

Towards transparency in public procurement

Introduction

Government procurement in India has been an archaic and labyrinthine system of administrative procedures. This has led to decision making being restricted and subject to the personal knowledge, experience and outlook of the concerned official rather than a progressive and ascertainable methodology based on rules. This has led to malpractices and arbitrariness becoming inherent to the procurement of goods and services by public sector. With the government envisaging growth of Public Private Partnership (“PPP”), it is imperative that the government of India (“GOI”) brings about an effective and expeditious mechanism for procurement which would also augment the development of PPP projects. All of this has given impetus to the introduction of the proposed Public Procurement Bill, 2011 (“PPB”), which has been framed upon the UNCITRAL Model Law for Public Procurement. The Parliament has yet to enact the proposed bill. Once the PPB becomes law it shall establish a department for the monitoring of procurement which will be responsible for framing rules for the operation of the act, which would then have to obtain parliamentary sanction prior to enforcement.

This newsletter discusses the essential elements and guiding principles of the PPB and focus includes the procurement methods contained therein, the redressal mechanism, offences and punishments of the PPB and the way ahead.

1. The Purpose and Scope

The PPB intends to bring about transparency, accountability and competition in the procurement processes and aims to completely replace the current norms of procurement excluding procurements for national defence, national security, natural calamities, epidemics or other emergencies.

PPB proposes the establishment of a new Department of Procurement Policy (“Department”) and the Procurement Regulatory Authority (“Authority”). The Department will prepare and notify the rules under PPB for all procuring entities.¹ It will also lay the framework, which would be adhered to and opted by the procuring entity (“Entity”). The role envisaged for the Department is of a single window interface for both Entity and GOI to provide advise, guidelines, policies and documentation for procurement. It will also be empowered to rescind or modify administrative actions of an Entity if found to be inconsistent with the PPB.

The Authority will be established as an appellate authority for review of decisions made by an Entity in instances of complaints by bidders with regard to the procurement

¹ Procuring entities are defined in Section 3 of the PPB. It encompasses all ministries and departments of the GOI and any body corporate or unincorporated who by terms of benefits received or control exercised or preferential treatment accorded, establish themselves as public bodies as per law.

process, and, shall act as an advocate for the concerns of stakeholders, while advising the GOI.

The GOI should aim to lay down the guidelines and procedures for the excluded procurement in such manner that any entity participating in a bid process for supply of goods or services to the government has the benefit of the redressal procedure laid down in the PPB.

2. Principles and Procedures

The principles of the PPB ensure maximum participation by bidders. Everything from communication, qualification, description and evaluation has been framed to be inclusive rather than exclusive, in contrast to earlier procedures. PPB seeks to lay down the framework for procedures to be followed by the procuring entities and bidders, while authorizing the Entity to make decisions regarding the creation of a roster of registered qualified bidders for certain classes of procurement, multi-year contracts for goods and services and to undertake pre-qualification processes. In exceptional circumstances, the Entity is authorized to cancel procurement, reject low bids and exclude bidders who violate the PPB. It imposes a duty upon the Entity to adhere to standard terms of procurement promulgated by the Department and ensure timely contractual payments. These principles are applicable to all procurements by an Entity including but not limited to goods, services, works, assets, land or PPP projects.

As a first, even the Entity has been bound with a confidentiality clause, which requires them to maintain the same during the continuation of the bid process. However, there are no sanctions for breach. Another fresh obligation upon the Entity is to create and maintain detailed records of the entire bid process, from inception to award of contract so that it can be called upon by the Department, Authority, tribunal, special court or the Supreme Court at any juncture of the bid process, but there is no corresponding penalty for violation but it could potentially be construed to be action in violation of the PPB and lead to cancellation or challenge of the procurement process.

3. Procurement Processes

Open competitive bidding has been established as the primary methodology for all procurement wherein all interested bidders can participate based on the price. Certain exceptions have been carved out for special circumstances requiring limited tendering, limited tendering with interaction, electronic reverse auction or framework agreements. These are:

3.1 Limited tendering is to be conducted when the procurement is either of highly complex nature or is of readily available goods of a value below \$20,000 or in instances where the financial aspects of the proposals are secondary to the technical, quality, qualifications and experience elements of the proposals, which have evaluative and elementary importance for the procurement.

3.2 The tendering can be done through interaction with the bidders where any of the following conditions are deemed to be fulfilled by the Entity: **(a)** when information and feedback are required for the refinement of subject matter; **(b)** when it is essential through an

interaction with bidders to assess commercial viability or recover R&D costs; **(c)** when the examination of financial proposals is secondary to the quality and technical aspects of the proposals and financial negotiations are required for acceptable terms and conditions; **(d)** where the procurement is urgent and was unforeseeable by the Entity or in instances of disasters, natural or otherwise or for national security; **(e)** where the goods being procured are a repurchase product from same vendor and the purchase is a supplement or extension of the original purchase, keeping in mind the size of the following procurement, reasonableness of price and unsuitability of alternative goods; **(f)** when the procurement is for an amount below \$4,000 of goods that are sold to the general public.

In instances where an open competitive bidding would be cancelled due to non performance or an unsuccessful award and the Entity envisages that repeating the procedure would not provide a different result, other procedures outlined in the PPB can be chosen by the Entity as per the conditions of procurement.

3.3 Two radically new processes that the PPB will introduce are **(i) electronic reverse auction**, which is adopted when the subject matter of procurement is clearly outlined and the bid can be conducted in a situation of near perfect competition due to the presence of a competitive market of bidders, and **(ii) framework agreement procedure**, where the contract is with one or more suppliers for the subject matter of procurement and the need therefor can arise at any point for an indefinite period on a repeated basis or may arise urgently. Thus, to ascertain the quality and supply of goods/services, the Entity will enter into a framework agreement to ensure that the goods/services are available at the required time, of ascertained quality and within the time constraints. While these new processes have been introduced under influence from UNCITRAL, the government has been leaning towards e-procurement, as demonstrated by the undertaking of e-auction for 3G spectrum and slowly progressing electronic processes for various government filings and forms.

However, the PPB errs in not taking into account or laying down an appropriate procedure for bid process of projects which come under the ambit of swiss challenge (unsolicited proposals). The Supreme Court of India has laid down the guidelines in this regard² and many states and central entities are adopting this process for award of PPP projects.³ The government should make appropriate provisions in the PPB and prescribe conditions and procedure to be followed by central and state government entities if they adopt the swiss challenge method for award of PPP projects.

4. Public Private Partnerships

Though past efforts by the GOI in PPP have not elicited enthusiastic results, the hurdles of the current sector-wise laws, policies and regulations have also impeded the number and growth of the projects planned in the current five year plan period. PPP, till now, was subject to procedure based on precedent, but now, has been provided with a definite set

² Ravi Development v. Shree Krishna Prathisthan AIR 2009 SC 2519, 2009 (8) SCALE 96, (2009) 7 SCC 462

³ Jaipur Development Authority is planning to execute its Mega Film City venture through the swiss challenge process. Various state legislatures, e.g., Andhra Pradesh, Jharkhand, have enacted it as a valid method under their Infrastructure Development legislations.

of rules and procedures to be followed regarding their award and implementation. The procurement is undertaken by entering into a concession agreement. The award of project could be as per procedures established upon the fulfillment of conditions described in section 3.2 (a) to (d) above. Another positive change is that the PPB proposes to bring all PPP entities under the definition of public entities for the purposes of the Right to Information Act, 2005.

5. Procedure for redressal, offences, punishment and penalty

The PPB creates a four step redressal procedure.

- Any entity with a grievance will be entitled to approach the head of the Entity for adjudication who must follow the prescribed timeframe.
- The appeal against an Entity's order shall lie to the Authority.
- An appellate tribunal shall be established which shall hear appeals from the decisions made by the Authority and appeals against any orders issued by an arbitration tribunal in any matter related to procurement. The tribunal is proposed to be established as an alternative to the high courts with similar powers.
- Any appeal against any order of the tribunal would rest with the Supreme Court of India. In other words, the appellate tribunal shall possess the necessary expertise to deal with matters emanating from procurement disputes.

The PPB seeks to punish actions undertaken by either a functionary of the Entity or a participant in the bid process which would impede or affect the procurement with stringent fines and imprisonment. The punishment envisaged ranges from imprisonment for a period of 1 to 10 years along with pecuniary fines which may range from \$40,000 to \$100,000 and may lead to debarment from participation in any bid process. For the award of the punishments, the government can constitute special courts with powers equivalent to a court of sessions for the trial of offences. The jurisdiction of civil courts and high courts is excluded. If companies will be held responsible for commission of offences, the officers-in-default will be liable. In all probability, this will devolve on the Board of Directors of the company along with key managerial personnel.

Clearly, the foregoing are few steps too many for a judicial process, as even with limited timeframes for adjudication of disputes, the multi-layer nature makes the redressal procedure cumbersome and time consuming, thereby defeating the objectives of PPB. A better mechanism could be the replacement of the powers of the Authority to adjudicate with the power to challenge the decisions of the Entity before the appellate tribunal, which would then quasi-judicially address the decision prior to an appeal before the Supreme Court of India.

Conclusion

Currently government procurement is governed by multifarious administrative procedures which, in turn, have resulted in unequal treatment, administrative inaction and excessive litigation against GOI. This has led to protracted delays thereby hindering development and functioning of the entities. With the shift towards disinvestment and PPP, it has become crucial to define procedure for the departments and the participants. Additionally it is imperative to have an effective enforcement mechanism. The PPB is a step in the right direction in that regard.

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