



The Legal 500 Country Comparative Guides

India: Public Procurement

This country-specific Q&A provides an overview to public procurement laws and regulations that may occur in India.

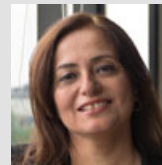
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1. **Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL)**

There is no comprehensive or any specific legislation that governs public procurement contracts in India. The legislative framework on public procurement (which mostly takes place through a tender process for large procurements) is presently based on guidelines contained in rules, procedures and manuals formulated by the Government, which apply to government departments and public sector undertakings (**PSUs**). These are, namely:

- General Financial Rules 2005 (**GFR**) and the Delegation of Financial Power Rules, 1987 (**DFPR**):

The general rules regarding public procurement are provided under the GFR, which are applicable to all ministries and departments of the Government. GFR are supplemented by the DFPR, which are based on the principles of the GFR and empower the Central Government to sanction expenditure for public procurement contracts.

In line with the GFR, a few state governments and PSUs have developed their own financial rules which govern public procurement. Additionally, certain states such as Tamil Nadu and Karnataka have enacted specific rules and regulations governing public procurement called the Tamil Nadu Transparency in Tenders Act, 1988 and the Karnataka Transparency in Public Procurement Act, 1999, respectively.

In addition to the GFR and the DFPR, the Directorate General of Supplies and Disposals under the Ministry of Commerce and Industry (**DGS&D**), which is the central purchasing and quality assurance organization, also issue guidelines to strengthen transparency and integrity in public procurement. Further, the Central Vigilance Commission (**CVC**) which is created to address governmental corruption, has framed tender guidelines.

At present, there is no relationship between government contracting/public procurement laws in India with any international or foreign bodies such as WTO, EU and UNCITRAL.

- Defence Procurement Manual (**DPM**) and Defence Procurement Procedures (**DPP**):

New defence procurement management structures and systems were set up in the Ministry of Defence which came into effect from 30 December 2002 and that are applicable to procurements resulting from the 'buy' decision of the Defence Acquisition Council. DPM 2005 and DPP 2005 provide comprehensive guidelines in this regard. These procedures were further revised in the years 2008, 2009, 2011, 2013, 2016 and 2018 to ensure expeditious procurement of the approved requirements of the armed forces. Given the specific requirements of procurement in the defence sector, the DPM and DPP lay down the procedures relating to public procurement in the defence sector and provide for measures to ensure expedited decision-making along with simplified contractual procedures. Broadly,

these guidelines contain procedures for the following:

- Buy and make through transfer of technology;
- Buy and make (Indian); and
- The Prevention of Corruption Act, 1988 and the Indian Penal Code, 1860:

These legislations impose criminal liability and penalties on bidders who may indulge in fraudulent, corrupt or malicious practices.

- The Public Procurement Bill, 2012 (**Bill**):

The Government has introduced the Bill to put in place a specific legislation with the aim of maintaining integrity and public confidence in the public procurement process. The Bill derives its essence from the UNCITRAL Model Law of July 2011.

The Bill covers the procurement of goods, services, works, procurements by public private partnership (**PPP**) as well as special purpose vehicles (**SPVs**). The Bill seeks to ensure transparency and accountability in the public procurement process and fair and equitable treatment of all bidders.

The Bill was introduced in the Indian Parliament on May 2, 2012 but is yet to be enacted as it is pending for deliberations by a standing committee of the Parliament.

2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements?

Public procurement / government contracts which are equal to or more than the value of INR 5 million are generally governed by the rules and guidelines for public procurement as mentioned above. Examples of such contracts include PPP contracts, engineering procurement and construction (EPC) contracts, concession agreements and operation and management (O&M) contracts.

Further, a government entity may, after consultation with the appropriate authority, outsource a contract to a specifically preferred contractor. In such a situation, the proposal must contain a detailed justification, explaining the circumstances leading to the said outsource.

While GFR is an umbrella regulation which governs the process for public procurement, various departments and utility sectors have introduced rules/guidelines which supplement the GFR in public procurements in their departments and sectors. For instance, the Electricity Act, 2003 provides for a bidding process for determination of tariffs. Additionally, the New Exploration Licensing Policy framed under the Petroleum and Natural Gas Regulatory Act, 2006 provides for the evaluation of bids according to the transparent

quantitative bid evaluation criteria that evaluates the financial and the technical capability of the bidders, the proposed work schedule as well as the monetary package.

While the defence sector is governed by the DPP and DPM, the railways are governed by a number of specific laws and use the Indian railways e-procurement systems (IREPS) for procurement.

There are other sectors which have issued rules and regulations to guide the public procurement process, such as the telecom sector which is guided by the National Telecom Policy and the energy sector wherein the Ministry of New and Renewable Energy released a National Policy on Biofuels and a Strategic Plan for New and Renewable Energy Sector. In fact, 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. Even the pharmaceuticals sector has introduced the Pharmaceutical Purchase Policy 2013 which aims to reserve the procurement of certain medicines from the Central PSUs.

Regulations have also been introduced to encourage micro, small and medium size enterprises to participate in the public procurement process. The Public Procurement Policy for Micro and Small Enterprises Order, 2012 provides that a minimum of 20% of annual value of goods/ services of the Central Government and PSUs must be procured from micro and small enterprises.

In addition to all the above-mentioned sector specific guidelines, DGS&D has been authorised to undertake procurement on behalf of those ministries/departments which lack the expertise to undertake such processes on their own.

3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction?

The public procurement regime is generally applicable to contracts/procurement with value of INR 5 million or above. Contracts falling below this value, usually escape the jurisdiction of the procurement regime. The intention of the Government is to encourage local suppliers in case the value of procurement is less than INR 5 million, subject to there being sufficient local capacity and competition.

4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.

To summarise, there are no specific legislations in India that govern public procurement. The legislative framework on public procurement is based primarily on guidelines contained in

rules, procedures and manuals. These guidelines apply to contracts having value of either equal to or above the limit of INR 5 million. However, the basic principles underlying such guidelines would be applicable to all contracts, including those valued below INR 5 million and the parties to such contracts are bound to act in a just, fair, equitable and transparent manner.

5. For the procurement of complex contracts*, how are contracts publicised? What publication or journal is used for these purposes?

Public procurement is generally conducted through a tendering process. The Supreme Court of India has held that the notifications for inviting tenders are required to be advertised in well-known daily newspapers with all the relevant details of the tender.

Further, as per guidelines of the CVC, notifications for public tenders are required to not only be published in trade journals and newspapers, but also on the website of the concerned public authority along with all the relevant bid documents forming part of the tender.

In this regard, certain states in India have formulated specific requirements for the publication of notices inviting tenders. For instance, the State of Rajasthan requires the notices inviting tenders for procurement contracts which are above INR 10 million to be published on the notice board of the procurement authority, in one regional newspaper, one state-level newspaper as well as in one all-India-level daily newspaper having wide circulation. While, in the State of Tamil Nadu, tender notices for contracts that have an estimated value above INR 750 million, are to be mandatorily published in all editions of Tamil Nadu's English and regional language newspapers, as well as the Indian Trade Journal.

The time period within which the bidders have to respond to the notice inviting tenders is at the discretion of the relevant authority publishing these notices and varies depending upon the nature of the procurement. The Bill states that in fixing the last date for submission of bids, the procurement entity must take into account the need of the bidders and accordingly the bidders must be provided with reasonable time to prepare and submit their bids.

6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders?

In cases wherein the procurement of contracts involves an initial selection stage, before invitation to tender documents are issued, the bidders are usually selected on the basis of the eligibility criteria determined by the procurer/ authority. Such eligibility criteria are not fixed or tailor made and are usually formulated to promote competition and transparency.

In the case of defence procurement contracts, at the first instance, a request for information (RFI) is issued to all original equipment manufacturers (OEMs) and upon receipt of information from these players, the criteria and specification of procurements are set out and

finalised, after which the tenders are issued. Since most of the utilities are owned by government entities or PPP entities, they are required to follow the applicable procedure for procurement for selection of the bidders.

7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so what are those grounds of mandatory exclusion?

At the outset, there are no specific grounds of exclusion which have been prescribed. The CVC recommends that government procurement entities should adopt an Integrity Pact (**Pact**) with the bidders/ contractors. The Pact is adopted by almost all parties in the public procurement process and would cover instances of bribery and corruption.

The model Pact provides, that in case the bidder or the contractor before being awarded the contract or during its execution has engaged in or committed a transgression which is in violation of its commitments (as mentioned below) or has put its reliability or credibility in question, the procuring entity is entitled to disqualify such bidder/ contractor from the tender process and/or impose a ban on business dealings with such bidder/ contractor.

The commitments of the bidders/ contractors include:

- The bidder/ contractor shall not give any of the employees of the procuring entities involved in the tender process, any material or other benefit in order to obtain any advantage during the tender process or during the execution of the contract.
- The bidder/ contractor shall not enter into an undisclosed agreement or understanding (formal or informal) with the other bidders. In other words, the bidder/contractor must not take any action which will restrict competition or introduce cartelization in the bidding process.
- The bidder/ contractor shall not commit any offence under the provisions of the Prevention of Corruption Act, 1988 or the Indian Penal Code, 1860.

The general principle is that the government or any government authority must exercise any discretionary power vested in it in a fair and non- arbitrary manner in the selection process. Any exclusion of a bidder can otherwise be challenged in the Indian courts.

8. Please described a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures.

Procurement procedures in India, are based on the bidding process. The different kinds of bidding procedures typically followed in India are briefly discussed below-

- *Open competitive bidding*: In this type of bidding, the bids submitted by the parties are opened to the public. This type of bidding creates a transparent bidding process, wherein the interested parties are made aware of the selection of the bidder.

- *Restrictive bidding*: In this procedure, the invitation to bid is only sent to a limited number of bidders that have been pre-qualified through a screening process.
- *Two-stage bidding*: Two-stage bidding process is usually taken up where a heightened sense of professional proficiency is required. In such cases, two separate bids (technical and financial) are invited from the procurers.
- *Single source procurement/ Spot purchase*: As opposed to the other procedures covered above, this method is non-competitive and is used in exceptional circumstances after obtaining the approval of a competent authority. The special/exceptional circumstances could be an emergency, limitation of cost or continuance of previous work.

In addition to the above procurement methods/procedures, other methods may also be notified by the Government.

The timelines for procurement in all the above processes varies depending upon the nature of the procurement and the terms of the tender, and may range anywhere between 6 to 15 weeks.

It may also be noted, that the decision of the procurer to subscribe to one of the above procedures depends upon the subject matter and the nature of procurement. The procuring entity is required to ensure that the method chosen must be consistent with the criteria of pre-qualification and any restrictions that are imposed before execution.

9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured?

Approach for procurement for a relatively low value contract is usually the same as complex contracts and procuring entities are bound to act in a just, fair, equitable and transparent manner.

10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?

The current best practice that is adopted over and above ensuring compliance with the relevant procurement regime is the electronic procurement regime or 'e-Procurement' involving the submission of bids through the online portal created for this purpose. For encouraging electronic submission of bids, the Government has created a central public procurement portal (CPPP) within which all the prerequisites and authentications are carried out and the documents are also published. As a process, prior to submission of bids on the portal, the bidders are required to enroll themselves on the CPPP.

11. Please explain any rules which are specifically applicable to the evaluation of bids.

There are no specific rules which have been prescribed to evaluate the bids. The evaluation and selection process and mechanism are subject to the requirements prescribed in the bid documents, which may vary. However, the Supreme Court of India has laid down principles in various judicial precedents which are used as guidelines for evaluation of bids. These principles broadly provide for fairness, transparency, equality, non-arbitrariness and non-discriminatory treatment of bids.

Based on these principles laid down by the Supreme Court of India, the procuring entity usually evaluates the bids on the basis of:

- (a) Price or economic efficiency;
- (b) Quality of goods/ raw material;
- (c) Costs of operation;
- (d) Terms of payment;
- (e) Guarantee;
- (f) Technical competence; and
- (g) Professional competence

In addition to the abovementioned principles, a commonly adopted method for the selection of bids is the selection of the lowest bid (referred to as the *L1 method*). This method is usually adopted in case of rate contracts or lump sum contracts.

Another commonly used method for evaluation, is the selection of the highest bidder method (referred to as the H1). This method is usually adopted in cases of revenue sharing contracts or a contract where an upfront premium is payable to the procurer. Yet another method of evaluation is wherein the bidder requires the shortest concession period is selected. This method is usually adopted in concession projects involving a fixed revenue stream.

The procurer may also select a bidder based on their combined scores from the evaluation of their technical bid and financial bid calculated on the basis of a pre-determined weightage basis.

However, procurers are not bound to evaluate and select bids based on these methods and select the bid quoting the highest price or the highest evaluated bidders and have the discretion to select another bidder if they are convinced that the selection process was fair,

just and reasonable.

12. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder.

At the outset, there is no obligation on the procuring authority/bodies to provide reasons for their award or selection of a bidder to the other unsuccessful bidders. However, since Government entities fall within the purview of 'state' under Article 12 of the Constitution of India, they are bound by the provisions of the Right to Information Act, 2005 and may be required to disclose their reasons in case an unsuccessful bidder makes a formal request under the Right to Information Act, 2005.

The exceptions to the disclosure *inter alia*, includes such information the disclosure of which:

- would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interest of the 'state', its relation with any foreign state, or lead to incitement of any offence;
- has been expressly forbidden to be published by any court or disclosure of which may constitute contempt of court;
- would cause a breach of privilege of the parliament of India or a state legislature; and
- includes the information such as commercial confidence, trade secrets or intellectual property rights and cabinet papers including records of deliberations of the council of ministers, secretaries and other officers which are not required to be disclosed.

13. What remedies are available to unsuccessful bidders in your jurisdiction?

The unsuccessful bidders may challenge the bidding process by invoking the writ jurisdiction of the concerned High Courts or the Supreme Court of India, as the case may be. In the event, the unsuccessful bidder manifestly establishes before the writ court that the procuring entity while evaluating the bids violated the principle of fairness, transparency and equal treatment and the procurement process has been carried out in an arbitrary and discriminatory manner, the writ court may cancel the contract awarded to the bidder. The writ court may also direct the procuring entity to initiate the procurement process afresh so that irregularities occurred during the evaluation stands corrected in compliance with the afore-stated settled principles. The courts are however careful before interfering in the bidding process. In various decisions, courts have held that the terms of invitation of *tender* are not open to judicial scrutiny. The *courts can interfere* only if the policy decision is arbitrary, discriminatory or mala fide.

14. Are public procurement law challenges common in your jurisdiction?

It is not uncommon for bidders to challenge the public procurement process in India. The challenge itself may not cause reputational harm, though a bidder may possibly suffer such harm due to its blacklisting by the procurer for a specified time period. The challenge also

does not usually affect the prospects of future procurement contracts, as the evaluation criteria for each procurement is separate and independent unless a bidder has been blacklisted for a certain period of time. The above concerns however often weigh on the minds of the bidders.

The cost involved in such procurement challenge claims depends upon a number of factors including process of challenge, the number of hearings involved and the legal fees charged by counsels.

15. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case).

The adjudication of disputes in Indian courts can be time consuming and cumbersome. A dispute raised against the procurement process by way of a writ jurisdiction may be resolved within 2-3 months but could take up to a few years based on various factors such as the complexity of the case, nature of dispute and the forum where the dispute is raised.

The key stages in the resolution of a dispute involving a challenge to the procurement process, would include (i) filing a writ petition before the concerned state high court; (ii) admission of writ petition by the concerned court; (iii) reply/counter affidavit to the writ petition by the procurer; (iv) rejoinder to the reply by the petitioner; and followed by (v) submission of oral arguments before the court.

16. What rights/remedies are given to bidders that are based outside your jurisdiction?

The rights/ remedies available to foreign bidders/ bidders based outside India are the same as those afforded to bidders in India. Further, since, the Constitution of India mandates equality before law and prohibits discrimination, the foreign bidders would not be treated differently but as per rule of law. There is also no preferential treatment given to any bidders from any particular jurisdiction or country including members of GPA or EU.

17. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract?

There is no discrimination in the bidding process for subsidiary entities of an overseas bidder and Indian bidders. The subsidiary of an overseas-based bidder, will be afforded the same rights and remedies as a nationally owned company bidding in India. The Indian subsidiary would be treated as a domestic entity in seeking remedies before Indian courts.

However, certain procurement criteria may provide for additional requirements for foreign bidders (upon being declared as successful bidder) such as, incorporation of an SPV /subsidiary in India, wherein the foreign bidder is required to maintain certain level of

ownership or control during the period of the contract. Certain bids may also have conditions regarding supply of certain quantity of goods which are manufactured locally.

18. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues?

There is no specialist court/ tribunal which has been authorised to deal with matters specifically relating to public procurement issues. The unsuccessful bidders, who may want to challenge the bidding process can invoke the writ jurisdiction of the concerned High Courts or the Supreme Court of India, as the case maybe.

The adjudication of disputes arising out of or in relation to the public procurement contracts, will either fall with the arbitral tribunal or the civil courts having jurisdiction to entertain such disputes, depending upon the terms of the contract and the value of the claim sought.

19. Are post-award contract amendments/variations to publically procured, regulation contracts subject to regulation in your jurisdiction?

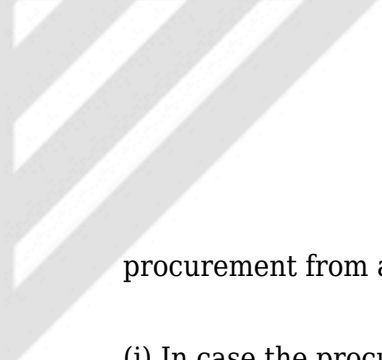
At the outset, contracts in India are governed by the provisions of the Indian Contract Act, 1872, pursuant to which the parties to a contract are free to mutually amend the contract. However, amendments or variations to the terms and specifications of the contract after the bid has been procured is usually not acceptable by the procurer and may be permitted only on a case to case basis under extraordinary circumstances. The intent behind dealing with the amendments or modifications, is always to prevent losses to the public exchequer and therefore, only where the modifications and amendments are considered to be necessary and inevitable, such amendments to the contract may be allowed after considering its financial consequences.

In relation to the changes to the identity of the supplier as a result of sale or insolvency may be permitted, subject to the terms and conditions of the contract as well as the prior permission of the procuring authority. Depending upon the terms of the contract, such changes may also result in a right to termination by the procuring authority.

20. How common are direct awards for complex contracts (contract awards without any prior publication or competition)?

Direct awards are not common in India. Having said that, there may be certain situations where such direct awards or procurement from a single source are permitted. The Supreme Court of India, in this regard has held that though the normal course of action while undertaking public procurement is an auction or calling for tenders, there may be certain exceptional circumstances wherein the usual course of auction and bidding may not be pursued.

The GFR 2017, provides that contracts may be awarded on a nomination basis or



procurement from a single source may be resorted to, in the following limited circumstances:

- (i) In case the procurer or the awarding authority has knowledge that only a particular firm manufactures the required goods; or
- (ii) In case of any emergency; or
- (iii) For the purpose of standardization of machinery or spare parts to be compatible to the existing sets of equipment.

An award resulting from single source procurement may be challenged on grounds such as (i) the process being in violation of the Constitution of India and/or violation of any applicable laws in force; (ii) the lack of transparency in conducting the procurement process; or (iii) unreasonableness or arbitrary conduct resorted to for procurement.