded by an invitation to tender and conditions of contract).
- (iii) Goods can be purchased without inviting bids: (a) on the basis of a certificate from the competent authority, where the goods are of up to INR 25,000 in value; and (b) on the recommendation of the relevant Local Purchase Committee if between INR 25,000 and INR 250,000 in value.
- (iv) A limited tender enquiry (with no advertisement necessary) can be pursued for goods valued less than INR 2,500,000.
- (v) The monetary ceilings for direct online purchases on the Government e-Marketplace (“GeM”, a portal for the purchase of common use goods and services) are as under:
 - (a) up to INR 50,000: through any of the available eligible suppliers on GeM;
 - (b) INR 50,000 – INR 3,000,000: eligible GeM seller having the lowest price of amongst at least three different manufacturers; and
 - (c) over INR 3,000,000: eligible supplier having the lowest price after mandatorily obtaining bids using the online bidding/reverse auction tool.

2.4 Are there aggregation and/or anti-avoidance rules?

These issues are typically governed by the tender documents which may, for instance, specify that the credentials of a bidder may not be aggregated with those of its group companies/holding company/JV partner, etc. for the purpose of determining compliance of the bidder with the specified qualification criteria for the supply of goods. The documents may also permit clubbing the financial standing credentials of the fully owned subsidiary bidding company with those of its holding company, with appropriate legal documents proving such ownership. Bidders may be queried during the tender process and requested to provide substantiating documents to ensure probity.

2.5 Are there special rules for concession contracts and, if so, how are such contracts defined?

Concession contracts are agreements where the right is granted to a private sector entity to undertake actions for the provision of a public good or service, which would, save for such grant, be provided by a public sector entity.

There are no comprehensive central rules or regulations governing concessions. However, states such as Tamil Nadu, Gujarat, Himachal Pradesh, Punjab, Andhra Pradesh and Bihar have infrastructure development laws that include matters pertaining to work or services concessions.

Further, Model Concession Agreements (“MCAs”) have been formulated by the government to standardise terms on which licences are granted to private entities for delivery of goods and services for public benefit. MCAs have been developed across sectors (for instance for highways, metros, ports, airports, railway stations, etc.) and set out the contractual framework for implementation of PPP projects under the policy and regulatory framework in question 1.1 above. They address critical issues such as mitigation and unbundling of risks, allocation of risks and returns, symmetry of obligations, reduction of transaction costs, termination, etc. Various versions of the MCA have been

formulated on the basis of the different PPP modes such as Build Operate Transfer (Toll), Build Operate Transfer (Annuity), Design, Build, Operate and Transfer (“DBOT”) and Operate Maintain and Transfer (“OMT”).

2.6 Are there special rules for the conclusion of framework agreements?

Yes, the GFR and MPG lay down principles pertaining to the conclusion of framework agreements, typically referred to as ‘rate contracts’. Such contracts can be entered into with one or more suppliers for the supply of specified goods/services at specified prices and for a specified period of time. The contract is in the nature of a standing offer from the supplier and no quantity or minimum drawal is guaranteed under the contract. The procurer can conclude more than one rate contract for a single item and also has the option to renegotiate the price with the rate contract holders.

Typically, rate contracts are entered into by DGS&D for common user items which are frequently needed in bulk across government departments. If a ministry/department directly procures goods for which DGS&D has a rate contract in place, the price paid for the goods should not exceed that stipulated in the rate contract. The MPG further suggests that rate contracts should be entered into by DGS&D via the GeM for specialised and engineering items.

2.7 Are there special rules on the division of contracts into lots?

Yes, there is an accepted principle of division of contracts into “parallel contracts” on terms to be set out under the tender documents. The tender documents will reserve the right of the procurer to divide the contract quantity between suppliers. The manner of deciding the relative share of lowest bidder (L1) contractor and the rest of the contractors/tenderers should be clearly defined under the tender, along with the minimum number of suppliers sought for the contract. This is particularly advantageous for the procurer in case of critical/vital/safety/security nature of the item, large quantity under procurement, urgent delivery requirements and inadequate vendor capacity, to ensure security of supply.

Further, the MPG suggests that if it is discovered that the quantity under the tender is such that a sole supplier is not capable of supplying the entire quantity, and there was no prior decision/declaration in the bidding documents to split the quantities, then the quantity finally ordered may be distributed among the other bidders by counter offering the L1 rate in a manner that is fair, transparent and equitable.

However, the GFR prohibits dividing a demand for goods into small quantities so as to make piecemeal purchases to avoid procurement through L1 buying (i.e. lowest price), bidding or reverse auction requirements on GeM or the necessity of obtaining the sanction of higher authorities (which may be required based on the estimated value of the total demand).

2.8 What obligations do purchasers owe to suppliers established outside your jurisdiction?

While there are no obligations specific to foreign suppliers, the GFR and the procurement policies established under its general principles seek to ensure the transparent, fair and equitable treatment of all suppliers – whether local or foreign – and the promotion of competition in public procurement.

However, the following items are of relevance to foreign bidders and suppliers:

- (i) Certain manuals of ministries and PSUs may, under the term of the tender documents, obligate foreign suppliers to enter into the tender contract and supply via a local entity (as a JV, consortium or subsidiary).
- (ii) Further performance guarantees may be sought from foreign suppliers who do not have a track record of supply in India.
- (iii) Certain long-term contracts may have continuing obligations in the form of transfer of technology and warranty support from foreign suppliers.
- (iv) For qualifying contracts under the Public Procurement (Preference to Make in India) Order, 2017, local suppliers will be given purchase preference if they match the winning bid of a foreign supplier within a certain margin above the L1 price (see question 3.4 below for more information).

3 Award Procedures

3.1 What types of award procedures are available? Please specify the main stages of each procedure and whether there is a free choice amongst them.

- (i) **Advertised Tender Enquiry:** This is the default mode of procurement. The tender is advertised on governmental websites, national newspapers, the Indian Trade Journal, the central public procurement portal (“CPPP”) and GeM, and also circulated to foreign embassies (in the case of global tenders).
- (ii) **Limited Tender Enquiry:** Procurement is obtained through selected suppliers. A pre-selected list of vendors, prepared through a thorough screening process, is directly approached for bidding. As this strains the transparency principle, it should only be pursued for goods/services up to INR 2,500,000 in value.
- (iii) **Two-stage Bidding:** Two bids (technical and financial) are invited from the procurers (usually in highly technical tenders).
- (iv) **Nomination-based Tenders:**
 - (a) **Proprietary Article Certificate (“PAC”):** Where items can only be procured from the original equipment manufacturers or manufacturers having proprietary rights, this is done against a PAC signed by the appropriate authority.
 - (b) **Single Tender Enquiry:** Procurement under invitation to one firm only, without a PAC. Typically used:
 - in emergencies with the approval of a competent authority; and
 - for machinery standardisation or for procurement of spare parts that are compatible with existing machinery/equipment (on the advice of a competent technical expert and approved by the competent authority).
- (v) **Procurements without Calling Tenders:** This is typically undertaken for small value purchases of standard specifications and includes withdrawals against rate or framework contracts (see question 2.6), direct procurement without quotation (for goods upto INR 25,000 with approval of the competent authority) and direct procurement by the Purchase Committee (for goods up to INR 250,000, and based on market survey to ascertain reasonableness of rate, quality and specifications).
- (vi) **Electronic Reverse Auction:** Presentation by bidders of successively more favourable bids during a scheduled period of time and automatic evaluation of bids.

- (vii) **Government to Government (“G2G”):** Also known as Foreign Military Sales Program, G2G deals involve the transfer/sale of a country’s defence equipment, services, training, etc. to other foreign governments. In the defence sector, the DPP contemplates the conclusion of an Inter-governmental Agreement for such purpose, along with the deputation of a delegation to the seller country (to ascertain acceptability of equipment, select from multiple choices, etc.).

The choice of procedure will in large part be dictated by the subject matter, value, technical complexity and nature of the procurement. The method chosen must be consistent with the criteria of pre-qualification and any restrictions that are imposed before execution, and the mandates of the GFR must at all times be adhered to.

3.2 What are the minimum timescales?

Ordinarily, the minimum time to be allowed for submission of bids should be three weeks from the date of publication of the tender notice or availability of the bidding document for sale, whichever is later. Where bids are also to be obtained from abroad, the minimum period should be four weeks for both domestic and foreign bidders.

In terms of the award of the tender, while the MPG sets out a suggested time schedule as a guideline for finalising contracts against various modes of procurements, the schedule will typically be led by the nature of requirements, sourcing, sample evaluation, site visit/pre-bid meeting with prospective bidders and government, etc. guidelines. The GFR stipulates that, to reduce delay, the appropriate timeframe for each stage of procurement should be prescribed by the relevant ministry/department.

3.3 What are the rules on excluding/short-listing tenderers?

The Central Purchase Organisation (e.g. DGS&D) maintains a list of “registered suppliers” (i.e. eligible suppliers who are qualified and capable of delivering goods commonly required for government use). All ministries/departments can utilise this list of suppliers, in addition to maintaining their own list of suppliers. Registration is undertaken based on parameters captured under the GFR and other specific procurement guidelines, including the supplier’s past performance, manufacturing capabilities, quality control systems, after-sales services and financial standing.

However, a supplier can be removed from the list of approved suppliers if he fails to comply with the terms of the registration, fails to supply the goods on time, supplies substandard goods, makes a false declaration to any government agency or in public interest.

Further, a bidder can be debarred/blacklisted (i) for up to three years, if he has been convicted of corruption or of a criminal offence as part of execution of a public procurement contract, and (ii) for up to two years for breach of the code of integrity.

3.4 What are the rules on evaluation of tenders? In particular, to what extent are factors other than price taken into account (e.g. social value)?

Generally, the criteria for evaluation of bids are:

- (i) technical qualifications: technical specifications and prior technical performance of the product, past experience of the bidder, availability of qualified personnel, etc.;
- (ii) financial qualifications: solvency, net worth, etc.; and
- (iii) financial proposal: the tender is typically awarded to the lowest evaluated bid (“L1”).

However, the government has sought to boost the domestic sector through reserved/preferential procurement of locally produced goods and services such as in the pharmaceuticals and electronics sectors. PSUs have been permitted to relax the norms of 'prior experience and prior turnover' for MSME bidders.

The Public Procurement (Preference to Make in India) Order, 2017 also seeks to promote manufacturing and production of goods and services locally in India. Thereunder, and in respect of procurement for goods where the relevant Ministry has communicated that sufficient local capacity and local competition exists, only local suppliers will be eligible to contract for contracts that are less than INR 5,000,000 in value. For contracts which have a value of over INR 5,000,000, local suppliers will be given purchase preference if they match the winning bid of a foreign supplier within a certain margin above the L1 price.

In addition, in certain sector-specific procurement guidelines (such as defence and telecoms), offset content (local content) and value of such offset is an important factor in the valuation of a tender.

3.5 What are the rules on the evaluation of abnormally low tenders?

Under the MPG, an 'abnormally low bid' is one in which the bid price, in combination with other bid elements, appears so low as to raise material concerns regarding the capability of the bidder to perform the contract at the offered price.

The MPG suggests that the procuring entity should seek written clarifications from the bidder, including detailed price analyses of its bid price covering scope, schedule, allocation of risks and responsibilities, and any other requirements of the bid's document. If, thereafter, the procuring entity determines that the bidder has substantially failed to demonstrate its capability to deliver the contract at the offered price, it may reject the bid/proposal. Abnormally low tenders may lead to a conclusion of anticompetitive behaviour, which is also a ground for ordering a re-tender.

3.6 What are the rules on awarding the contract?

All tenders must be evaluated strictly on the basis of the terms and evaluation methods captured under the tender enquiry document (based on which offers have been received) and no new material condition can be brought in at the time of evaluation.

In a two-stage tender, bids are obtained in two parts: (i) the technical bid consisting of all technical details along with commercial terms and conditions; and (ii) the financial bid indicating itemised pricing for the items mentioned in the technical bid. The technical bids are opened by the procuring ministry/department in the first instance, and evaluated by a competent committee. At the second stage, the financial bids of only those bidders whose offers are found to be technically acceptable are opened. These bidders are intimated the date and time of the opening of the financial bid for further evaluation and ranking, pursuant to which the contract is awarded.

Generally, the contract is awarded to L1, subject to the procurer determining that the price is reasonable (based on factors such as receipt of sufficient competitive bids from different sources, current market price, last purchase price of same/similar goods, terms and period of delivery, etc.). However, the contract may also be awarded to the highest bidder (i.e. H1 method, typically in case of contracts contemplating revenue sharing, return on the procurer's equity, etc.), bidder requiring the lowest government grant/subsidy or shortest concession period, etc.

3.7 What are the rules on debriefing unsuccessful bidders?

While there are no specific rules regarding debriefing of unsuccessful bidders, GFR stipulates that bid securities must be returned to unsuccessful bidders within 30 days after the award of the contract.

3.8 What methods are available for joint procurements?

There are no separate procedures specified, and the general procurement rules will apply. Under the GFR, in the case of projects jointly executed by several governments, where the expenditure is to be shared by the participating governments in agreed proportions, and where the expenditure is initially incurred by one government and the shares of the other participating governments are recovered subsequently, such recoveries from the other governments are to be exhibited as abatement of charges under the relevant expenditure Head of Accounts in the books of the governments incurring the expenditure initially.

3.9 What are the rules on alternative/variant bids?

Alternative/variant bids must be specifically permitted by the terms of the tender in order to be considered. Failing this, such tender submission is liable to be rejected.

3.10 What are the rules on conflicts of interest?

In tender submission, the GFR prescribes that no official of a bidder or a procuring entity shall contravene the code of integrity – which includes a disclosure of conflict of interest. The MPG further indicates that conflict of interest with other bidders is a ground for disqualification of a bidder in view of the anti-competitive practices that could arise therefrom. In tender evaluation, the courts have generally, and as a rule of administrative law, advocated the exclusion of persons having a conflict of interest from the bid evaluation/award process.

3.11 What are the rules on market engagement and the involvement of potential bidders in the preparation of a procurement procedure?

Market engagement and involvement of potential bidders is limited to the technical aspects of any procurement requirement and not for a procurement procedure.

In the case of a two-stage tender, the GFR stipulates that the procuring entity should hold discussions with the bidder community to finalise the technical specifications in the first stage, with a view to enhance the technical capacity of the procuring entity by drawing on the know-how from the market.

Further, sector-specific guidelines for defence recognise the need to share the future needs of armed forces with the defence industry. To this end, long-term acquisition plans and requirements are made available on the website of the Ministry of Defence for use by the industry. The industry may even be involved in consultations at the feasibility stage itself. Draft qualitative requirements, indicative time frames, envisaged quantities, etc. may also be shared, to the extent actionable by the industry.

Generally, the involvement of a bidder in the bidding process (including in drafting the tender documents, discussing possible specifications, etc.) would lead to the disqualification of such bidder. In instances where the code of integrity is considered to have been breached, the bidder may be debarred for up to two years.

4 Exclusions and Exemptions (including in-house arrangements)

4.1 What are the principal exclusions/exemptions?

While it is mandatory, under the GFR, for ministries/departments to receive all bids through e-procurement portals in respect of all procurements, exemptions are made for:

- (i) cases where national security and strategic considerations demands confidentiality (with the approval of the Secretary of the relevant Ministry); and
- (ii) tenders floated by Indian Missions Abroad (with the approval of the competent authority).

Similar exemptions apply to e-publishing tenders on the CPPP.

In addition, G2G procurement does not follow standard procurement procedure but instead is based on provisions agreed between the Indian government and the government of the contracting country under an Inter-governmental Agreement. Further, in respect of the defence sector, separate provisions for fast-track procurement are applicable under the DPP for acquisitions for meeting urgent operational requirements.

4.2 How does the law apply to "in-house" arrangements, including contracts awarded within a single entity, within groups and between public bodies?

There are no specific procurement rules applicable to in-house arrangements. In a "pure" in-house procurement (i.e. the performance by the procurer of activities using its own administrative, human, technical, etc., resources exclusively, without any support from an external entity), public procurement rules will not be applicable since there is no distinct and separate legal entity involved and there is no need to award a contract.

However, where the procurer does not perform the activity through an internal department but engages another government entity that is legally separate from the procurer, a contract between these entities must be concluded (i.e. an intra-government contract). In such event, the procurement rules discussed above will continue to apply. In keeping with general contracting principles, all intra-group contracts should be entered into on an arm's length basis, should comply with transfer pricing regulations and should not trigger anti-avoidance measures.

5 Remedies

5.1 Does the legislation provide for remedies and if so what is the general outline of this?

- (i) An aggrieved bidder can report irregularities in the procurement process to the concerned officials of the procuring entity. This may include approaching the independent external monitor appointed under the CVC

guidelines to oversee implementation of the integrity pact. In addition, alleged probity violations can also be subject to criminal investigation by the relevant enforcement authorities.

- (ii) The procurer can terminate the contract for default, insolvency, etc. of the supplier, forfeit performance security, blacklist the supplier, seek damages, etc.
- (iii) Typically, and as directed by the MPG, tenders contemplate settlement of disputes via mutual consultation, failing which the parties can resort to arbitration as per the Indian Arbitration and Conciliation Act, 1996.
- (iv) Courts can also be approached seeking enforcement of contractual terms and/or remedies such as damages for breach, specific performance and injunctions under the Indian Contract Act, 1872, the Sale of Goods Act, 1930 and the Specific Relief Act, 1963.

5.2 Can remedies be sought in other types of proceedings or applications outside the legislation?

The bidding process is further subject to limited judicial review in the exercise of the writ jurisdiction of the High Courts and the Supreme Court of India. The courts will typically intercede only in cases of violation of constitutional/statutory requirements, a lack of transparency, reasonableness or fairness in action, or arbitrary conduct.

Further, Indian citizens are entitled to procure information from the government through a "right to information" ("RTI") application. The RTI process is geared towards promoting transparency, and information requested is to be expeditiously provided by the relevant public authority.

5.3 Before which body or bodies can remedies be sought?

See questions 5.1 and 5.2 above.

In addition, certain sector-specific regulatory authorities with judicial and quasi-judicial powers have been established to adjudicate disputes and dispose of appeals in a time-bound manner, such as the Telecom Disputes Settlement and Appellate Tribunal ("TDSAT") and the electricity regulatory commissions.

The Competition Commission of India can also be approached to address anti-competitive issues in public procurement.

5.4 What are the limitation periods for applying for remedies?

Normally, claims for specific performance or compensation for contractual breach, involving private parties, should be raised within three years from the date on which cause of action arises (or, where the breach is continuing, the date on which it ceases). However, the limitation period for suits by or on behalf of the government is 30 years from the date on which the cause of action arose.

There is no deadline for approaching a court in its writ jurisdiction (as discussed in question 5.2). Nonetheless, writ petitions should be agitated in a timely manner by the aggrieved party. The court may decline to intervene in the event of an unreasonable delay.

5.5 What measures can be taken to shorten limitation periods?

Limitation periods prescribed under law cannot be shortened or contracted out of.

5.6 What remedies are available after contract signature?

See question 5.1, points (ii) – (iv) and question 5.2. Please note that in the case of infrastructure projects of a public nature, a recent amendment to specific relief law has prohibited the grant of injunctions that would hinder/delay completion of the project.

5.7 What is the likely timescale if an application for remedies is made?

Disposal of judicial proceedings in India can take from a few months to several years, based on complexity of the action, the forum, etc.

5.8 What are the leading examples of cases in which remedies measures have been obtained?

Ramana Dayaram Shetty v. International Authority of India (1979) is a landmark decision on the issue of state control and administrative action, with equal relevance in the sphere of public procurement. The Supreme Court observed:

- Government actions must be informed with reason, and not arbitrary.
- Government actions must be based on standards that are neither arbitrary nor unauthorised.
- The Government, when contracting, must do so in a fair manner, without any discrimination and by following a fair procedure.
- If Government action departs from the above principles, it would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

In *Centre for Public Interest Litigation v. Union of India* (2012), the Supreme Court cancelled 122 2G spectrum licences issued to various telecom companies by the government on a “first come, first serve” policy at archaic rates. The court observed that there is a fundamental flaw in this approach as it involves an “element of pure chance or accident” and held that an auction held fairly and impartially is the best method for the state to allocate public or natural resources. This case has been a stepping stone towards the introduction of a specific and exclusive procurement law in India in the form of the Public Procurement Bill, 2012 (currently before the Parliament).

5.9 What mitigation measures, if any, are available to contracting authorities?

MPG suggests the following contract management risk mitigation measures:

- (i) Any advance payments to suppliers should be interest bearing and released in stages linked to the progress of the contract. The advance should be progressively adjusted against bills cleared for payment.

- (ii) Contract modifications and renegotiations should not substantially alter the nature of the contract so as to vitiate the basis of selection of the contractor.
- (iii) A contract management manual or operating procedure should be prepared for large value contracts, reflecting an inbuilt systems of checks and balances.
- (iv) Agents should only be as per the terms of the contract, and sub-contracting should typically not be allowed.

6 Changes During a Procedure and After a Procedure

6.1 Does the legislation govern changes to contract specifications, changes to the timetable, changes to contract conditions (including extensions) and changes to the membership of bidding consortia pre-contract award? If not, what are the underlying principles governing these issues?

The procurer may, at any time prior to the bid submission date, amend bid documents by issuing a corrigendum. This may be done at the procurer’s initiative or in response to a clarification sought by a prospective bidder. When the amendment/modification materially alters the original terms, and/or there is not much time left for the tenderers to respond or prepare a revised tender, (a) fresh publication of the amendment should be undertaken, following the same procedure as for publication of the original tender enquiry, and (b) the time limit for submission of tenders (and corresponding timeframes) should be suitably extended. The MPG indicates that in exceptional circumstances, the consent of the bidder may be requested in writing to extend the period of bid validity. A bidder accepting the request will not be permitted to modify his bid.

Further, tender documents typically permit bidders to alter/modify their bid within the deadline for submission of tenders. Any alterations/modifications received after such deadline will not be considered. Additionally, any withdrawal of the tender after this deadline could result in forfeiture of the bidder’s security deposit along with other sanctions.

6.2 What is the scope for negotiation with the preferred bidder following the submission of a final tender?

Post-tender negotiations are specifically discouraged under the CVC guidelines, and even post-tender negotiations with the lowest bidder (L1) can only be undertaken for reasons to be recorded in writing. Any deviations from the terms of the tender should be recorded during submission of the tender proposal by the bidder. These deviations will be taken into account at the time of tender award and typically only limited negotiations are allowed post tender award.

6.3 To what extent are changes permitted post-contract signature?

Post-award, the terms of the contract including the scope and specifications should not be materially varied. In exceptional cases, however, where unavoidable, modifications may be allowed after taking into account the corresponding financial and other implications. In order to vary the conditions, specific approval of the competent authority must be obtained. Further, no extensions to the scheduled delivery or completion dates should be granted except

upon *force majeure* events, as specified in the contract, or for other reasons contained under the terms of the contract. All changes should be in the form of an amendment to the contract duly signed by all parties to the contract.

6.4 To what extent does the legislation permit the transfer of a contract to another entity post-contract signature?

Determined on a case-by-case basis. As a general rule, assignment of contractual obligations to another entity is not allowed unless specifically approved by the tendering authority.

7 Privatisations and PPPs

7.1 Are there special rules in relation to privatisations and what are the principal issues that arise in relation to them?

Privatisation in government-owned companies occurs post approval from the Cabinet Committee on Economic Affairs, which is a central government cabinet level body. It also (on an *ad hoc* basis) decides the mode (usually via IPO) and scope of privatisation. Once an in-principle approval is obtained, privatisation follows the normal process that is specified for the selected mode. As an example, if it is via an IPO, securities regulations will apply for the capital float.

7.2 Are there special rules in relation to PPPs and what are the principal issues that arise in relation to them?

The Ministry of Finance has issued special procedures and guidelines for procurement of PPP projects which are applicable to all central government ministries, departments and PSUs.

These guidelines contemplate a two-stage bidding process (the first for shortlisting eligible bidders, and the second under which shortlisted bidders conduct a comprehensive examination of the project and submit financial offers). It also provides for pre-qualification of bidders, the creation of a reserve list of bidders for substitution (in cases of withdrawal or rejection from the list). Projects above INR 10,000,000,000 in value are sent to the PPP Approval Committee (set up under the Finance Ministry to appraise PPP projects) and then to the Cabinet for final approval. The project authority can also specify restrictions to prevent concentration of projects in the hands of a few entities.

The Department of Economic Affairs has, in 2011, also formulated an extensive policy for PPP projects (including rules regulating expenditure, appropriation of revenue, contingent liabilities, etc.), but the policy has not been finalised at the time of writing this chapter.

Further, the Department of Economic Affairs, in 2016, introduced the PPP Guide for Practitioners, which guides practitioners in developing projects through PPP frameworks.

Please also see question 2.5 above.

8 The Future

8.1 Are there any proposals to change the law and if so what is the timescale for these and what is their likely impact?

- (i) **The Public Procurement Bill, 2012:** Provides for a uniform, streamlined procurement process espousing good faith, equity and anti-arbitrariness. It proposes open competitive bidding as the preferred procurement method and also incorporates UNCITRAL Model Law, 2011 principles (such as privatisation). The bill is currently pending before Parliament, but there is no clarity regarding the timescale for notification.
- (ii) **Draft National Telecom Policy 2018:** Drafted to transition from physical to digital infrastructure, in line with the Make in India initiative. Promotes procurement of domestic products/services with domestically-owned IPR (particularly for security-related products). The draft document is currently open for comments from stakeholders and the public.

8.2 Have there been any regulatory developments which are expected to impact on the law and if so what is the timescale for these and what is their likely impact?

- (i) **Specific Relief Act, 1963:** A recent amendment prohibits courts from granting injunctions in respect of 'infrastructure projects' (i.e. transportation, energy, communication, water and sanitation, and social and commercial infrastructure) which would hinder/delay the progress/completion of the project (for instance, filed by an unsuccessful bidder). The rationale here is to prevent impediments to the completion of public welfare works.
- (ii) **Prevention of Corruption (Amendment) Act, 2018:** Introduces a number of amendments to the existing law such as punishment for the bribe-giver (including: (a) bribes directly given to a public servant; (b) *inter se* dealings between persons with the intention to bribe a public servant; and (c) acceptance of a bribe to influence a public servant), prosecution of commercial organisations (including personal liability of persons in charge), forfeiture of property obtained through illicit means, etc. Private entities should not fall foul of these provisions in their dealings with the government (including the bidding process).



Prashant Mara

BTG Legal
804 Lodha Supremus
Dr. E. Moses Road, Worli
Mumbai – 400018
India

Tel: +91 22 2482 0820
Email: prashant@btg-legal.com
URL: www.btg-legal.com

Prashant Mara is a commercial and regulatory lawyer with a focus on strategic investments and collaborations, procurement projects, compliance, investigation support and dispute management. He specialises in the technology, defence (with a focus on technology transfer and licensing) and industrials (with a focus on technology deployment) sectors. His work is primarily in the areas of foreign investment, public procurement, anti-bribery and cybercrime.

Prashant was previously co-head of the India Group at Osborne Clarke and prior to that ran the India desk of a Franco-American firm in Paris. He started his career as in-house counsel at Infosys and managed their European legal operations.

Prashant is qualified to practise in India and read law at the National Law School of India University, Bangalore.



Devina Ramakant Deshpande

BTG Legal
804 Lodha Supremus
Dr. E. Moses Road, Worli
Mumbai – 400018
India

Tel: +91 22 2482 0820
Email: devina@btg-legal.com
URL: www.btg-legal.com

Devina is a senior associate with BTG Legal, focusing on the technology, defence and industrials sectors. Her experience includes cross-border and domestic investments, M&A, procurement, commercial contracting, compliance, pre-dispute advisory, corporate governance and corporate advisory.

Devina has previously worked at a Magic Circle UK law firm in their London and Dubai offices. She is dual-qualified, being admitted to practise law in India and a solicitor of the Senior Courts of England and Wales.



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59 Tanner Street, London SE1 3PL, United Kingdom

Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255

Email: info@glgroup.co.uk