

# Legal 500

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India

Public Procurement

Contributor

Phoenix Legal



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This country-specific Q&A provides an overview of public procurement laws and regulations applicable in India.

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## India: Public Procurement

\*"Complex contracts" refers to contracts including: where the needs of the contracting authority cannot be met without adaptation of readily available solutions; contracts involving design or innovative solutions; where prior negotiation is required before a contract can be awarded due to particular circumstances related to the nature, the complexity or the legal or financial make-up of a contract or because of risks attaching to these circumstances; and where technical specifications cannot be determined with sufficient precision with reference to established technical standards, references or specifications.

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

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

- General Financial Rules, 2017 (GFR) and the Delegation of Financial Power Rules, 1978 (DFPR):

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

In line with the GFR, a few state governments like Tamil Nadu, Karnataka, Rajasthan, Andhra Pradesh, Mizoram, Odisha, Punjab, Uttarakhand and Assam and certain PSUs have developed their own financial rules which govern public procurement. The states of Tamil Nadu, Karnataka, Rajasthan and Assam have enacted specific rules, policies and regulations governing public procurement namely the Tamil Nadu Transparency in Tenders Act, 1998, the Karnataka Transparency in Public Procurement Act, 1999, the Rajasthan Transparency Public Procurement Act, 2012, The Andhra Pradesh

Infrastructure (Transparency through Judicial Preview) Act, 2019, The Mizoram Public Procurement Rules, 2020, Odisha General Financial Rules, 2023, Punjab Transparency in Public Procurement Rules, 2022, The Uttarakhand Procurement Rules, 2008 and the Assam Public Procurement Act, 2020 respectively.

- Manual for Procurement of Goods, 2017 (MPG); Manual for Procurement of Works, 2019 (MPW); and Manual for Procurement of Consultancy and Other Services, 2017 (MPCS):

These manuals contain the guidelines on procurement of goods, works, consultancy and other services. The Ministry of Finance, Department of Expenditure revises/ updates the manuals from time to time. These administrative guidelines are supplemented by manuals and policies governing procurement by individual ministries/ departments, such as defence, telecom and railways.

In addition to the above, the Government e-Marketplace (GeM) is an online platform for public procurement in India. The initiative was launched on August 9, 2016 by the Ministry of Commerce and Industry, Government of India with the objective to create an open and transparent procurement platform for government buyers. The common use goods and services, as defined in GeM are required to be procured mandatorily through GeM. For other goods and services not included in GeM, the relevant Ministries/ Departments have been delegated authority to make their own arrangements of goods and services. The process of e-procurement through GeM has been discussed further in other queries below.

The Directorate General of Supplies and Disposals under the Ministry of Commerce and Industry (DGS&D), which is the central purchasing and quality assurance

organisation, also issue guidelines to strengthen transparency and integrity in public procurement. Further, the Central Vigilance Commission (CVC) which is created to address governmental corruption, has framed tender guidelines.

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

- Defence Procurement Manual, 2009 (DPM) and Defence Acquisition Procedure, 2020 (DAP):

New defence procurement management structures and systems were set up in the Ministry of Defence (MoD) which came into effect from December 30, 2002 and that are applicable to procurements resulting from the 'buy' decision of the Defence Acquisition Council. DPM 2009 and DAP 2020 provide comprehensive guidelines for acquisition for the defence sector. In September 2020, MoD released the DAP to streamline the procurement process and provide a boost to indigenous arms manufacturing. Given the specific requirements of procurement in the defence sector, the DPM and DAP lay down the procedures relating to public procurement in the defence sector and provide for measures to ensure expedited decision-making along with simplified contractual procedures. Broadly, these guidelines contain procedures for the following:

- Buy and make through transfer of technology; and
- Buy, innovate and make (Indian)

With an intent to reduce reliance of imports and increase the dependency on indigenous defence capability, the Government in pursuance of the Defence Procurement Procedure (DPP) and the DAP, on February 10, 2023, issued a press release on import in the defence sector. The press release states that to achieve self-reliance in defence sector and to provide impetus to design, development and manufacture of defence equipment/platforms in India, the following initiatives/policies have been taken by the Government, inter alia:

- Establishment of new Defence Industrial Corridors, one each in Uttar Pradesh and Tamil Nadu.
- Opening of Defense Research & Development (R&D) to academia, industry, and start-ups, with a 25% budget dedicated to advancing the nation's defense technology development.
- A progressive increase in the amount of the

Defense Budget allotted to military modernization and domestic procurement.

- The Ministry of Defense has set aside money totaling Rs. 84,598 Cr (68% of the entire Capital Acquisition Budget) for domestic capital procurement in 2022–2023 in accordance with the Government of India's Aatmanirbhar Bharat initiative.

- The Prevention of Corruption Act, 1988 and The Bharatiya Nyaya Sanhita, 2023:

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

## 2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements? In addition to any central government procurement regime please address the following: regulated utilities procurement regime (e.g. water, gas, electricity, coal, oil, postal services, telecoms, ports, airports), military procurements, non-central government (local, state or prefectures) and any other relevant regime. Please provide the titles of the statutes/regulations that regulate such procurements.

The GFR provides guidelines for all contracts, except those having a very low value of approximately less than INR 25,000 (approx. USD 300). Examples of such contracts vary from those for procurement of goods, PPP contracts, engineering procurement and construction (EPC) contracts, concession agreements and operation and management (O&M) contracts.

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

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

Act, 2006 provides for the evaluation of bids according to the transparent quantitative bid evaluation criteria that evaluates the financial and the technical capability of the bidders, the proposed work schedule as well as the monetary package.

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

There are other sectors which have issued rules and regulations to guide the public procurement process, such as the telecom sector which is guided by the National Telecom Policy and the energy sector wherein the Ministry of Petroleum and Natural Gas released a National Policy on Biofuels and a Strategic Plan for New and Renewable Energy Sector. Even Coal India Limited has introduced guidelines in 2023 for the procurement of goods and services. While, for renewable energy, the Government in 2023 issued guidelines for wind power and wind solar hybrid power procurement. Specifically on July 26, 2023, the Ministry of Power notified the Guidelines for Tariff Based Competitive Bidding Process for Procurement Power from Grid Connected Wind Power Projects under Section 63 of the Electricity Act, 2003, superseding the earlier 2017 guidelines and on August 21, 2023, the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Solar Hybrid Projects (2023 Guidelines) under Section 63 of the Electricity Act, 2003, superseding the earlier 2020 guidelines. Both the guidelines have the similar objectives, *inter alia*–

1. Facilitating the addition of renewable capacity and meeting the Renewable Purchase Obligation (RPO) requirement of distribution licenses.
2. Establishing an open, equitable, and standardized framework for procurement that is based on competitive and open bidding along with appropriate risk-sharing amongst stakeholders in order to facilitate the purchase of electricity at competitive prices in the best interests of consumers, enhance the bankability of projects, and guarantee investors reasonable returns.
3. As an additional step to reduce sector risk, a framework for long-term, intra- or interstate power sales and purchases should be provided.
4. In addition to the above, the guidelines issued for wind solar hybrid projects also aim to promote competitive procurement of electricity from grid connected wind solar hybrid power

projects.

In 2013, the Ministry of Electronics and Information Technology introduced the Policy on Preference for Domestically Manufactured Electronic Goods which aims at providing preference to domestically manufactured electronic products in Government procurement for its own use and not with a view to commercial resale or with a view to use in the production of goods for commercial sale. Even the pharmaceuticals sector has introduced the Pharmaceutical Purchase Policy 2013 which aims to reserve the procurement of certain medicines from the Central PSUs.

Regulations have also been introduced to encourage micro, small and medium size enterprises to participate in the public procurement process. The Public Procurement Policy for Micro and Small Enterprises Order, 2012 provided that a minimum of 25% of annual value of goods/services of the Central Government and PSUs must be procured from micro and small enterprises. Further, a special provision has been added to encourage women owned micro and small enterprises. Out of the total annual procurement from micro and small enterprises, 3% from within the 25% target was to be earmarked for procurement from micro and small enterprises owned by women.

To encourage the 'Make in India' policy of the Government and to enhance income and employment by promoting manufacturing and production of goods and services in India, the Ministry of Commerce and Industry has issued a Public Procurement (Preference to Make in India) Order, 2017. This order was subsequently revised in 2018, 2019, 2020 and 2021. As on date, several State Governments have implemented Public Procurement (Preference to Make in India) Order, 2017, such as Mizoram, Nagaland, Himachal Pradesh, Andhra Pradesh and Goa. The applicable rules of GFR allow the Central Government to provide (by way of notification) mandatory procurement of any goods or services from any category of bidders, or provide for preference to bidders on the grounds of promotion of locally manufactured goods or locally provided services.

In addition to all the above-mentioned sector specific guidelines, the procurement of common use goods and services as outlined and available on GeM are mandatorily required to be procured through GeM.

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

**differ depending on the nature of procurement (i.e. for goods, works or services) and/or the sector (public, utilities, military)? Please provide all relevant current thresholds in your jurisdiction. Please also explain briefly any rules on the valuation of a contract opportunity.**

The GFR provides guidelines for procurement of goods starting at a value of INR 25,000. The GFR does not provide for one threshold of value of contracts which are required to be governed by the guidelines issued in the GFR. It prescribes specific rules for various thresholds of contracts. For instance, it provides for constitution of a local purchase committee for purchase of goods in the range of INR 25,000 to INR 2,50,000. In order to promote local manufacturers and suppliers, the Government has increased the limit of tenders for procurement of goods, services and works from outside India to INR 2 billion.

There are no such separate rules provided for valuation of a contract.

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

To summarise, there are no specific legislations in India that govern public procurement. The legislative framework on public procurement is based primarily on guidelines contained in rules, procedures and manuals. These guidelines generally apply to contracts having value of either equal to or above the limit of INR 5 million. However, the basic principles underlying such guidelines would be applicable to all contracts, including those valued below INR 5 million and the parties to such contracts are bound to act in a just, fair, equitable and transparent manner.

**5. For the procurement of complex contracts\*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes? What is the typical period from the publication of the advert that bidders have to respond to the advert for a complex contract?**

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

incorporated and validated by the Central Vigilance Commission in circular dated December 11, 2012, wherein the Central Vigilance Commission focused on transparency in works/ purchase/ consultancy contracts awarded on nomination basis.

As per GFR (Rule 159 and 160), it is mandatory for all ministries and departments of the Central Government to publish their tender enquiries, corrigenda thereon and details of bid awards on the Central Public Procurement Portal (CPPP). CPPP enables the tenderer to download the tender schedule and submit the bids online.

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

In this regard, certain states in India have formulated specific requirements for the publication of notices inviting tenders. For instance, the State of Rajasthan requires the notices inviting tenders for procurement contracts which are above INR 10 million to be published on the notice board of the procurement authority, in one regional newspaper, one state-level newspaper as well as in one all-India-level daily newspaper having wide circulation. While, in the State of Tamil Nadu, tender notices for contracts that have an estimated value above INR 750 million, are to be mandatorily published in all editions of Tamil Nadu's English and regional language newspapers, as well as the Indian Trade Journal. The State of Maharashtra requires the notices inviting tenders for procurement contracts above INR 50 million to be published in minimum one national level newspaper and one state level newspaper. As per the sources available online, in the State of Bihar tender notices for contracts that have an estimated value of above INR 2.5 million, are to be mandatorily published in at least one national daily newspaper having wide circulation, as well as the Indian Trade Journal. Even for the tenders falling below the abovementioned thresholds, the States impose other/limited modes of publication such as only on the notice board of the procurement authority and the regional newspaper.

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

**6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders? If there are differences in methodology between different regulated sectors (for example between how a utility might undertake a regulated procurement procedure and how a government department might do so), please summarise those differences.**

In cases wherein the procurement of contracts involves an initial selection stage, before invitation to tender documents are issued, the bidders are usually selected on the basis of the eligibility criteria determined by the procurer/ authority. Such eligibility criteria are not fixed or tailor made and are usually formulated to promote competition and transparency. The criteria of selection should be fair, having regard to the specific circumstances of procurement. Appropriate parameters depending upon the procurement can be prescribed as eligibility criteria to select the right bidder.

In the case of defence procurement contracts, at the first instance, a request for information (RFI) is issued to all original equipment manufacturers (OEMs) and upon receipt of information from these players, the criteria and specification of procurements are set out and finalised, after which the tenders are issued. Since most of the utilities are owned by government entities or PPP entities, they are required to follow the applicable procedure for procurement for selection of the bidders.

Also, in the case of railway procurement contracts, IREPS is the official portal of Indian Railways for procurement of goods, works and services, sale of materials and leasing of assets through the process of e- auction or reverse auction. The website provides a secure platform to users for online transactions for procurement. The Ministry of Railways, Government of India can prescribe the tender criteria and eligibility for the same depending upon the procurement.

**7. Does your jurisdiction mandate that certain bidders are excluded from tendering procedures (e.g. those with convictions for bribery)? If so, what are those grounds of mandatory exclusion? Are there any notable features of how this operates in your jurisdiction e.g. central registers of excluded suppliers? Does your jurisdiction**

**specify discretionary grounds of exclusion? If so, what are those grounds of discretionary exclusion?**

The GFR (Rule 151) provides that a bidder may be debarred/ blacklisted (i) for up to three years, in case they have been convicted of corruption or of a criminal offence as part of execution of a public procurement contract; and (ii) for up to two years for breach of the code of integrity.

The CVC recommends that government procurement entities should adopt an Integrity Pact (**Pact**) with the bidders/ contractors. The Pact is adopted by almost all parties in the public procurement process and would cover instances of bribery and corruption.

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

The commitments of the bidders/ contractors include:

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

The DGS&D is required to maintain a list of all debarred bidders which is also required to be displayed on its website as well as the website of CPPP.

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

otherwise be challenged in the Indian courts.

**8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures. Please include a timeline that includes the key stages of the process, including an estimation for the total length of the procedure.**

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

- *Open competitive bidding*: In this type of bidding, the bids submitted by the parties are opened to the public. This type of bidding creates a transparent bidding process, wherein the interested parties are made aware of the selection of the bidder.
- *Restrictive bidding or selective tendering or Limited Tender Enquiry (Limited Bidding)*: In this procedure, the invitation to bid is only sent to a limited number of bidders that have been prequalified through a screening process.
- *Two-stage bidding*: Two-stage bidding process is usually taken up where a heightened sense of professional proficiency is required. In such cases, two separate bids (technical and financial) are invited from the procurers.
- *Single source procurement/ Spot purchase*: As opposed to the other procedures covered above, this method is non-competitive and is used in exceptional circumstances after obtaining the approval of a competent authority. The special/exceptional circumstances could be an emergency, limitation of cost or continuance of previous work.

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

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

It may also be noted, that the decision of the procurer to subscribe to one of the above procedures depends upon the subject matter and the nature of procurement. The

procuring entity is required to ensure that the method chosen must be consistent with the criteria of prequalification and any restrictions that are imposed before execution.

**9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured. (For these purposes, please assume the contract in question exceeds the relevant threshold for application of the procurement regime by less than 50%)**

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

Additionally, the Department of Expenditure, Ministry of Finance vide an office memorandum issued in September, 2022 and January 11, 2023 introduced the concept of Push Button Procurement (PBP) whereby in case of bids valuing less than INR 5 lakhs (Five lakhs rupees) and where at least 5 (five) bids are received, the bidder has the option to evaluate the reasonability of the bid through GeM portal. The monetary threshold for such procurement through PBP was increased to INR 5 lakh (Five lakh rupees), inclusive of all taxes vide Office Memorandum notified by the Ministry of Finance Department of Expenditure Procurement Policy Division dated January 11, 2023. This enables the bidder to assess the reasonability of the rates which automates decision making without human intervention.

Another change brought about in January, 2023, allows the buyers to extend the PBP date once by 3 more days, at the time of preparation of tender document, in case of lesser participation.

The intention behind the PBP procedure is to introduce a user-friendly approach and reduce disproportionate efforts expended to low bids. This method is additional and the procurement entity may opt for it.

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

The current best practice that is adopted over and above ensuring compliance with the relevant procurement

regime is the electronic procurement regime or 'eProcurement' involving the submission of bids through the online portal created for this purpose. E-procurement encompasses the entire tendering process, beginning with the online publication of tender inquiry, followed by online bid submission by bidders, online bid opening, uploading of bid evaluation findings and publication of contract award.

For encouraging electronic submission of bids, the Government has created CPPP within which all the prerequisites and authentications are carried out and the documents are also published. As a process, prior to submission of bids on the portal, the bidders are required to enroll themselves on the CPPP.

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

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

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

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

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

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

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

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

The Procurement Policy Division of the Ministry of Finance, Government of India on October 29, 2021 issued guidelines which would act as "general instructions" within the meaning of Rule 6(1) of the GFR. The guidelines are aimed at ushering in reforms in public procurement and public project management. The formulation and release of the guidelines came as a measure of periodic review of the existing procurement procedures.

The guidelines were prepared under the aegis of the Central Vigilance Commission (CVC) after a thorough review and consultation process involving experts from various fields of public procurement. Similarly, the Comptroller and Auditor General (CAG) and the National Institution for Transforming India (NITI) Aayog carried out a detailed analysis of the existing procedures and rules for public procurement to suggest changes in strategies to meet present and future challenges in public procurement. The guidelines attempt to incorporate in the realm of public procurement, innovative rules for efficient and quick execution of public projects. A few of the improvements carried out in the existing regime include prescribing strict timelines for payments when due. Further, timely release of ad-hoc payments of 70% or more of the bills raised by vendors is expected to improve the financial position and liquidity amongst the contractors more particularly the Micro, Small and Medium Enterprises (MSMEs).

The guidelines also prescribe alternative methods for selection of contractors apart from the prevailing ones. In cases where it is deemed appropriate, quality parameters can be given weightage over cost during evaluation of proposals in a transparent and fair manner, through what is termed as Quality cum Cost Based Selection ("**QCBS**"). QCBS can be employed in cases where the procurement has been declared to be a Quality Oriented Procurement (QOP) or for procurement of non-consulting services where the value of the procurement does not exceed INR 10 crores (INR 100 million).

Further, in case of procurement of goods and/or works,



the Department of Expenditure, Ministry of Finance vide an office memorandum issued in April, 2022 has specified that in case the lowest bidder withdraws, fails to sign the procurement contract and/or fails to provide the security as may be required for the performance of the contract, the procuring entity in such case will have to re-tender the case.

**12. Does your jurisdiction have specific rules for the treatment of bids assessed to be "abnormally low" for the purposes of a particular procurement (i.e. a low priced bid, significantly lower than any other bid or a bid whose pricing raises questions of sustainability/viability over the contract term)? If so, is there a definition of what "abnormally low" means and please can you provide a short summary of the specific rules?**

In India, an abnormally low bid is one in which the bid price, in combination with other elements of the bid, appears so low that it raises material concerns as to the capability of the bidder to perform the contract at the offered price.

In such cases of abnormally low bids, the procuring entity may seek written clarifications from the bidder, including detailed price analyses of its bid price in relation to scope, schedule, allocation of risks and responsibilities, and any other requirements of the bid documents. If, after evaluating the price analyses, the procuring entity determines that the bidder has substantially failed to demonstrate its capability to deliver the contract at the offered price, the procuring entity may reject the bid/proposal. However, it is advisable to fix a normative percentage below the estimated cost, which could be automatically be considered as an abnormally low bid.

It is also specified that due care should be taken while formulating the specifications at the time of preparation of bid document so as to have a safeguard against the submission of abnormally low bid from the bidder.

Additionally, the Department of Expenditure, Ministry of Finance vide office memorandum issued in November, 2020 clarified that no provisions are to be inserted in the bid documents regarding additional security deposit/bank guarantee in case of abnormally low bids. If there are compelling circumstances to ask for any additional security deposit or bank guarantee in case of abnormally low bids, then the same can be taken only with the approval of the next higher authority to the authority competent to finalise the particular tender, or the secretary of the ministry/ department, whichever is lower.

**13. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder. Are regulated procuring bodies required to provide these reasons for their award decision before awarding the contract in question?**

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

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

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

There are clauses under various tender documents which state that the authority reserves its right to reject any bids without assigning any reason whatsoever. However, in February 2022, the Delhi High Court held that tender inviting authorities cannot act arbitrarily or whimsically or out of *mala fide* in awarding or rejecting bids. Merely having a clause in the tender which provides that the bids may be accepted or rejected without assigning any reasons does not mean that the procuring entity should not have any valid reasons to justify their conduct. Moreover, the GFR also provides that the reasons for rejecting a tender to a prospective bidder must be disclosed when such enquiries are made by the bidder.

**14. What remedies are available to unsuccessful bidders in your jurisdiction? In what circumstances (if any) might an awarded contract be terminated due to a court's determination that procurement irregularity has occurred?**

The unsuccessful bidders may challenge the bidding process by invoking the writ jurisdiction of the concerned High Courts or the Supreme Court of India, as the case may be. In the event, the unsuccessful bidder manifestly establishes before the writ court that the procuring entity while evaluating the bids violated the principle of fairness, transparency and equal treatment and the procurement process has been carried out in an arbitrary, biased and discriminatory manner, the writ court may cancel the contract awarded to the bidder. Another aspect examined by the courts is whether the terms and conditions of the tender have been tailor-made/ skewed to suit a specific person or entity. This means that in order to award a contract to a particular party/ person/ entity, a reverse engineering process is evolved to achieve that objective by making the tender conditions such that only one party is suitable for / fits the tender requirements. Such an endeavor has been categorized as "Decision Oriented Systematic Analysis" and is not looked upon favorably. The writ court may also direct the procuring entity to initiate the procurement process afresh so that irregularities occurred during the evaluation stands corrected in compliance with the afore-stated settled principles.

The courts are, however, careful before interfering in the bidding process because it causes proxy litigation in purely contractual matters. In various decisions, courts have held that the terms of invitation of tender are not open to judicial scrutiny. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

**15. Are public procurement law challenges common in your jurisdiction? Is there a perception that bidders that make challenges against public bodies suffer reputational harm / harm to their prospects in future procurement competitions? If so, please provide brief comment. Assuming a full hearing is necessary (but there are no appeals), how much would a typical procurement claim cost: (i) for the defendant and (ii) for the claimant?**

It is not uncommon for bidders to challenge the public procurement process in India. In fact, in 2021, the Supreme Court discussed that the ground reality that almost no tender remains unchallenged. The challenge itself may not cause reputational harm, though a bidder may possibly suffer such harm due to its blacklisting by the procurer for a specified time period. The challenge also does not usually affect the prospects of future procurement contracts, as the evaluation criteria for each procurement is separate and independent unless a bidder has been blacklisted for a certain period of time. The above concerns however often weigh on the minds of the bidders.

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

**16. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case). Please summarise the key stages and typical duration for each stage.**

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

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

**17. What rights/remedies are given to bidders that are based outside your jurisdiction? Are foreign bidders' rights/remedies the same as those afforded to bidders based within your jurisdiction? To what extent are those rights dependent on whether the host state of the**

### **bidder is a member of a particular international organisation (i.e. GPA or EU)?**

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

### **18. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract? Would such a subsidiary be afforded the same rights and remedies as a nationally owned company bidding in your jurisdiction?**

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

However, certain procurement criteria may provide for additional requirements for foreign bidders (upon being declared as successful bidder) such as, incorporation of an SPV/ subsidiary in India, wherein the foreign bidder is required to maintain certain level of ownership or control during the period of the contract. Certain bids may also have conditions regarding supply of certain quantity of goods which are manufactured locally.

### **19. In your jurisdiction is there a specialist court or tribunal with responsibility for dealing with public procurement issues? In what circumstances will it have jurisdiction over a public procurement claim?**

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

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

### **20. Are post-award contract amendments/ variations to publicly procured, regulated contracts subject to regulation in your jurisdiction? Are changes to the identity of the supplier (for example through the disposal of a business unit to a new owner or a sale of assets in an insolvency situation) permitted in your jurisdiction?**

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

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

### **21. How common are direct awards for complex contracts (contract awards without any prior publication or competition)? On what grounds might a procuring entity seek to make a direct award? On what grounds might such a decision be challenged?**

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

the usual course of auction and bidding may not be pursued.

The GFR, provides that contracts may be awarded on a nomination basis or procurement from a single source may be resorted to, in the following limited circumstances:

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

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

## 22. Have your public procurement rules been sufficiently flexible and/or been adapted to respond to other events impacting the global supply chain (e.g. the war in the Ukraine)?

The Government of India has taken various steps time and again to introduce various exemptions and relaxations in order to ensure smooth functioning of trade and respond to the global exigencies.

Primarily, for ensuring promotion of trade within India, the Government has in line with the Public Procurement (Preference to Make in India) Order, 2017, made efforts to promote Indian businesses while disqualifying foreign bids for procurement of those goods/ services or works which have sufficient local capacity and competition in India. Further, restrictions have been imposed on procurement from countries that share land borders with India on grounds of defence and national security. Bidders from such countries are required to obtain the necessary registration/ clearances from the competent Indian authorities in order to be eligible to participate in the procurement process. When registering for a bid, the Government of India made it mandatory for the bidders to specify the nation of origin of the commodities on GeM.

While the war led to certain disruptions and uncertainties, the Indian market has stabilised and the relations between India and Russia have ensured that the market does not get affected heavily. The Government of India continues to monitor the supply chain disruptions which may be caused by the war and other global issues and accordingly regulate procurement to ensure that it remains seamless.

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