

India

Sumeet Kachwaha

Kachwaha and Partners

Legislative framework

1 What is the relevant legislation and who enforces it?

India has a federal constitution, with the responsibility for governance divided between the central and state governments. 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. But the subject can be said to be covered indirectly under the State List heading 'Trade and Commerce', thereby enabling states to legislate on the subject. The Union can also legislate on the subject under its residuary powers. Parliament has not enacted any legislation on the subject so far (but see question 3). Several states have enacted legislation on the subject but the law is not comprehensive. Hence public procurement is governed by government policies. The subject is primarily covered by the General Financial Rules 1963 (amended in 2005) framed by the Ministry of Finance by executive order and the Delegation of Financial Powers Rules 1978 (again framed by the Ministry of Finance). Further, the Directorate General of Supplies and Disposals (DGS&D) 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. They are very detailed in nature.

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.

2 In which respect does the relevant legislation supplement the EU procurement directives or the World Trade Organization's Government Procurement Agreement (GPA)?

India has not acceded to the GPA.

3 Are there proposals to change the legislation?

Yes. In January 2011, a committee on public procurement was set up by the government and recommended that a public procurement law be enacted as soon as possible. Recently, a group of ministers on corruption has approved the Draft Public Procurement Bill 2012. The bill is yet to be introduced in Parliament. The bill seeks to incorporate best practice into law. It encompasses the various categories (ie, goods, services, works and PPPs). It also provides a grievance redress system and a code of integrity. Last, it provides for offences and specifies penalties for violation, which includes imprisonment.

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

There is no legislation for procurement, as stated in question 1. Procurement by the Ministry of Defence is covered by the Defence Procurement Procedures 2013 (which replaced the 2011 version) and the Defence Procurement Manual 2013.

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 (NELP) in 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 PPP projects (see question 11).

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 control of the government are not bound by the procurement procedures described in question 1.

6 For which, or what kinds of, entities is the status as a contracting authority in dispute?

The law is fairly well settled and the status of a contracting authority is rarely in serious dispute.

7 Are there specific domestic rules relating to the calculation of the threshold value of contracts?

The procurement rules and policies mentioned in question 1 are applicable to all contracts, except those of a very low value (generally US\$500 or less).

8 Does the extension of an existing contract require a new procurement procedure?

The existing contract would not be extended as a matter of routine. Only in exceptional circumstances, with reasons recorded in writing and with the approval of the competent authority, can the contract be extended. In all other cases, a new procurement procedure would have to be undertaken.

9 Does the amendment of an existing contract require a new procurement procedure?

After the conclusion of the contract, any relaxation of the contract terms and specifications is 'severely discouraged'. In exceptional cases, however, where the modifications and amendments are considered to be 'absolutely essential', the same may be allowed after taking into account the corresponding financial implications.

10 May an existing contract be transferred to another supplier or provider without a new procurement procedure?

The existing contract, as a matter of rule, cannot be transferred to another supplier or provider without a new procurement procedure being followed.

11 In which circumstances do privatisations require a procurement procedure?

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 short-listing 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.

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

See question 11.

13 What are the rules and requirements for the award of works or services concessions?

There are no separate central rules or regulations governing these. States such as Gujarat, Andhra Pradesh, Tamil Nadu, Himachal Pradesh, Punjab and Bihar have infrastructure development laws which include matters pertaining to works or services concessions.

14 To which forms of cooperation between public bodies and undertakings does public procurement law not apply and what are the respective requirements?

There is no specific legislation that applies to such situations. Public bodies are required to adopt the same procurement rules even while dealing with another public body. It would make no difference if a private body is in a joint venture with a public body, unless the

public body is in a minority position, in which event the public procurement rules may not apply.

The procurement procedures

15 Does the relevant legislation specifically state or restate the fundamental principles for tender procedures: equal treatment, transparency, 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 11). The PPP bid document, inter alia, 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, inter alia, 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.

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 would lead to disqualification.

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 three types of tenders:

- advertised tender enquiry;
- limited tender enquiry; and
- single tender enquiry.

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. 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:

- where the competent authority in the concerned 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? If yes, what requirements must be fulfilled?

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 Are there special rules or requirements determining the conduct of a negotiated procedure?

Post-tender negotiations are strictly discouraged. This is specifically stated in government guidelines (Central Vigilance Commission 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.

22 When and how may the competitive dialogue be used? Is it used in practice in your jurisdiction?

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.

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? If yes, does the award of a contract under the framework agreement require an additional competitive procedure?

As stated above, the procurement legislation does not deal with framework agreements.

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 same may be permitted by the authority 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 unduly burdensome or risky requirements in tender specifications prohibited?

There is no prohibition regarding unduly burdensome or risky requirements in tender specifications.

27 What are the legal limitations on the discretion of contracting authorities in assessing the qualifications of tenderers?

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 tendering authority therefore has to proceed in accordance with the limitations contained in the tender document or in the applicable manuals or rules.

28 Are there specific mechanisms to further the participation of small and medium 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 (MSMEs) had formulated a public procurement policy for MSMEs which had been approved by the cabinet in November 2011. Recently, 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 (MSEs). At this stage, this is a goal but it will become mandatory from April 2015. This policy also includes a further reservation of 4 per cent in favour of MSMEs owned by specified 'backward classes'.

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

29 What are the requirements for the admissibility of alternative bids?

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

30 Must a contracting authority take alternative bids into account?

See question 29.

31 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.

32 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.

33 What constitutes an 'abnormally low' bid?

'Abnormally low' bids are those that vary from the estimated rates by more than 25 per cent even after updating the scheduled rates to match the prevailing cost index.

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

Abnormally low tenders may lead to a conclusion of anti-competitive 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).

35 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 is subject to judicial review (inter alia 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.

Review proceedings and judicial proceedings**36** 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 monitor 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 in 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.

37 How long does an administrative review proceeding or judicial proceeding for review 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.

38 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 36), or the procedure prescribed has not been followed.

39 What are the deadlines for a review application and an appeal?

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 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.

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

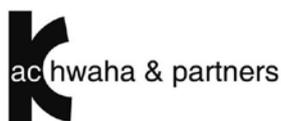
No. Suspension can only be ordered by the court by issuing an interim order. This is granted on consideration of the merits on a prima facie basis and the balance of injury to parties.

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

No.

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

The procurement file is treated as confidential and is not liable to 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.



Sumeet Kachwaha

skachwaha@kaplegal.com

1/6 Shanti Niketan
New Delhi 110021
India

Tel: +91 11 4166 1333
Fax: +91 11 2411 0763
www.kaplegal.com

43 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.

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.

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 due to an illegal or unconstitutional procedure can approach the high court in its writ jurisdiction and seek redress. As to the grounds for interference, please see questions 27 and 36.

46 If a violation of procurement law is established in an administrative or judicial review proceeding, can disadvantaged bidders claim damages? If yes, please specify the requirements for such claims.

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 is mala fide or intended to favour someone;
- the process adopted or decision made is 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.