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Internationalisation of government procurement
regulation: The case of India

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Abstract

In the absence of a national public procurement policy, a plethora of rules and procedures govern public purchase practices of federal and sub-federal government entities including public sector enterprises (PSEs) in India. While these norms generally follow international best practices, their implementation falls short in providing transparency, accountability, efficiency and professionalism in the award of public contracts. With mandatory e-tendering of federal, sub-federal and PSE contracts already in place, enacting the lapsed Public Procurement Bill 2012, which inter alia provides for an independent dispute resolution mechanism and integrating states within a national procurement policy would complete the set of reforms needed to usher in transparency and efficiency in public purchases and internationalise the country's government procurement regulation.

Keywords

Government procurement, India, e-procurement, dispute settlement, transparency

JEL code: H57

1. Introduction*

India is a federation of states with multiple layers of governance. Understandably therefore, procurement occurs at various levels of government in India. These include the central government, the state governments, and the three tiers of local government - village, intermediate, and districts. Additionally, there are centrally and state-owned enterprises (SOEs). There is no single uniform law governing procurement by all of these public entities; instead a framework of rules, codes and manuals governs procurement distinctly at the federal level, sub-federal levels, by SOEs and by entities within the Ministry of Defence and Indian Railways.

Given the diversity and complexity within the country and India's colonial legal legacy, the absence of a single uniform law governing procurement by all of these public entities is not surprising, though the soundness of the procedural framework in place has been noted by the World Bank (2003) in its Country Procurement Assessment Report (CPAR). This said, India would benefit enormously from the harmonization and simplification of these different procedures, leading to improved governance, tax-payers receiving a better value for their money and greater overall efficiency in the economy given the broad range of producer services that governments still deliver within and across the country. Such harmonization and simplification would also make procurement processes more transparent and efficient, improving access for both domestic and foreign suppliers.

In the abstract of its CPAR, the World Bank (2003) also notes that "in the absence of a central lead department or agency in the centre, dedicated to policy and oversight of public procurement, and, in the absence of a central law or state act in public procurement, a 'Public Procurement Law' complemented by a set of Public Procurement Regulations, to replace and consolidate the present fragmented rules, will improve the transparency of the process, and accountability of public officials. Furthermore, the introduction of an independent authority - Public Procurement Tribunal - and a debriefing procedure should be useful steps to improve transparency, as well as simplified review and approval process, and a revamping of blacklisting rules."

Encouragingly, India has already been taking steps in this direction and significantly, all these reforms have been made unilaterally. For instance, the previous central government was involved in the process¹ of legislating a public procurement bill (Public Procurement Bill, 2012²) covering procurements undertaken by central government ministries, departments and SOEs. The Bill incorporates international best practices in this area embedded in the UNCITRAL Model Law on Public Procurement, World Bank guidelines and the WTO's GPA and in some instances, even improves upon them.

Several state governments including Rajasthan, Karnataka and Tamil Nadu have their own public procurement legislations that are also based on international best practices. In fact, the states of Karnataka and Tamil Nadu were the first in the country to implement end-to-end e-procurement even before the central government and since 2012, all central, state and SOE contracts above a certain threshold are mandatorily tendered on an e-portal along with details on contract awards. This e-

* I would like to thank Aris Georgopoulos, Bernard Hoekman and Petros Mavroidis for their invitation to write this paper and Robert Anderson and conference participants for their useful comments.

¹ The Bill had already been passed by the Lower House of the Indian Parliament before the latter was dissolved in the wake of the newly elected government taking office. It would now need to be re-introduced in the Indian Parliament by the new government.

² The draft of the Public Procurement Bill, 2012 is available at the following web address: <http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/58_2012_LS_EN.pdf> and corrigendum thereto at: <http://164.100.24.219/BillsTexts/LSBillTexts/Errata/Cor_EN_58_2012_LS.pdf>

procurement has not only ushered in greater transparency in the system, but also led to “better value for money” either in terms of falling tender premiums (ADB, 2011) or improvements in quality (Lewis-Faupel et.al, 2014).

However despite these advancements, there are many implementation challenges and corruption is rife in the award of public contracts. Besides heterogeneity in performance at the state level, “the quality of the personnel is not as good, and there is much more intervention by politicians, and higher incidence of corruption” (World Bank, 2003, op. cit., page 8). Micro and Small Enterprises (MSEs) continue to receive purchase and price preferences in procurement by central government ministries/departments/SOEs. Moreover, India does not have a domestic bid challenge procedure though the Public Procurement Bill, 2012 has provisions for setting up an independent Procurement Redressal Committee. And the Bill itself needs to be re-introduced in the Parliament by the new government and be subject to review by different committees, the two Houses and approved by the President of India before it becomes an Act.

Against this background, this paper provides a case study of the internationalization of procurement regulation in the context of India. Section 2 provides some estimates of the size of India’s procurement market and access to foreign suppliers. Section 3 details various aspects of India’s procurement policy before discussing the influence of international norms on this policy in Section 4. Section 5 describes the approach towards transparency and statistical reporting while Section 6 provides an overview of existing procurement impact assessment studies in the context of India. Sections 7-8 assess India’s dispute settlement and e-procurement systems and Section 9 concludes, discussing inter alia the internationalization of India’s procurement regulation and the country’s position vis-à-vis the WTO’s GPA.

2. Data

Data on public expenditure (current and capital expenses reported in broad economic categories) are available in the budget and finance documents of various central and state government ministries and departments as well as municipal corporations, but information on actual expenses incurred in the purchase of goods and services cannot be retrieved from these data. There is also no single compiling or reporting agency for data on public procurement in India. Moreover, evidence on contestability of India’s procurement markets is at best anecdotal.

This said, the mandatory e-tendering of above-threshold central, state and SOE contracts since 2012 and details on the award of public contracts is generating a huge information base on procurement in India. An analysis of these central and state e-portals reveals that there is a wealth of procurement information now available for almost all the 29 states and 6 centrally-administered union territories (UTs) and SOEs in the country. This includes information on the value of the contract, number of bidders, name and address of winning supplier, name and sector of procuring entity, dates of tender advertisement and award, tendering method and the number of days to contract implementation. The information on these e-portals can also be used to examine the extent of foreign procurement by Indian governments by entity, state/UT and/or sector. While these details can be accessed online easily, a database on these would have to be assembled manually, which is both tedious and time-consuming.

Estimates are also available of the size of procurement markets and foreign involvement in government procurement in India. These estimates involve different methodologies and sets of data, which explains the differences in them. According to Srivastava (2003), for instance, total value of purchases by the central and state governments and public enterprises, which could in principle be subject to international competitive bidding, varies between 3.4 and 5.7% of GDP. Khurana (2001) estimates government procurement at 3.85% of GDP at current prices for 2002-2003.

India's Trade Policy Review for 2002, in the Report by the WTO Secretariat states "In 2000/01 the estimated value of purchases by the central government procurement agency, the Directorate General of Supplies and Disposals (DGS&D) was Rs. 32.8 billion (around USD 0.8 billion); additional procurement by ministries of central and state governments as well as public sector enterprises was estimated at around Rs. 23.1 billion (approximately USD 0.6 billion) for the year 2000/01." These amounts were 0.2 and 0.1%, respectively, of India's GDP in current USD in 2001.

The CPAR of the World Bank (2003) estimated the value of public procurement at all levels of government at about 13% of the national budgets (over 20% of GDP), while Shingal (2012) estimated the size of the general government procurement market at 7.1% of the country's GDP and value of contestable general government purchases in the range of €6.1-18.4 bn in 2007 (0.7-2.1% of India's 2007 GDP).

Shingal (2012) has developed a methodology to estimate the size of market access in non-GPA countries including India. Using this methodology, he has estimated the access to EU firms in India's procurement markets. The EU's disaggregated breakdown in India's procurement markets for the year 2007 from Shingal (2012) is reported in Table 1. His findings suggest that EU firms supplied Indian federal and sub-federal entities and SOEs goods and services worth €23.8 - €71.4 mn in the year 2007, which was 18.6% of India's total foreign public procurement in that year. These results also suggest that the bulk of public contracts to EU suppliers were awarded in paper, motor vehicles, electronic equipment, other machinery & equipment, other commercial services (OCS) & other government services (OSG) that together accounted for 83.4% of the EU's access in India's public markets.

Table 1: EU's access in India's procurement markets (€'000s, 2007)

Sector	India^a	India^b
Agriculture forests fishery	35.2	105.7
Mining and energy extraction	0.0	0.0
Food beverages tobacco	64.9	194.8
Textiles	266.8	800.3
Wearing apparel	223.0	669.1
Leather products	0.0	0.0
Wood products	0.0	0.0
Paper products, publishing	2988.1	8964.2
Petroleum, coal products	0.1	0.3
Chemical, rubber, plastic products	2050.0	6150.0
Mineral products nec	2.6	7.9
Ferrous metals	0.0	0.0
Metals nec	0.0	0.0
Metal products	165.0	495.0
Motor vehicles and parts	2589.8	7769.5
Transport equipment nec	317.4	952.2
Electronic equipment	4299.0	12897.0
Machinery and equipment nec	3994.2	11982.5
Manufactures nec	86.4	259.2
Electricity	0.0	0.0
Gas manufacture, distribution	18.5	55.6
Transport svcs	756.1	2268.3
Other commercial svcs (OCS)	3307.2	9921.6
Other govt svcs (OSG)	2895.3	8685.9
Total	24059.8	72179.3

Source: Shingal (2012)

Note: The estimates cover central and state government entities as well as SOEs. "a" and "b" correspond to contestable government expenses being 10% and 30%, respectively, of adjusted general government expenses. For detail see Shingal (2012).

A recent source of data on general government finance consumption expenditure (GFCE) is the World Input-Output Database (WIOD, Timmer et.al 2012). The disaggregated breakdown of India's GFCE and public consumption imports in \$ mn for the year 2011 from the WIOD is reported in Table 2. These data suggest that total government final consumption expenditure and total public consumption imports were \$209 trillion and \$7.1 trillion, respectively, in the year 2011. While public administration and defence; education and other community, social and personal services were the major sectors of governments' consumption spending according to these data, the bulk of public consumption imports were made in miscellaneous manufacturing; electrical and optical equipment; machinery; and chemicals and chemical products.

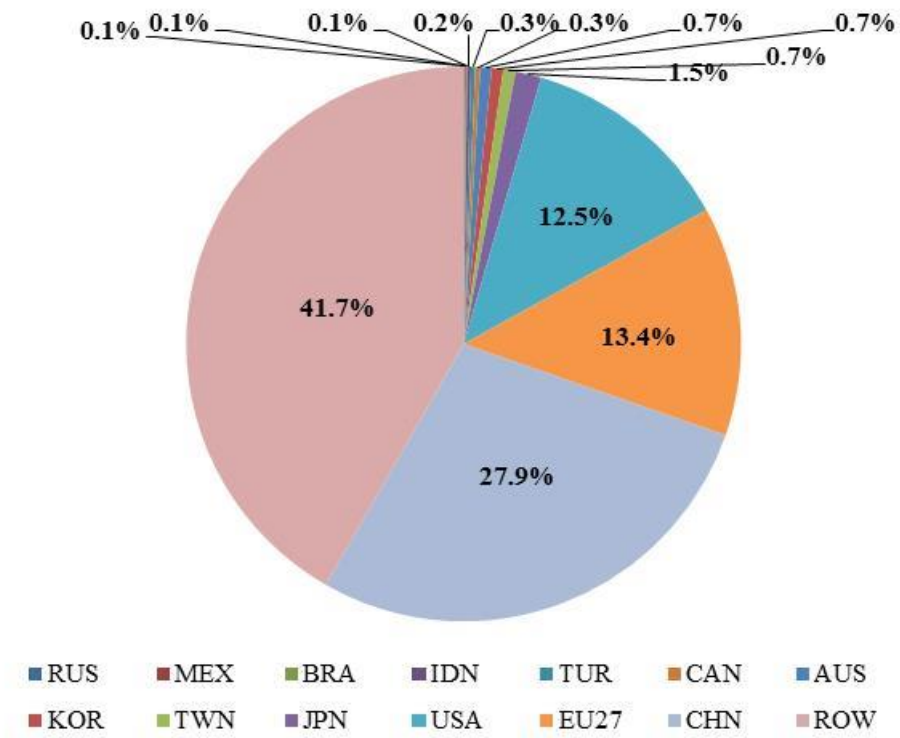
Table 2: Disaggregated breakdown of India's GFCE and public imports (\$ mn, 2011)

Sector	GFCE	Sector share of total (%)	Public imports	Sector share of total (%)
Agriculture, Hunting, Forestry and Fishing	2,757	1.3	29	0.4
Mining and Quarrying	77	0.0	17	0.2
Food, Beverages and Tobacco	1,903	0.9	24	0.3
Textiles and Textile Products	1,899	0.9	156	2.2
Leather, Leather and Footwear	21	0.0	6	0.1
Wood and Products of Wood and Cork	9	0.0	34	0.5
Pulp, Paper, Paper, Printing and Publishing	2,150	1.0	43	0.6
Coke, Refined Petroleum and Nuclear Fuel	1,763	0.8	72	1.0
Chemicals and Chemical Products	1,339	0.6	331	4.6
Rubber and Plastics	252	0.1	81	1.1
Other Non-Metallic Mineral	35	0.0	27	0.4
Basic Metals and Fabricated Metal	501	0.2	160	2.2
Machinery, Nec	682	0.3	367	5.1
Electrical and Optical Equipment	429	0.2	838	11.7
Transport Equipment	1,515	0.7	132	1.8
Manufacturing, Nec; Recycling	276	0.1	4,325	60.2
Electricity, Gas and Water Supply	5,402	2.6	18	0.3
Construction	3,960	1.9	9	0.1
Sale, Maintenance and Repair of Motor Vehicles	145	0.1	13	0.2
Wholesale Trade and Commission Trade	1,125	0.5	66	0.9
Retail Trade; Repair of Household Goods	1,837	0.9	32	0.4
Hotels and Restaurants	3,777	1.8	86	1.2
Inland Transport	3,853	1.8	10	0.1
Water Transport	54	0.0	0	0.0
Air Transport	158	0.1	0	0.0
Other Supporting and Auxiliary Transport Activities	196	0.1	2	0.0
Post and Telecommunications	1,918	0.9	23	0.3
Financial Intermediation	4,799	2.3	81	1.1
Real Estate Activities	0	0.0	0	0.0
Renting of M&Eq and Other Business Activities	2,074	1.0	72	1.0
Public Admin and Defence; Compulsory Social Security	113,309	54.2	15	0.2
Education	30,705	14.7	1	0.0
Health and Social Work	8,251	3.9	1	0.0
Other Community, Social and Personal Services	11,855	5.7	115	1.6
Total	209,025	100	7,188	100

Source: WIOD, Timmer et.al (2012); own calculations

Figure 1 shows the breakdown of India's aggregate public consumption imports by source countries from the WIOD for the year 2011 and shows that China, EU27 and the US were the major suppliers accounting for more than 50% of the total. Table 3, also from the WIOD, reports the disaggregated breakdown of India's public consumption imports by source countries again for the year 2011.

Figure 1: Breakdown of India's aggregate public consumption imports by source countries (2011)



Source: WIOD, Timmer et.al (2012); own calculations

Table 3: Disaggregate breakdown of India's public consumption imports by source countries (\$ mn, 2011)

Sector	AUS	BRA	CAN	CHN	EU27	IDN	JPN	KOR	MEX	RUS	TUR	TWN	USA	ROW
Agriculture, Hunting, Forestry and Fishing	1	0	3	2	3	0	0	0	0	0	0	0	2	17
Mining and Quarrying	0	0	0	12	0	0	0	0	0	0	0	0	0	5
Food, Beverages and Tobacco	0	0	0	5	10	0	0	0	0	0	0	0	1	7
Textiles and Textile Products	1	0	0	49	28	0	1	2	0	0	1	0	7	66
Leather, Leather and Footwear	0	0	0	3	0	0	0	0	0	0	0	0	0	2
Wood and Products of Wood and Cork	0	0	0	7	5	0	0	0	0	0	0	0	3	20
Pulp, Paper, Paper, Printing and Publishing	0	0	0	6	11	0	1	0	0	0	1	0	9	13
Coke, Refined Petroleum and Nuclear Fuel	0	0	0	3	11	0	1	7	0	0	0	3	2	44
Chemicals and Chemical Products	2	1	1	128	93	3	5	4	1	0	0	3	13	77
Rubber and Plastics	0	0	0	38	12	0	2	1	0	0	0	0	4	24
Other Non-Metallic Mineral	0	0	0	10	9	0	0	0	0	0	0	0	1	6
Basic Metals and Fabricated Metal	1	0	0	66	29	0	5	0	0	0	0	0	4	54
Machinery, Nec	1	0	0	249	13	0	5	1	0	0	0	0	5	92
Electrical and Optical Equipment	0	1	1	283	50	4	10	14	4	0	0	14	231	226
Transport Equipment	0	0	0	47	42	0	5	3	0	0	1	0	5	29
Manufacturing, Nec; Recycling	8	3	9	1041	362	7	37	15	1	2	12	29	551	2247
Electricity, Gas and Water Supply	0	0	0	1	16	0	0	0	0	0	0	0	0	1
Construction	0	0	0	0	7	0	0	0	0	0	0	0	0	2
Sale, Maintenance and Repair of Motor Vehicles	0	0	0	0	12	0	0	0	0	0	0	0	0	0
Wholesale Trade and Commission Trade	1	0	0	0	56	0	0	0	0	0	0	0	0	10
Retail Trade; Repair of Household Goods	0	0	0	0	13	0	0	0	0	0	0	0	0	18
Hotels and Restaurants	27	0	4	25	27	0	2	0	0	0	0	0	0	1
Inland Transport	0	0	0	2	1	0	2	0	0	0	0	0	4	1
Water Transport	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Air Transport	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Other Supporting and Auxiliary Transport Activities	0	0	0	0	1	0	0	0	0	0	0	0	0	1
Post and Telecommunications	0	0	0	13	9	0	0	0	0	0	0	0	0	1
Financial Intermediation	0	0	0	0	38	0	1	0	0	0	1	0	29	12
Real Estate Activities	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Renting of M&Eq and Other Business Activities	3	0	0	7	27	0	0	0	0	0	0	0	19	15
Public Admin and Defence; Compulsory Social Security	0	0	0	0	14	0	0	0	0	0	0	0	0	1
Education	0	0	0	0	1	0	0	0	0	0	0	0	0	1
Health and Social Work	0	0	0	0	1	0	0	0	0	0	0	0	0	0
Other Community, Social and Personal Services	1	0	1	12	59	0	31	0	0	0	0	0	3	8
Total	47	6	20	2008	961	15	108	48	6	4	18	51	896	3000

Source: WIOD, Timmer et.al (2012); own calculations

Note however that WIOD data do not include government capital expenses, so the data reported in Tables 2 and 3 underestimate both the value of public procurement and public imports.

This said, in a regressive development, the data reporting requirements in Article XVI: 4 of the Revised GPA (RGPA) are less onerous than those in Article XIX: 5 of the Uruguay Round GPA (URGPA). In particular, unlike the requirements of Article XIX: 5 of URGPA, Article XVI: 4 of RGPA does not require data on awarded public contracts to be reported by the nationality of the winning supplier. In the absence of actual information on market access required to be reported even by GPA Contracting Parties, the only source of internationally comparable information on market access in both GPA and non-GPA country procurement markets remains the WIOD database or using the methodology in Shingal (2012), both of which can only yield estimates. This also makes it difficult to examine the actual impact of the GPA on market access in GPA Contracting Parties.

3. Procurement policy in India³

3.1. The legal framework for government procurement in India

There is no single uniform law governing procurement by various public entities in India; instead a framework of rules, codes and manuals governs procurement distinctly at the federal level, sub-federal levels, by SOEs and by entities within the Ministry of Defence and Indian Railways.

The procurement of goods and services by the central government in India are undertaken pursuant to the General Financial Rules, 2005 (GFR, 2005), and the Delegation of Financial Powers Rules, 1978, as issued by the Ministry of Finance, GoI. The purchase procedures followed by various government departments have evolved in line with these general principles. Where deemed necessary, public procurements are also subject to review by the Central Vigilance Commission (CVC). Procuring entities are required to adhere to the CVC's guidelines in relation to all public procurements.

In addition, there are sector specific guidelines and regulations on public procurement. For instance, defence procurement is undertaken pursuant to the Manual on the Defence Procurement Procedure (DPP), which is issued by the Ministry of Defence from time to time. Procurement of stores for the central government is undertaken pursuant to the manual of the Directorate General of Supplies & Disposals (DGS&D), which is the relevant authority in respect of such procurements.

DGS&D under the aegis of the Department of Supply is the central purchasing organization of GoI. Decentralization in the 1970s restricted the role of the DGS&D to finalizing rate contracts for "common use" items. Since then, the role of the DGS&D has declined gradually and, even in nominal terms, purchases by the directorate have fallen over time. Moreover, other ministries and departments and departmental undertakings have been delegated powers enabling them to make their own purchases.

The procedures followed by state governments are based on the states' financial rules and a number of states have the equivalent of a central-stores purchasing organization. At the sub-federal level, Rajasthan, Tamil Nadu and Karnataka were the first states to enact their own public procurement laws, with Himachal Pradesh being the next to publish a draft bill some years later. Recently, the state government of Jharkhand has also come out with a draft procurement policy, the Jharkhand Procurement Policy 2013⁴.

³ Sub-sections 3.2 through 3.4 draw heavily on Lex Mundi Ltd. (2012).

⁴ Available at http://jharkhandindustry.gov.in/pdf/JP_Policy_2013.pdf.

Interestingly though, these experiences did not fully inform the draft public procurement bill first published by the Planning Commission in India, which merely included a provision providing price preferences to domestic bidders. Significantly, nationality of bidders was not listed as a permissible basis of discrimination, making it similar to the UNCITRAL Model Law requiring national treatment in the award of public contracts⁵.

The Rajasthan legislation has closely followed the Public Procurement Bill 2012 besides meeting international benchmarks in public procurement. Two notable aspects of the Rajasthan Public Procurement Rules, 2013 are the extent of institutionalization in undertaking analysis of procurement related information and the use of a Code of Integrity⁶ to reduce corruption. The Karnataka and Tamil Nadu procurement legislations are not as comprehensive as the Public Procurement Bill 2012 though these states were amongst the first to implement e-procurement procedures. The draft Jharkhand Procurement Policy 2013 is the first state procurement policy in India to accord preferential treatment in the award of public contracts to “local” MSEs over enterprises located outside the state⁷.

Apart from rules governing procurement at the central and state levels, certain criminal penalties are also prescribed under the Indian Penal Code, 1860, and the Prevention of Corruption Act, 1988, for corrupt and fraudulent practices in the award of public contracts. India also has the Right to Information Act⁸ 2005 (RTI Act) giving Indians access to government records.

Since 2012, GoI was involved in the process of legislating a public procurement bill (Public Procurement Bill, 2012) covering procurements undertaken by the central government, all bodies owned/controlled by the central government or established by an act of the Parliament, or otherwise specified by the central government⁹. The Bill, passed by the Lower House of the Indian Parliament in the previous elected regime, covers procurements of goods, works, services, procurements for purposes of national security and other strategic considerations, public private partnerships (PPPs), and any other procurements specified by the central government. Significantly however, the Bill does not contemplate the cessation of the applicability of other legislation in India on this subject and is envisaged as operating concurrently with all such legislation, which is a serious lacuna that needs to be addressed.

With the new government, the Bill has lapsed and would need to be re-introduced in the Indian Parliament. The Public Procurement Division within the Ministry of Finance is currently involved in addressing some issues before the Bill can again be put forth for enactment. After this, the minimum time for the Bill to become an Act could still be as much as one year, assuming that all goes well.

3.2. Requirements for foreign participation in procurement processes

There are no restrictions on foreign participation in procurement processes unless otherwise specified in a particular tender, but foreign investment is prohibited or restricted in certain sectors in accordance

⁵ Sandeep Verma, ‘Why procurement reform in Indian states is tricky?’ Business Standard, 10 Feb 2014.

⁶ The Code of Integrity prohibits anti-competitive practices, bribery, hampering transparency in the bidding process besides monitoring conduct in cases of conflict of interest. The bidding documents are required to be free from conditions which could encourage anti-competitive practices.

⁷ This preferential treatment should cover at least 20% of total annual purchases of goods and a minimum 15% of services.

⁸ Under the terms of the Act, any person may request information from a "public authority" (a body of government or instrumentality of State) which is expected to reply expeditiously or within thirty days. The Act also requires every public authority to computerise their records for wide dissemination and to proactively publish certain categories of information so that the citizens need minimum recourse to request for information formally. This law was passed by Parliament on June 15, 2005 and came into force on October 13, 2005. Information disclosure in India was hitherto restricted by the Official Secrets Act, 1923 and various other special laws, which the new RTI Act overrides.

⁹ Subject to these being entities that receive substantial financial assistance from the central government in so far as the utilization of such assistance towards procurement is concerned.

with the country's FDI policy. There are also sectors such as Atomic Energy and Railway Transport (except Mass Rapid Transport Systems) in which private participation is prohibited, which thus also makes foreign bidders ineligible for participation in public bids, unless specifically permitted by the government.

Foreign companies are, in most cases, not required to set up branches, subsidiaries, or otherwise enter into joint ventures and other commercial arrangements to be eligible for participation in the bidding processes. This said, terms of certain bids may require that the successful bidder incorporate a special purpose company (SPV) in India to discharge contractual obligations and that the successful bidder also retain specified levels of ownership and control of the SPV so incorporated, typically in the form of shareholding lock-ins and change of control restrictions. To the extent that certain specified portions of public procurement are required to be sourced domestically and/or are subject to offset requirements, foreign bidders would need to meet such requirements.

Finally, apart from bilateral agreements¹⁰ and restrictions on commercial transactions with certain countries¹¹, there are no general reciprocity requirements for public procurement under Indian law. However, where a procuring entity has prior commercial arrangements with other international entities, the entity may also be subject to requirements of such international entities¹².

3.3. Procedures for awarding procurement contracts

While there is no centralized bidders registry in India, government agencies may, from time to time, pre-qualify certain bidders for identified categories of projects/assignments on the basis of their technical qualifications. Subsequently, during the validity of these pre-qualifications/evaluations, bid documents for such projects/assignments may only be addressed to these pre-qualified bidders.

3.3.1. e-procurement

Pursuant to the office memorandum issued by the Department of Expenditure, Ministry of Finance, GoI, dated 30 November 2011 and the amendment thereto dated 30 March 2012, the central government introduced an e-procurement regime. Procurements in respect of tenders of value of Rs. 1 mn and above by the central government, Central Public Sector Enterprises (CPSEs) and autonomous/statutory bodies constituted by the central government are thus required to be undertaken through e-procurement. Moreover, to promote e-procurement further and to ensure maximum tendering of central government contracts through this route, the tender limit for mandatory e-procurement has been brought down to Rs. 500,000 effective 1 April 2015 and further to Rs. 200,000 effective 1 April 2016, vide office memorandum dated 9 January 2014¹³. However, the procuring entity is allowed to opt out of the e-procurement process on grounds of confidentiality requirements, national security or otherwise to safeguard the interests of the entity.

For participation in bid processes of the central government, bidders are required to register on the e-procurement portal of the central government <<http://eprocure.gov.in>>, and also obtain necessary digital signatures and e-tokens from designated providers. Further, bids are required to be submitted only in identified electronic formats (PDF/xls/rar/dwf), unless otherwise specified by the authority issuing the tender. Additionally, the required bid security and other specified documents may, despite

¹⁰ The India-Japan Comprehensive Economic Partnership Agreement (CEPA) has a Chapter on government procurement.

¹¹ These include, for instance, restrictions on import of rough diamonds from Cote d'Ivoire and arms and related material from Iraq.

¹² For instance, where any Indian entity has existing loan arrangements with the Export-Import Bank of the United States, such an entity may, due to prior contractual arrangements, be required to not have any dealings with suppliers based in Iran, to the extent that the same is restricted under applicable laws of the United States.

¹³ http://finmin.nic.in/the_ministry/dept_expenditure/ppcell/eProcurement09012014.pdf

the e-tendering process, also be required to be provided in original hard copy (and not electronically). State governments have similar requirements. The e-procurement process was implemented by states well before the central government with the states of Karnataka and Tamil Nadu being amongst the first to do so.

3.3.2. Other tendering procedures

Other prevalent mechanisms for tendering include (i) Procurement via an advertised tender, which in addition to publication on the authority's website/other governmental websites, is also typically published in national newspapers having a wide circulation and in the Indian Trade Journal published by GoI. In the event of this being a global tender, the bid documents are also required to be circulated to foreign embassies and provided for publication on the websites of these embassies. (ii) Procurement through a limited tender, where the tender is provided to only pre-qualified bidders; and (iii) Procurement via the Swiss challenge method for projects proposed by private parties.

3.3.3. Selection of the winning supplier

The commonly adopted mechanisms for the selection of the successful bidder include (i) Selection of the lowest bidder (L1 method), adopted for the selection of the successful bidder, *inter-se* technically qualified bidders, for lump-sum and rate contracts. (ii) Selection of the highest bidder (H1 method), adopted for the selection of the successful bidder, *inter-se* technically qualified bidders, for revenue-sharing based contracts and/or contracts that contemplate an upfront premium from the successful bidder and/or provide for a return on equity investment by the procuring entity. (iii) Selection of the bidder requiring the lowest government grant or the lowest subsidy (evaluated on a net present value basis), adopted for projects that have low financial viability. (iv) Selection of the bidder requiring the shortest concession period, adopted for projects with a fixed revenue stream. (v) Selection of the bidder offering the highest extent of capacity creation, investment or quantum of work, adopted on a case-by-case basis and has been used, for instance, in the bids of production sharing contracts for oil & gas resources, where the bid parameter is *inter-alia* the minimum work program offered to be undertaken by the bidder.

Further selection of the bidder may also be based on the combined scores from the evaluation of their technical bid and financial bid, on the basis of a pre-determined weightage mechanism. In this mechanism, the financial proposals would continue to be evaluated on the basis of the methods listed above, as applicable, given the nature of the bid process.

However, procuring entities are not bound to accept the bid of the highest evaluated bidder and can select other bidders, subject to the procuring entity being able to demonstrate that the selection process was undertaken on a reasonable, fair, transparent, and non-arbitrary basis. Besides, certain procuring entities may also reject bids that are extremely low or otherwise biased in favour of the bidder in financial terms.

3.3.4. Criteria for evaluation and comparison of bid proposals

The criteria for evaluation and comparison of bid proposals are laid down by the procuring entity in its bid documents and *inter alia* include (i) Satisfaction of technical qualification requirements, which may be specified in terms of the past experience of the bidder (particularly for similar assignments) and availability of qualified personnel (which may also include experience in similar assignments) (ii) Satisfaction of financial qualification requirements, including net worth and solvency of the bidder and financial capacity to undertake the proposed assignment under the bid.

3.4. Review Procedures

Unlike the requirements of the UNCITRAL Model Law and the WTO's GPA, Indian law does not provide for a domestic bid challenge procedure in matters of public procurement. This said the lapsed Public Procurement Bill 2012 has provisions to set up a Procurement Redressal Committee, where a bidder aggrieved by the conduct of a procuring entity has recourse to an appeal.

For now however, the bidding processes of all public entities are subject to limited judicial review in exercise of the writ jurisdiction of the High Courts and the Supreme Court of India. The courts intervene in this process only on the grounds of violation of constitutional or statutory provisions, or on account of the lack of probity, fairness and transparency, or reasonableness, or the presence of arbitrariness. This judicial review mechanism is also applicable to contractual arrangements executed in implementing the procurement bid or in the event of non-compliance with the terms of such contractual arrangements.

The typical dispute resolution mechanisms utilised under contracts in India include:

(i) Dispute resolution through court process: This pertains to civil disputes that are subject to the rules of procedure prescribed under the Civil Procedure Code, 1908. Additionally, depending on the forum in question (the High Courts or the Supreme Court of India), certain specific rules of procedure may additionally be applicable. Further, decrees of foreign courts, to the extent that the same relate to reciprocating territories identified by GoI, can be enforced as such, with the assistance of the Indian judicial system, in accordance with the Civil Procedure Code, 1908.

(ii) Dispute through Arbitration processes: Arbitration proceedings in India are governed by the terms of the (Indian) Arbitration and Conciliation Act, 1996 (Arbitration Act). However, parties have the freedom (subject to the Arbitration Act), to prescribe rules and procedure for such arbitral proceedings under their contractual arrangement, including *inter-alia* the number and mode of appointment of the arbitrators. The Arbitration Act recognizes awards issued pursuant to international commercial arbitration (as identified under the Arbitration Act), and such awards are enforceable, in accordance with the provisions of the Arbitration Act.

(iii) Dispute resolution through mutual discussion and conciliation proceedings: Such dispute resolution mechanisms are undertaken on the basis of the terms and conditions specified under the contractual arrangement between parties. However, given that the Arbitration Act also provides for a statutory framework for conciliation proceedings, it is open to the parties to specify that conciliation proceedings be undertaken pursuant to the terms of the Arbitration Act. Further, notwithstanding the applicability of the Arbitration Act, any dispute resolution through the means of mutual discussion or conciliation, is non-binding, and is typically contemplated as a pre-cursor to other dispute resolution mechanisms.

(iv) Dispute resolution through expert determination: Such dispute resolution mechanism is typically undertaken in the context of technical/financial disputes, wherein the contractual arrangement of the parties contemplates reference of disputes relating to certain specified subject matters for determination by an identified expert, in accordance with rules and regulations deemed appropriate by such expert (or otherwise prescribed by the contract).

It may be noted that all non-judicial dispute resolution mechanisms, irrespective of contractual arrangements to the contrary, are nonetheless subject to judicial review. However, judicial review of arbitration awards is only available on certain specified grounds, as specifically enumerated under the Arbitration Act.

Finally, it is also pertinent to note that the Arbitration Act recognizes international arbitration awards in respect of matters identified as relation to international commercial arbitration, and such awards can be enforced in accordance with the provision of the Arbitration Act.

However, the scope and possibility of exclusion of the application of the Arbitration Act for international commercial arbitration is presently sub-judice before the Supreme Court of India. As per present judicial precedent, such an exclusion is possible only where (i) the seat and the place of arbitration is outside India; and (ii) the governing law of such contract is not Indian law.

This said, Indian government entities typically prefer the applicability of the provisions of Indian law as the governing law for contracts and the Arbitration Act as the law governing the arbitration proceedings under such contract.

3.5. Preferential policies

Reservations in matters of public procurement still exist for MSEs and for certain products/sectors. Pursuant to the Public Procurement Policy for MSEs, Order 2012¹⁴, dated 23 March 2012, central government ministries/departments and Central Public Sector Enterprises (CPSEs) are expected to procure 20% of their total goods and services from MSEs over a three-year period effective 1 April 2012. The minimum 20% requirement is to be mandatory effective 1 April 2015.

The WTO Secretariat in its Report on India's Trade Policy Review (2011) notes that "MSEs also receive purchase and price preferences in procurement by central government ministries/departments and CPSEs. Under the purchase-preference system, 358 items have been reserved for exclusive procurement from MSEs and 21 items for exclusive manufacturing in the micro and small sectors. The purchase-preference system offers price preferences of up to 15% to MSEs over the quotations provided by large-scale industries. MSEs are also assisted through the: (i) issue of tender sets free of cost; (ii) exemption from payment of "earnest money" (deposits); and (iii) waiver of security deposits up to the monetary limit for which the unit is eligible, based on certain "transparent" criteria. The National Small Industries Commission serves as a single point of negotiation for eligible MSEs for government purchasing preference schemes."

Illustrations of preferential sectoral policies include the following:

(i) The central government has reserved all items of hand-spun and hand-woven textiles (khadi goods) for exclusive purchase from the Khadi and Village Industries Commission (KVIC). The central government purchases all items of handloom textiles exclusively from the KVIC and/or the Association of Corporations and Apex Societies of Handloom, and coir products from the Coir Board.

(ii) India's National Electronics Policy 2012¹⁵ has made it mandatory for all government organizations to give preference to domestically manufactured laptops and tablet PCs. The rules¹⁶ prescribe a "50% preference (in value terms) ... to domestically manufactured Laptop PCs and Tablet PCs in Government procurement, subject to the condition that the Laptop PCs and Tablet PCs meet domestic value addition in terms of Bill of Material (BOM) of 25% and 30% respectively in Year 1 to qualify as domestically manufactured." This value addition was increased by 5 percent in March 2014.

(iii) In 2007, India issued a five-year drugs policy wherein the central government was required to exclusively purchase certain medicines manufactured by pharma CPSEs and their subsidiaries. The reservation applies to a maximum of 102 medicines notified by the Department of Chemicals and Petrochemicals from time-to-time. Under this policy, procuring entities, CPSEs and autonomous bodies may invite limited tenders from pharma CPSEs and their subsidiaries or purchase directly from them at the National Pharmaceutical Pricing Authority certified or notified price with a discount of up to 35%. However, if no pharma CPSEs can supply these medicines, the procuring entities may

¹⁴ http://eprocure.gov.in/cppp/sites/default/files/ordersandcirculars_contents/ORD_DOC_NO_4/imsme_FinalPressorder.pdf

¹⁵ <http://pib.nic.in/newsite/erelease.aspx?relid=88619>

¹⁶ <http://pib.nic.in/newsite/erelease.aspx?relid=91915>

purchase from other manufacturers. Pharma CPSEs and their subsidiaries are required to comply with the good manufacturing practices norms stipulated in the Drugs and Cosmetic Rules.

4. Influence/relevance of international norms

The World Bank's (2003) CPAR notes that the procedural framework in place in India to govern and administer public procurement is similar to that of the World Bank-ADB guidelines¹⁷, the WTO's GPA and the UNICTRAL Model Law. The frameworks of rules, procedures, codes, manuals and documents in place are designed to address the key basic guiding principles of public procurement: transparency, economy, efficiency, effectiveness, fairness and competition amongst prospective suppliers. However, unlike the requirements of the UNCITRAL Model Law and the WTO's GPA, there is no independent dispute redressal system, though the lapsed Public Procurement Bill 2012 has provisions to set up a Procurement Redressal Committee.

In May 2011, India became a party to the United Nations Convention against Corruption (UNCAC¹⁸). The United Nations Office on Drugs and Crime (UNODC) is the guardian of the UNCAC with the mandate to assist and enhance capacity of Member States to implement the provisions of the UNCAC. In line with this role, UNODC India is implementing two anti-corruption projects supported by the Siemens Integrity Initiative to strengthen India's efforts to effectively implement Article 9 of UNCAC¹⁹.

The first project *inter alia* has undertaken an assessment of Indian legislation to assess compliance with the UNCAC and indicates compliance of the lapsed Public Procurement Bill 2012 and Draft Rules for Public Private Partnerships 2011 with the UNCAC. With this legislation, India is well on her way to achieving comprehensive legislative coverage for probity in public procurement.

The Draft Rules for PPP (2011) contain many good practices that strengthen India's compliance with the UNCAC. These rules address bribery, collusion and to some extent, money laundering. There is also a separate legislation for money laundering in India. The PPP rules provide for measures against procurement officials who may be originators of corruption, code of conduct for private sector and debarment policies for defaulting bidders. These rules address the procurement stage as well as the contract management and project implementation stages, besides requiring maintaining a record of each public purchase. The Draft PPP rules also lay down obligations for the government in case the private sector is unable to meet its commitments as per the PPP contract to ensure provision of facilities to the public.

¹⁷ The World Bank works to ensure that procurement in projects financed by the International Bank for Reconstruction and Development (IBRD) and/or the International Development Association (IDA) is conducted in accordance with its Articles of Agreement. These Articles require the Bank to make arrangements to ensure that loan proceeds are used only for the purposes for which the loan was granted. They also require proper attention to be paid to economy and efficiency. Political and other non-economic influences or considerations must not influence procurement in Bank projects. Detailed procurement guidelines are available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/Procurement-May-2004.pdf> and the revised World Bank (WB), *Guidelines Procurement of Goods, Works and Non-Consulting Services under IBRD Loans and IDA Credits by World Bank Borrowers-Draft March 2010* (2010), available at <http://siteresources.worldbank.org/INTPROCUREMENT/Resources/ProposalRevisionPRGLsMarch2010trackmode.pdf>. The procurement guidelines of the ADB can be accessed at <http://www.adb.org/Documents/Guidelines/Procurement/guidelines-April-2006.pdf>.

¹⁸ Recognizing the importance of strengthening anti-corruption measures in public procurement the UNCAC, which came into force in 2005, provides for Article 9 ("public procurement and management of public finances") as an important provision in preventing corruption.

¹⁹ The two projects are 'Public-Private Partnership for Probity in Public Procurement' and 'Incentives to Corporate Integrity and Cooperation in Accordance with UNCAC'. The former seeks to reduce vulnerabilities to corruption in Public Private Partnership (PPP) projects while the latter addresses a larger umbrella of private sector integrity issues including private sector association with the government under public procurement.

Most international legal instruments on the subject of government procurement address either competition/market access or probity issues. For instance, the UNCTIRAL Model Law and the Uruguay Round GPA are solely focused on competition and transparency issues, while the UNCAC and the 2008 OECD Guidelines on Public Procurement are more concerned with enhancing integrity in public procurement. In contrast, the lapsed Public Procurement Bill, 2012 addresses both competition and probity issues within the same legal instrument, thus making it a unique piece of legislation.

Even in the Revised GPA, probity and integrity aspects are confined to the Preamble, without any operative clauses to ensure enforcement. The Bill, in contrast, “proposes probity principles by incorporating provisions for a Code of Integrity binding on the procuring entity and bidders, covering bribe-taking and bribe-giving, collusion and bid-rigging, disclosure of conflict of interest/previous transgressions. Breach of the Code excludes bidders from the procurement process, involves forfeitures, recoveries, and debarment from participation in future procurements. Stiff punishment can be invoked for taking or offering gratification in respect of public procurement/abetment of such offences; debarment from bidding can take place in certain circumstances.” (CUTS International, 2012)

Moreover, unlike the Prevention of Corruption Act (India’s main anti-corruption legislation), the Bill addresses both the supply and the demand side of corruption, making both acceptance and offer of inducement for wrongful advantage in procurement an offense. In this respect, it follows the lead of the UNCAC, which seeks to address corruption in both the public and the private sector.

Thus, the lapsed Public Procurement Bill 2012 incorporates best international practices reflected in the WTO GPA, UNCAC and the UNCTIRAL Model Law. In fact, there are instances where the Bill’s provisions even improve upon international best practices, such as empowering the government to make electronic procurement mandatory, providing for the setting up of a central e-procurement portal, both of which take the standards of transparency to a higher level than those prescribed in the WTO GPA. It also prescribes e-reverse auction as one of the modes of procurement.

5. Approaches towards transparency and reporting of statistics

The lapsed Public Procurement Bill, 2012 seeks to regulate the award of government contracts above Rs. 5 million in order to ensure “transparency, accountability and probity” in public purchases. The Bill provides for a central e-procurement portal for posting and exhibiting matters relating to public procurement and empowers the central government to declare adoption of e-procurement as compulsory for any stage of procurement. It also requires a procuring entity to maintain a record of procurement proceedings.

However, the provisions of the Bill are restricted to central government purchases only. Moreover, they do not explicitly require data to be compiled on this subject. Data on public expenditure (current and capital expenses reported in broad economic categories) are available in the budget and finance documents of various central and state government ministries and departments as well as municipal corporations, but information on actual expenses incurred in the purchase of goods and services cannot be retrieved from these data. There is also no single compiling or reporting agency for data on public procurement in India. Moreover, evidence on contestability of India’s procurement markets is at best anecdotal.

This said, the mandatory e-tendering of above-threshold central, state and SOE contracts since 2011-12 and details on the award of public contracts is generating a huge information base on procurement in India. An analysis of these central and state e-portals reveals that there is a wealth of procurement information now available for almost all the 29 states and 6 centrally-administered union territories (UTs) and SOEs in the country. This includes information on the value of the contract, number of bidders, name and address of winning supplier, name and sector of procuring entity, dates

of tender advertisement and award, tendering method and the number of days to contract implementation. The information on these e-portals can also be used to examine the extent of foreign procurement by Indian governments by entity, state/UT and/or sector.

There has been another recent significant development²⁰. With the support from the World Bank, public procurement observatories are being established by premier management institutions in India with the principal objectives of observing procurement process and advocating better practices for process improvement. These observatories have been set up at the Indian Institute of Management (IIM) Lucknow in the state of Uttar Pradesh; IIM Raipur in the state of Chhattisgarh; and Assam Institute of Management (AIM) Guwahati in the state of Assam.

The observatories aim at accomplishing the following objectives:

- i) Collection and analysis of procurement (including contract implementation) related data in the states
- ii) Monitoring and documenting procurement policies and rules in the state and if possible, the actual contract implementation
- iii) Share best practices (from other states in India and abroad) in procurement cycle management with state governments through workshops and seminars

The observatories have begun developing key procurement performance indicators and are in the process of collecting, analysing and disseminating procurement data, policies, rules etc. Some of the key performance indicators are available on the websites such as time taken for various activities in e-procurement in Uttar Pradesh in 2011.

Observatories are also serving as vehicles for sharing best practices and capacity building in the states. Seminars and workshops have already been conducted by observatories in Uttar Pradesh and Assam on procurement processes targeting government staff, media and the general public.

6. Extant research on the impact of national procurement policies

In the absence of a national-level procurement policy in the country, there is no research on its impact. In fact, the need for a national public procurement policy is being recognized and advocated²¹ more openly now. However, there is some work assessing the impact of different procurement practices and given the diversity of procurement regulation in India, research on this subject has been sporadic at best.

In an early paper²², Sinha (1994) noted that public procurement practices in the Indian electrical equipment industry failed to incentivize innovation. Indian companies producing power equipment were found to spend only 2 percent of their sales on R&D compared to foreign companies that entered into JVs/ technical collaboration agreements etc. and spent as much as 12 percent. However, contracting procedures in the industry did not reward innovation, so there was no incentive to improve the product offering. In fact, a product with enhanced facilities was likely to be considered a deviation from contract specifications.

The first substantive paper on India's public procurement policies, including estimates of the size of contestable government procurement, was Srivastava (2003). In its CPAR, the World Bank (2003) carried out an extensive review of India's procurement regime that began in 2000 and covered the central government, four "representative" state governments (Maharashtra, Karnataka, Tamil Nadu,

²⁰ <http://www.procurementlearning.org/public-procurement-observatories-set-up-in-indian-states/>

²¹ For instance see CUTS International (2014).

²² Rajeev Sinha (1994), Government Procurement and Technological Capability: Case of Indian Electrical Equipment Industry, *Economic and Political Weekly*.

Uttar Pradesh) and CPSEs in three different phases. Gasiorek et.al (2007) provided an analysis of India's procurement policies in the context of a potential EU-India trade agreement, focussing on the barriers confronting EU firms in contesting India's public markets.

Recently, there has been more work on this subject, in particular by Sandeep Verma, a senior civil servant, who has written extensively assessing the country's central and state-level procurement policies and their different attributes. Besides being published in different law and policy journals and print media, his work on this subject is available on SSRN²³. In fact, the following two sections of this paper that assess India's dispute settlement and e-procurement systems draw heavily on his research.

In other work, the UNODC (undated) has published a report assessing the compliance of Indian legislation with the UNCAC, which was also reviewed in Section 4 of this paper. The ADB (2011) has conducted an assessment of India's e-procurement system, which is also discussed in Section 8 of this paper.

CUTS International (2012), in different projects funded by DFID and the British High Commission, has also carried out extensive research on India's procurement policies and related issues. They add value in particular by including analyses of procurement issues in three major sectors: health, IT and railways. In the health sector, for instance, their report mentions that "procurement of drugs is often based on the lowest tender price quotations. Many domestic and international pharmaceutical brand suppliers are discouraged by this and cease to participate in the government procurement market resulting in reduced competition and diminished value for money. The 'two-bid' system which has a two rounds of application with both the technical bid and the financial bid may be a step in the right direction."

Finally, in a more contemporaneous paper, Lewis-Faupel et.al (2014) conduct an empirical assessment of e-procurement policies in India and Indonesia. In the case of India, the authors examine procurement practices between 2000 and 2009 for a central government funded rural road construction programme implemented by state road departments, the Pradhan Mantri Gram Sarak Yojana (PMGSY). Under this programme, roughly 145 road packages are tendered per state per year.

The authors show that, in both India and Indonesia, e-procurement increases the probability that the winning bidder comes from outside the region where the contract takes place. This is consistent with e-procurement decreasing the costs of submitting bids for those not physically present. However, the authors find no systematic evidence for e-procurement lowering prices paid by the government. In contrast, e-procurement was found to lead to quality improvements. In the case of India in particular, they find e-procurement leading to higher quality roads, with the quality grades rising by about 12 percent in e-procurement projects compared to other projects. They also find e-procurement winning contractors in India to have higher quality on average, which suggests that e-procurement in India facilitated the participation of higher quality contractors.

7. Assessment of dispute settlement mechanisms²⁴

Existing complaint procedures in India generally require proof of criminal behaviour on part of government officials in the award of public contracts. The only other options are either to pursue remedies by complaining to government departments themselves or to bring in litigation before the courts. The first option is not entirely impartial and independent and the second option suffers from

²³ http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=1090557

²⁴ This section draws heavily on Verma (2010).

protracted litigation and high costs²⁵, making it an unattractive forum to pursue complaints against contract-award decisions of public entities.

Additionally, there is a lack of procedural clarity and finality in decisions on complaints. These could be made simultaneously to various administrative levels within the procuring entity or to a designated Chief Vigilance Officer (CVO), the concerned administrative department or directly to the Ministry of Finance, in addition to other political executives such as the concerned Minister. Both in theory and in practice, each one of these offices could start independent assessments and reach widely differing conclusions, a situation that is sub-optimal²⁶.

External oversight bodies suffer from similar jurisdictional overlaps and apparent lack of finality. The Central Vigilance Commission (CVC) can make recommendations at best in cases of corruption; the Central Bureau of Investigation (CBI) conducts its own criminal investigations requiring conviction in a court of law; while the office of the Comptroller and Auditor General (CAG) conducts mostly post-hoc audits with non-binding observations that are placed before the Public Accounts Committee of the Indian Parliament²⁷.

A recent and comparatively more focussed alternative now available to aggrieved bidders in the context of public procurement in India is the “Integrity Pact” (IP). IPs, introduced by Transparency International in the 90s, are a “voluntary” pact between public buyer and seller to eliminate corrupt practices. IPs were autonomously introduced as an incremental oversight and anti-corruption tool into the Indian public contracting scenario in 2006, with the CVC recommended adoption and implementation of IPs since 2007, covering all major purchases of PSUs. IPs may “constitute the *first*, if not the most efficient, forum for bidders to bring in complaints regarding agency procurement decisions” (Verma, 2010). A critical analysis of the suitability of IPs as a dispute settlement mechanism in the Indian context is provided in Verma (2010).

Finally, the lapsed Public Procurement Bill 2012 has provisions to set up a Procurement Redressal Committee, where a bidder aggrieved by the conduct of a procuring entity has recourse to an appeal. However, the grievance redressal mechanism in the Bill is still weak and would need to be adapted on the lines of the WTO’s GPA and the UNCTRAL Model Law in order to be more effective. For instance, the powers of the independent grievance redressal mechanism are restricted to making recommendations to the procuring entity, hence falling short of ensuring fair play. The procuring entity may reject these recommendations, providing reasons for non-acceptance. The WTO GPA also provides for judicial review in case the review body is a non-judicial entity like the Procurement Redressal Tribunal under the Bill. However, there is no provision in the Bill for judicial review of the decisions of this proposed tribunal.

²⁵ Sunil Sondhi (2000), *Combating Corruption in India: Role of the Civil Society* 12 (2000), available at <http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN019103.pdf>. See also International Finance Corporation, *Doing Business 2010 India* 40 (Enforcing Contracts), <http://www.doingbusiness.org/Documents/CountryProfiles/IND.pdf>. See also, Michael Gasiorek & Others, *Qualitative Analysis of a Potential Free Trade Agreement between the European Union and India-Annex 3-Regulatory Issues 1.1.1, at 8* (2007), available at <http://www.cuts-citee.org/pdf/EU-IndiaStudyAnnex3May01.pdf>.

²⁶ For instance see Sandeep Verma (2006), *E-Buying: The Works*, The Economic Times, February 2, 2006.

²⁷ An illustrative list of government offices involved in accountability and anti-corruption efforts is provided in OECD, *Implementing the Anti-Corruption Action Plan for Asia-Pacific: Reforms and Anti-Corruption Resources India* 1 (2008), available at <http://www.oecd.org/dataoecd/8/0/40528776.pdf>.

8. Assessment of e-procurement systems²⁸

The approach adopted for implementation of e-procurement systems in India has evolved over time. The concept of e-procurement was new about a decade ago when IT-savvy resources in individual government departments initiated the implementation of e-tendering in their respective departments using Commercial-Off-the-Shelf (COTS) software developed specifically to address government tendering requirements. The adoption of department specific e-tendering systems gradually increased as the concept became popular.

However, few government agencies initiated implementation of unified e-procurement systems. Institution driven unified e-procurement system implementations and continued adoption of e-procurement systems in individual departments finally led to the initiative to operationalize the e-procurement Mission Mode Project (MMP) under the National e-Governance Program (NeGP). The Ministry of Commerce & Industry (Department of Commerce) was identified as the line department for implementation of the e-procurement MMP in 2007.

The functional scope of e-procurement system referred to in India by e-procurement policy makers, Application Service Providers and in e-procurement implementations is similar to that of the definition provided in the Multilateral Development Banks e-procurement guidelines. Though there is widespread acknowledgement of the end-to-end scope addressed by e-procurement software, not all functional aspects of government procurement is handled electronically in existing e-procurement implementations in India. Even matured e-procurement implementations such as those in the state governments of Andhra Pradesh and Karnataka as well as Indian Railways do not have a fully integrated end-to-end e-procurement system implemented and fully operational.

This said, ADB (2011) notes the following key benefits to government departments implementing e-procurement systems: (i) rise in the average number of bidders per tender; (ii) a 15% fall in the tender premium; and (iii) decline in cycle time taken to evaluate tenders.

However, some concerns have been raised regarding possible adverse effects of introducing purely electronic systems on competition levels in public procurement, given the relatively higher cost and skewed regional distribution of Information & Communication Technology (ICT) access in India²⁹. Technical limitations to long-term storage of Public Key Infrastructure (PKI) encrypted electronic records could also lead to problematic situations in the event of public procurement decisions being contested in a court of law.

Moreover, the presence of a large number of websites with little integration, poor organisation of information, infrequent updating, absence of accurate and up-to-date information and largely unprotected sites where digital authentications of downloads is not possible, add to the time and costs involved in accessing information regarding procurement opportunities.

9. Conclusion

India does not have a national public procurement policy. In its absence, a plethora of rules and procedures govern public purchase practices of federal and sub-federal government entities including public sector enterprises. While these norms generally follow international best practices, their implementation falls short in providing transparency, accountability, efficiency and professionalism in the award of public contracts. The system is plagued by delays in procurement decisions leading to additional expenses, delays in payments from procuring entities, collusive practises between authorities and bidders, inadequate enforcement of regulations to check conflict of interests and the absence of an effective and independent dispute settlement mechanism.

²⁸ This section draws heavily on ADB (2011).

²⁹ For instance see Verma (2006).

This said, the previous government was in the process of enacting federal-level legislation on procurement, which not only addressed several of these concerns but also provided for compliance with international best practices enshrined in the UNCITRAL Model Law, the WTO's GPA, the ADB-World Bank procurement guidelines and the UNCAC. As of 2012, India has also acquired an 'Observer status' on the GPA at the WTO. In a first for Indian trade policy, government procurement has been covered in the India-Japan CEPA though the relevant provisions are limited to exchange of information in matters of central government procurement. Significantly, there is in-built scope for negotiations leading to a comprehensive chapter on the subject in the CEPA once India declares its intentions to accede to the WTO's GPA. In contrast, government procurement has been a sticking point in the ongoing EU-India Bilateral Trade and Investment Agreement negotiations.

A prompt enactment of an even-improved Public Procurement Bill 2012 by the new government would go a long way in the internationalization of procurement regulation in the country. However, since the Bill is only applicable to central government and CPSE purchases, there is a need for other states to develop similar legislation, all of which could come under a single national public procurement policy. This could further lead to the much-needed simplification and harmonization of cumbersome rules and procedures and bringing entities such as the Indian Railways within the ambit of a single national public procurement policy.

Finally, India has come a long way in developing e-procurement systems but needs to find solutions to the implementation challenges discussed earlier. E-procurement is an important measure to enhance transparency in procurement processes. Since procurement in India is decentralized, the emergence of multiple e-procurement systems is inevitable. The implementation of a unified e-procurement system would reduce the number of installations, but still multiple e-procurement systems may exist. The multiple e-procurement systems could be made inter-operable to develop a 'national' e-procurement system in effect by maintaining a national repository of tenders, a national database of registered suppliers and a national database on suppliers' performance.

With mandatory e-tendering of central, state governments and PSU contracts already in place, enacting the Public Procurement Bill and integrating states within a national procurement policy would complete the set of procurement reforms needed to usher in transparency and efficiency in public purchases in the country. In fact, to the extent that India has already accomplished some of these reforms unilaterally, the benefits from acceding to the GPA are confined to becoming eligible for reciprocal market access in the procurement markets of the other Contracting Parties, though even this would largely depend on the actual coverage of Indian central and state government entities and PSEs in this plurilateral agreement. This said, what is arguably as important as unilateral reforms and/or plurilateral/bilateral commitments, is a change in mind-set, which must intrinsically reject corruption in every walk of life.

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