

India

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Legislative framework

1 What is the relevant legislation regulating the award of public contracts?

India has a quasi-federal constitution, with a pro-federal leaning. The Union List, the State List and the Concurrent List in the Indian Constitution govern the legislative functions of the central (union) and state governments.

'Procurement' does not figure in any of the lists as a distinct subject though the subject is covered under the State List heading 'Trade and Commerce'. The union can also legislate on the subject under its residuary powers. Parliament has not enacted any legislation on the subject so far (see question 4). Several states have enacted legislation on the subject, but the law is not comprehensive. Hence public procurement is governed by government policies and court judgments. The policy framework primarily covered by the General Financial Rules (GFR) 1963 (amended in 2005 and 2017) framed by the Ministry of Finance by executive order and the Delegation of Financial Powers Rules 1978 (again framed by the Ministry of Finance). The GFR 2017 was issued by the Ministry of Finance on 11 February 2017 and came into force on 8 March 2017. Rule 153 (iii) of the GFR 2017, allows the Central Government to provide (by way of notification) mandatory procurement of any goods or services from any category of bidders, or provide for preference to bidders on the grounds of promotion of locally manufactured goods or locally provided services. Pursuant to this, on 15 June 2017, the Ministry of Commerce and Industry issued the Public Procurement (Preference to Make in India), Order 2017 on 15 June 2017. (See 'Update and trends' for more on the Make in India Order, 2017).

The *Directorate General of Supplies and Disposals Manual on Procurement* and the Central Vigilance Commission (CVC) Guidelines prescribe the procurement procedure to be followed by all central ministries. In furtherance to these rules, in August 2006 the Central Government, through the Ministry of Finance, carried out a detailed exercise and issued three manuals providing for procurement of goods, works and services. These manuals are meant to be guidelines to government ministries, relevant departments and public sector undertakings. The Ministry of Finance, Department of Expenditure issued a revised manual on the Procurement of Goods 2017 on 5 April 2017 and manual for Procurement of Consultancy and Other Services 2017 on 18 April 2017.

State governments generally follow the same procedure as the Central Government.

Judicial review of administrative action is vested in the high courts exercising their writ jurisdiction. Each state of the union has a High Court as its apex court.

2 Is there any sector-specific procurement legislation supplementing the general regime?

There is no legislation for procurement, as stated in question 1. However, there exist some sector-specific guidelines and regulations.

Procurement by the Ministry of Defence is covered by the Defence Procurement Procedures 2016 introduced by the Ministry of Defence on 28 March 2016 (replacing the 2013 version) and the Defence Procurement Manual 2013. The Ministry of Defence issued the Defence Procurement Manual 2016 on 4 November, 2016.

The Electricity Act 2003 provides for the determination of tariffs through a bidding process for the procurement of power by distribution licensees.

Under the Petroleum and Natural Gas Regulatory Board Act 2006, a board was constituted that introduced the New Exploration Licensing Policy over 1997 to 1998 to enhance exploration activity in the country. Bids are evaluated by the board on the basis of transparent quantitative bid evaluation criteria; the key criteria being technical capability, financial capability, work schedule and fiscal package.

The government of India has also developed special procedures and guidelines for the procurement of public-private partnership (PPP) projects (see question 9). There are no separate central rules or regulations governing works or service concessions. States including Gujarat, Andhra Pradesh, Tamil Nadu, Himachal Pradesh, Punjab and Bihar have infrastructure development laws that include matters pertaining to work or services concessions.

3 In which respect does the relevant legislation supplement the EU procurement directives or the GPA?

India has not acceded to the World Trade Organization's Agreement on Government Procurement.

4 Are there proposals to change the legislation?

In January 2011, a committee on public procurement was set up, which recommended that a public procurement law be enacted as soon as possible. Thereafter, a Group of Ministers on Corruption (an ad hoc group formed to investigate specified matters) approved the Draft Public Procurement Bill 2012. This Bill has, however, since lapsed.

Applicability of procurement law

5 Which, or what kinds of, entities have been ruled not to constitute contracting authorities?

The rules governing public procurement are binding only on the 'state' as defined in article 12 of the Constitution of India. 'State' is widely defined and interpreted to include not only the government, but also agencies and other autonomous bodies directly or indirectly controlled by it. Therefore, private bodies not under the government's control are not bound by the procurement procedures described in question 1.

6 Are contracts under a certain value excluded from the scope of procurement law? What are these threshold values?

The procurement rules and policies mentioned in question 1 are applicable to all contracts, except those of a very low value (generally US\$400 or less).

7 Does the legislation permit the amendment of a concluded contract without a new procurement procedure?

After the awarding of the contract, the terms thereof including the scope and specifications specified should not be 'materially varied'. In exceptional cases, however, where the modifications and amendments are 'unavoidable', the same 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.

8 Has there been any case law clarifying the application of the legislation in relation to amendments to concluded contracts?

Illustratively, in *Nex Tenders (India) Private Limited v Ministry of Commerce and Industry and Ors* (W P (C) No. 6,574 of 2007) the petitioner sought to challenge the extension and amendment of a government contract for providing services for the conduct of e-tendering, which according to the petitioner had the effect of widening the scope of the contract. The Delhi High Court quashed the extension and amendment of the original contract as 'the same materially and illegally alters the terms and conditions and scope of the original contract, which itself was entered into irregularly'.

9 In which circumstances do privatisations require a procurement procedure?

If the public entity or function is transferred into private ownership, a procurement procedure is required. On 16 May 2007, the Ministry of Finance issued special procedures and guidelines for procurement of PPP projects. The bidding process for PPP projects has been divided into two stages. The first stage is generally referred to as a request for qualification or expression of interest. The objective of the first stage is to shortlist eligible bidders for the second stage of the process. The second stage is generally referred to as the request for proposal or invitation of financial bids. Here, shortlisted bidders conduct a comprehensive examination of the project and submit their financial offers. On 18 May 2009, the Ministry of Finance issued revised guidelines for request for qualification (RFQ) for pre-qualification of bidders for PPP projects. Some of the main changes in the RFQ include elimination of the provision relating to shortlisting of bidders for more than one project. Provision has been made to:

- enable the project authority to specify restrictions to prevent concentration of projects in the hands of a few entities;
- make suitable amendments to meet social sector and other project requirement;
- increase the number of shortlisted bidders from five to six and further to seven in projects costing less than 5 billion rupees or for repetitive projects; and
- create a reserve list of bidders in case of substitution in the event of their withdrawal or rejection.

In 2011, the Department of Economic Affairs formulated an extensive policy for PPP projects including rules for regulating expenditure, appropriation of revenue, contingent liabilities, etc. However, this is still at the consultation stage within the government and has not yet been finalised. In April 2016, the Department of Economic Affairs introduced the *PPP Guide for Practitioners*, which serves as a manual for practitioners to develop projects through appropriate PPP frameworks.

10 In which circumstances does the setting up of a public-private partnership (PPP) require a procurement procedure?

See question 9.

Advertisement and selection

11 In which publications must regulated procurement contracts be advertised?

See question 19.

12 Are there limitations on the ability of contracting authorities to set criteria or other conditions to assess whether an interested party is qualified to participate in a tender procedure?

As a result of the mandate of the Constitution of India, the government and its agencies cannot treat citizens unequally, discriminatorily, arbitrarily or unreasonably. It must not waste public money and is accountable to judicial action if it attempts to do so. The CVC Guidelines in this regard also state that there must be transparency, fairness and maintenance of competition.

13 Is it possible to limit the number of bidders that can participate in a tender procedure?

As per the Guidelines issued by the CVC from time to time, the emphasis has been on open tendering as the most preferred mode of

tendering and widest possible publicity. In some cases, the procuring entity may limit the number of bidders. However, a statement of reasons to justify such imposition to limit the bidders must be provided by the procuring entity.

14 How can a bidder that would have to be excluded from a tender procedure because of past irregularities regain the status of a suitable and reliable bidder? Is the concept of 'self-cleaning' an established and recognised way of regaining suitability and reliability?

Under Indian law, there is no concept of 'self-cleaning', nor is there any measure to judge it. Exclusion and the extent thereof are subject to judicial review (among other things, on the grounds of proportionality).

After the specified period of exclusion is over, the officer in charge of procurement shall review the case and submit its report to the competent authority either recommending or rejecting the enlistment of the contractor. The competent authority may allow the enlistment of the contractor based on the recommendations and its own evaluation and findings.

The procurement procedures

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency and competition?

Yes.

16 Does the relevant legislation or the case law require the contracting authority to be independent and impartial?

Yes.

17 How are conflicts of interest dealt with?

The general rule prescribed by courts, as part of the administrative law of India, is that any person having a conflict of interest will not be part of the bid evaluation or award process. More specific provisions can be found in the documents created in relation to PPP projects (see question 9). The PPP bid document, among other things, provides that a bidder shall not have any conflict of interest and if it does, the authority shall forfeit the bid security or performance security bond as damages (without prejudice to any other right the authority may have). Conflict of interest is defined to include, among other things, when:

- a bidder or its constituent has a common controlling shareholding or other ownership interest;
- a constituent of a bidder is also a constituent of another bidder;
- two bidders have the same legal representation for the purposes of the bid;
- the bidders have a relationship that allows them access to each other's information or to influence the bid of any bidder; or
- the bidder has participated in preparation of any document, design or technical specification for the project.

Further, most government authorities are required to adopt the Integrity Pact recommended by Transparency International; this, among other matters, requires that the owner must exclude from the bidding process any known prejudiced person. The GFR 2017 state that no official of a procuring entity or bidder shall act in contravention of the Code of Integrity, which includes disclosure of conflict of interest.

18 How is the involvement of a bidder in the preparation of a tender procedure dealt with?

Any involvement of the bidder in the bidding process including in the drafting of tender documents or discussing possible specifications would lead to disqualification. Where the code of integrity has been breached, debarment for a period not exceeding two years may follow.

19 What is the prevailing type of procurement procedure used by contracting authorities?

The general rule is that any tender above a value of 2.5 million rupees must be through invitation by public advertisement. There are five types of tenders as per the GFR 2017:

- advertised tender enquiry;
- limited tender enquiry;

- single tender enquiry;
- two stage bidding; and
- electronic reverse auctions.

Ordinarily most procurement is conducted through advertised tender enquiries. The advertisement must be issued in the *Indian Trade Journal* (published by the government) and additionally in a national newspaper having wide circulation. The government has created a central public procurement portal where the advertisement is also to be published. Further, it should also be published on the website of the organisation. In the case of a global tender, the tender notice should be sent to the concerned foreign embassies requesting them to give it wide publicity and also post the tender notice on embassy websites.

Exceptions to the general rule of advertisement are:

- organisation certifies that the demand is urgent, setting out the nature of urgency and reasons why the need could not be anticipated earlier;
- the competent authority sets out reasons why it would not be in the public interest to procure the goods or services through advertised tender enquiry; and
- the sources of supply are definitely known and the feasibility of new sources beyond those being used are remote.

In such cases, a limited tender enquiry can be sent to all firms registered with the organisation or otherwise through the usual means of communication.

20 Can related bidders submit separate bids in one procurement procedure?

The tender documents usually prohibit 'related bidders' from submitting separate bids. The definition of related bidders can vary from instance to instance but the general intent is to prevent cartelisation and a party being able to make multiple attempts in the same process.

21 Is the use of procedures involving negotiations with bidders subject to any special conditions?

Post-tender negotiations are discouraged. This is specifically stated in government guidelines (CVC Guideline dated 3 March 2007). Even post-tender negotiations with the lowest bidder (L1) are not permitted, except for reasons to be recorded in writing.

The GFR 2017 also state that negotiation with bidders after bid opening must be 'severely discouraged'. However, they state that in exceptional cases 'where price negotiation against an ad hoc procurement is necessary owing to some unavoidable circumstances, the same may be resorted to only with the lowest evaluated responsive bidder'.

The basic principle is that there shall be no competitive dialogue. In some situations retendering may be ordered. This may be if L1's price does not seem to be reasonable and it is not willing to negotiate the same or sufficient number of tenders or responsive tenders have not been obtained.

In exceptional cases, for instance, during natural disasters, where procurement is possible from a single source, the bids offered were too low or the tendering was held on numerous dates but no bidders were present, then in such situations such contracts may be awarded through private negotiations.

22 If the legislation provides for more than one procedure that permits negotiations with bidders, which one is used more regularly in practice and why?

See question 21.

23 What are the requirements for the conclusion of a framework agreement?

The requirements for the conclusion of a framework agreement are not provided for in the procurement procedure.

24 May a framework agreement with several suppliers be concluded?

Yes, a framework agreement (commonly referred to as 'rate contracts' in India) may be entered into with one or more suppliers for a specified period of time where the procuring entity is unsure of its specific requirements. The prices may be predetermined or determined at the

stage of actual procurement. It is up to the procuring entity whether to adopt an additional competitive procedure. This, however, is limited to low value orders.

25 Under which conditions may the members of a bidding consortium be changed in the course of a procurement procedure?

There is no specific prohibition against changing consortium members in the general procurement legislation. However, in PPP documents, there is a restriction on changing of consortium members. The authority may permit the same during the bidding stage where the lead member continues as before and the substitute is at least equal in terms of technical or financial capacity to the member sought to be replaced. Approval for change of composition shall be at the sole discretion of the authority.

26 Are there specific mechanisms to further the participation of small and medium-sized enterprises in the procurement procedure? Are there any rules on the division of a contract into lots? Are there rules or is there case law limiting the number of lots single bidders can be awarded?

Yes. The Ministry of Micro, Small and Medium Enterprises had formulated a public procurement policy for micro, small and medium-sized enterprises (MSMEs), which had been approved by the cabinet in November 2011. An order dated 23 March 2012 was issued, titled the Public Procurement Policy for Micro and Small Enterprises Order 2012. It states that the Central Government, departments and public sector undertakings shall procure a minimum 20 per cent of their annual value of goods or services from micro and small enterprises. This minimum procurement has become mandatory from April 2015.

The policy also includes a further reservation of 4 per cent in favour of MSMEs owned by specified 'backward classes'. The Ministry of Micro, Small and Medium Enterprises issued a Circular dated 10 March 2016 allowing central public sector undertakings to relax the norms of 'prior experience and prior turnover' for those MSMEs that can deliver goods as per prescribed technical and quality specifications. The Ministry has also stated that there is a need for central public sector undertakings to achieve the minimum 20 per cent annual procurement target including 4 per cent by socially disadvantaged classes. It was stated that by the Ministry that during the previous financial year, 38 public sector undertakings managed to achieve the 20 per cent procurement target.

There are no rules on the division of a contract into lots.

27 What are the requirements for the admissibility of variant bids?

Variant bids will be considered only if permitted by the tender conditions. Otherwise the tender is liable to be rejected.

28 Must a contracting authority take variant bids into account?

Yes, if permitted by the terms of the tender. (See question 27.)

29 What are the consequences if bidders change the tender specifications or submit their own standard terms of business?

Any unilateral change by the bidder may result in the bid being considered unresponsive and being rejected. However, if the deviation is a mere technical irregularity or of no significance and does not pertain to an essential condition of eligibility, the authorities have discretion to waive the same.

30 What are the award criteria provided for in the relevant legislation?

The general rule is that the tender is awarded to L1. The exceptions are if the price of L1 looks unreasonable and it is not willing to negotiate or if it is considered that the organisation has not received a sufficient number of bids or responsive bids. In such situation there can be a retender. Otherwise, the tender will be awarded to L1 without negotiation.

Update and trends

The General Financial Rules (GFR) of 2017 were issued by the Ministry of Finance on 11 February 2017 and came into force on 8 March 2017 (a notification was issued by the Ministry of Finance). The government's focus in the GFR is to boost e-procurement through e-commerce portals, including online purchase of goods and services by various Central Government ministries and departments. The intent is to migrate to an internet-based platform. The GFR 2017 has introduced the concept of a government e-marketplace (GeM). The Directorate General of Supplies and Disposal or any competent agency will host an online portal for common use goods and services utilised by government buyers for direct online purchases. The procurement of goods and services by ministries or departments will be mandatory for goods or services available on GeM. The Ministry of Commerce and Industry issued the Public Procurement (Preference to Make in India), Order 2017 on 15 June 2017 as a part of the policy of the Government to encourage 'Make in India' and to promote manufacturing and production of goods and services in India with a view to enhancing income and employment.

The Ministry of Finance, Department of Expenditure issued revised manuals on the Procurement of Goods 2017 on 5 April 2017 and for Procurement of Consultancy and Other Services 2017 on 18 April 2017. These manuals have been revised keeping in mind the fundamental principles of transparency, fairness, competition, economy,

efficiency and accountability to be adopted in the procurement process.

It is now also mandatory for all procuring entities to publish their tender enquiries and receive all bids through e-procurement portals. Exemption is granted in cases where confidentiality is required or for reasons of national security with the approval of the competent authority.

Presently, the proposed Public Procurement Bill has failed to gain any momentum. The focus now is on legislation that enhances the ease of doing business. At the UN Global Compact India Conference held in June 2016, various stakeholders made a few suggestions.

First, there should be no monetary threshold except for emergency procurement and procurement for national security.

Second, where the procuring entity may not know in advance the technical, financial or legal means to identify its procurement needs it can enter into a dialogue with qualified bidders to set these specifications and select options with the best price-quality ratio, while maintaining neutrality in the sense that none of the dialogue partners has access to more information than any of the others.

Third, there should be a system to question the genuineness of abnormally low-priced tender offers. Fourth, there should be some system to check abuse of monopoly powers in single-source procurement.

Another suggestion was that 'sustainable public procurement' norms should be incorporated.

31 What constitutes an 'abnormally low' bid?

As per the *Manual for Procurement of Goods 2017*, an 'abnormally low bid' is one in which the bid price, in combination with other elements of the bid, appears so low that it raises material concerns as to the capability of the bidder to perform the contract at the offered price. 'Abnormally low' bids vary from the estimated rates by more than 25 per cent even after updating the scheduled rates to match the prevailing cost index.

32 What is the required process for dealing with abnormally low bids?

Abnormally low tenders may lead to a conclusion of anticompetitive behaviour and this is a ground to order retendering. Factors have been prescribed to judge the reasonableness of price, such as current market price, price of raw materials, period of delivery and quantity involved (though these are usually resorted to if the price is found to be too high and not abnormally low).

Review proceedings

33 Which authorities may rule on review applications? Is it possible to appeal against review decisions and, if so, how?

A tenderer shall have a right to be heard if it feels that the proper tendering process has not been followed or that its bid has been wrongly rejected. Such representation has to be sent to the specified authority within one month of the adverse order and be responded to by the said authority within one month thereof. Further, the Independent External Monitors appointed under the Integrity Pact can be approached seeking review of any decision. Save for this, the decision of a contracting authority is final unless challenged before a court of law. Judicial review would lie before the High Court of the relevant state. This is an exercise of the writ-issuing powers conferred on the high courts by the Constitution of India. The Indian judiciary is independent and proactive. It can review administrative actions if they are vitiated by any bias, arbitrariness, unfairness, illegality, or if they are discriminatory or irrational or even grossly unreasonable.

34 If more than one authority may rule on a review application, do these authorities have the power to grant different remedies?

Yes, if an appellate authority is provided for it generally has the power to modify or reverse the decision delivered by the subordinate authority. These are administrative procedures.

35 How long do administrative or judicial proceedings for the review of procurement decisions generally take?

This would vary from case to case. In straightforward cases of violation of constitutional principles, the review procedure may take up to 60 days – in other cases it may take up to two years.

36 What are the admissibility requirements?

The scope for interference in a procurement procedure is limited and the courts, over a period of time, have devised rules under which they may admit a challenge to a tender. The courts would interfere only in cases where the procedure followed is arbitrary, irrational or grossly unreasonable (see question 33), or the procedure prescribed has not been followed. The view taken is that interference by the courts in commercial transactions concerning the state is not justified except where there is substantial public interest involved and where the transaction is mala fide. The courts have affirmed from time to time that the government and its undertakings must have a free hand in setting terms of the tender. The court cannot interfere with the terms of the tender prescribed by the government merely because it feels that some other terms would have been fair, wise or logical.

37 What are the time limits in which applications for review of a procurement decision must be made?

There is no deadline for approaching a court in its writ jurisdiction. However, the court expects an aggrieved party to approach the court in good time and may decline to interfere if there has been an unreasonable delay.

No appeal lies as a matter of right but in cases of public importance, where significant questions of law are involved or where the high court decision is grossly erroneous, an appeal would lie with the Supreme Court. The period for the same is 90 days.

38 Does an application for review have an automatic suspensive effect blocking the continuation of the procurement procedure or the conclusion of the contract?

No. A suspension can only be ordered by a court issuing an interim order. This is granted on consideration of the merits on a prima facie basis and the balance of injury to parties.

39 Approximately what percentage of applications for the lifting of an automatic suspension are successful in a typical year?

See question 38.

40 Must unsuccessful bidders be notified before the contract with the successful bidder is concluded and, if so, when?

No. The GFR 2017 only make it mandatory for the procuring entity to publish details of the bid award on a central public procurement portal.

41 Is access to the procurement file granted to an applicant?

The procurement file is treated as confidential and may not be disclosed to any person not officially involved in the procurement process. However, an application under the Right to Information Act may be made seeking disclosure of the file, including the classification, evaluation and comparison process.

An application for disclosure can be declined on several grounds, including if the state concludes that the information concerns commercial or trade secrets of third parties. Further, the third parties involved are required to be notified and heard before ordering the disclosure of information submitted by them. Besides, the court under its writ jurisdiction may call upon the state to produce the procurement file for the court's perusal (to satisfy itself or due process). The court may, at its discretion, also allow disclosure of the whole or part of the file to the parties in dispute.

42 Is it customary for disadvantaged bidders to file review applications?

Since Indian courts are independent and proactive, it is fairly common for disgruntled bidders to seek judicial review.

43 If a violation of procurement law is established in review proceedings, can disadvantaged bidders claim damages?

So far there has been no reported case of a disadvantaged bidder claiming damages. However, in a 2007 decision (*Jagdish Mandal v State of Orissa* (2007) 14 SCC 517), the Supreme Court held obiter that, in

order to claim damages, the disadvantaged bidder must establish the process adopted or decision made by the authority was made in bad faith or intended to favour someone, or so arbitrary and irrational that the court can say that no responsible person acting reasonably and in accordance with the relevant law could have reached it, or the public interest is affected.

44 May a concluded contract be cancelled or terminated following a review application of an unsuccessful bidder if the procurement procedure that led to its conclusion violated procurement law?

This would depend upon the facts of the case and discretion of the court. Sometimes, where third-party interests have crystallised and public interest is involved, the court may not cancel the contract. See also question 36. However, there are cases to the contrary (see *Dr Subramanian Swamy v Union of India*, 2012 (3) SCC 1).

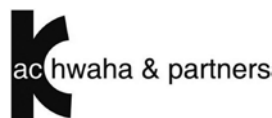
45 Is legal protection available to parties interested in the contract in case of an award without any procurement procedure?

Any party deprived of a contract owing to an illegal or unconstitutional procedure can approach the High Court in its writ jurisdiction and seek redress. As to the grounds for interference, see questions 12 and 33.

46 What are the typical costs of making an application for the review of a procurement decision?

The court fees involved in an application for review of a procurement decision are fixed and nominal (usually a few hundred US dollars). Counsel costs have a large variation.

Indian courts do not award realistic costs to the prevailing party, neither is a litigant seeking interlocutory relief subjected to conditions.



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