Public Procurement World - India

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# 1. The Laws

## a. What is the applicable legislation?

At the apex of the Indian legal framework governing public procurement is Article 299 of the Constitution of India. Article 299 stipulates that all contracts made in the exercise of the executive power of the Union of India or a State Government must be in the name of the President of India or the Governor of the State, as the case may be, and be executed on behalf of the President or the Governor or by such person as he or she may direct.

At the federal level, there is no dedicated legislation governing public procurement in India. However, at the state level, certain state legislatures (like Tamil Nadu and Karnataka) have enacted such laws.

Nevertheless, comprehensive rules and directives for public procurement have been put in place at the federal level in terms of:

The General Financial Rules, 2017 ("GFR");

The Delegation of Financial Powers Rules, 1978;

The Manual on Policies and Procedures for Purchase of Goods issued by the Ministry of Finance;

The Manual of Policies and Procedure for Employment of Consultants issued by the Ministry of Finance;

The Director General of Supplies and Disposals Manual;

Manuals governing procedures for purchase of goods/ services issued by individual ministries/ departments like defence, and public sector undertakings like BSNL;

Government orders regarding price or purchase preference or other facilities to sellers in the handloom Sector, cottage and small scale industries and to central public sector undertakings, etc.; and

The guidelines issued by the Central Vigilance Commission to increase transparency and objectivity in public procurement.

These rules and directives form the regulatory framework for public procurement by governmental instrumentalities. In addition, for works contracts, model bidding documents have been issued by various public authorities (such as the National Highways Authority of India, Planning Commission, etc.) which establish the standard contractual framework between the public authorities and private parties.

There also exist certain sectoral laws and underlying sectoral policies which guide public procurement. Within this framework, various governmental instrumentalities and agencies, including ministries and departments (such as the Public Works Department, the National Highways Authority of India), have evolved their own public procurement system. This chapter does not address these systems.

## b. Does the legislation relate to or interact with any applicable trade agreement, such as the European Union procurement rules, WTO Government Procurement Agreement (GPA) or the procurement requirements of the North American Free Trade Agreement (“NAFTA”)?

India is not currently party to the WTO Government Procurement Agreement. However, the GFR have been periodically revised to incorporate developments such as a rapid growth of alternative service delivery systems, developments in information technology, outsourcing of services and liberalisation of the system of procurement, accounting and disposal of goods in line with the international practices.

## c. What are the basic underlying principles of the legal framework?

Rule 144 of the GFR lays down the fundamental principles underlying the public procurement regime. It provides that every authority delegated with the financial powers to procure goods in the public interest shall be responsible and accountable for bringing efficiency, economy and transparency in matters relating to public procurement and for fair and equitable treatment of suppliers and promotion of fair competition in public procurement. Rule 144 of the GFR provides that the procedure for public procurement must conform to, *inter alia*, the following yardsticks:

The specifications in terms of quality, type, etc., as well as quantity of goods to be procured, should be clearly spelt out keeping in mind the specific needs of the procuring organisations. The specifications should meet the basic needs of the organisation without including superfluous and non-essential features, which may result in unwarranted expenditure. Care should also be taken to avoid purchasing quantities in excess of requirements to avoid inventory carrying costs;

Offers should be invited following a fair, transparent and reasonable procedure;

The procuring authority should be satisfied that the selected offer adequately meets the requirement in all respects;

The procuring authority should satisfy itself that the price of the selected offer is reasonable and consistent with the quality required; and

At each stage of procurement the procuring authority must place on record, in precise terms, the factors it considered in making the procurement decision.

Rule 173 of the GFR requires that all government purchases should be made in a transparent, competitive and fair manner to secure best value for money whereby prospective bidders will be enabled to prepare and submit their competitive bids with confidence. Some of the measures for ensuring the above are as follows:

The text of the bidding document should be self-contained and comprehensive without any ambiguities. All essential information which a bidder needs for submitting a compliant bid should be clearly spelt out in the bidding document in simple language. The bidding document should contain, amongst other things:

The criteria for eligibility and qualifications to be met by the bidders such as minimum level of experience, past performance, technical capability, manufacturing facilities and financial position, etc.;

Eligibility criteria for goods indicating any legal restrictions or conditions about the origin of goods, etc., which may be required to be met by the successful bidder;

The procedure as well as date, time and place for sending the bids;

Date, time and place of opening of the bid;

Essential terms of the procurement contract;

Special terms affecting performance, if any;

The criteria for evaluation of bids.

Provision should be made in the bidding document to enable a bidder to question the bidding conditions, bidding process and/or rejection of its bid;

Suitable provision should be kept in the bidding document for the settlement of disputes, if any, emanating from the resultant contract;

The bidding document should indicate clearly that the resultant contract will be interpreted under Indian Laws;

The bidders should be given reasonable time to submit their bids;

The bids should be opened in public and authorised representatives of the bidders should be permitted to attend the bid opening;

The specifications for the required goods should be clearly stated without any ambiguity so that the prospective bidders can submit meaningful bids. In order to attract a sufficient number of bidders, the specifications should be as broadly drafted as possible. Efforts should also be made to use standard specifications which are widely known in the industry;

In the case of turn-key contract(s) or contract(s) for the procurement of sophisticated and costly equipment or wherever felt necessary, suitable provision is to be made in the bidding documents for one or more rounds of pre-bid conference for clarifying issues and clearing doubts, if any, about the specifications and other technical details of the plant, equipment and machinery, etc., projected in the bidding document. The date, time and place of the pre-bid conference should be indicated in the bidding document. This date should be sufficiently in advance of the bid opening date;

Bids received should be evaluated in terms of the conditions already incorporated in the bidding documents. No new condition which was not incorporated in the bidding documents should be brought in for evaluation of the bids. Determination of a bid's compliance should be based on the contents of the bid itself without recourse to extrinsic evidence;

Bidders should not be permitted to alter or modify their bids after expiry of the deadline for receipt of bids;

Negotiation with bidders after bid opening must be severely discouraged. However, in exceptional circumstances where price negotiation against an *ad-hoc* procurement is necessary due to some unavoidable circumstances, negotiations may be entered into but only with the lowest evaluated compliant bidder;

Where a number of firms are placed on a rate contract for the same item, negotiation as well as counter offering of rates is permitted with the bidders and for this purpose special permission has been given to the Directorate General of Supplies and Disposals;

The contract should ordinarily be awarded to the lowest evaluated bidder whose bid has been found to be compliant and who is eligible and qualified to perform the contract satisfactorily as per the terms and conditions incorporated in the corresponding bidding document. However, where the lowest acceptable bidder is not in a position to supply the full quantity required, the remaining quantity, as far as possible, should be ordered from the next highest compliant bidder at the rates offered by the lowest compliant bidder; and

The name of the successful bidder should be published in the relevant Ministries' or Departments' notice board or bulletin or website.

## d. Is aerospace and defense procurement treated differently from other types of procurement?

While aerospace procurement is not treated differently from other types of procurement, all procurement by the Ministry of Defence is governed by the Defence Procurement Procedures, 2016. In decreasing order of priority, the procurement of defence equipment under this procedure are:

Buy (Indian – IDDM): procurement of products from an Indian vendor meeting one of two conditions – (i) products that have been indigenously designed, developed and manufactured with a minimum of 40% (forty percent) 'indigenous content' on cost basis of the total contract value, or (ii) products having 60% (sixty percent) 'indigenous content' on cost basis of the total contract value, which may not have been designed and developed indigenously.

Buy (Indian): procurement of products from an Indian vendor having a minimum of 40% (forty percent) 'indigenous content' on cost basis of the total contract value.

Buy and Make (Indian): Initial procurement of equipment in fully formed state in quantities as considered necessary, from an Indian vendor engaged in a tie-up with a foreign original equipment manufacturer, followed by indigenous production in a phased manner involving transfer of critical technologies as per specified range, depth and scope from the foreign original equipment manufacturer.

Buy and Make: An initial procurement of equipment in fully formed state from a foreign vendor, in quantities as considered necessary, followed by indigenous production through an Indian production agency in a phased manner involving transfer of critical technologies as per specified range, depth and scope, to the production agency.

Buy (Global): Outright purchase of equipment from foreign or Indian vendors. In case of procurement through foreign vendors, Government to Government route may be adopted, for equipment meeting strategic/ long term requirements.

In addition to the above listed categorisation, the 'Make' categorisation, aims at developing long-term indigenous defence capabilities. Acquisitions covered under the 'Make' category refer to equipment/ system/ sub-system/ assembly/ sub-assembly, major components, or upgrades thereof, to be designed, developed and manufactured by an Indian vendor.

The Defence Production Policy, 2011 stresses the preference for procurement from indigenous sources wherever possible, subject to ensuring that the defence forces have an edge over potential adversaries at all times – in immediate terms as well as in sustainability.

# 2. Application of the Statutory Procurement Laws

## a. Which public agencies are covered by the laws?

Rule 1 of the GFR states that the GFR shall be applicable to (a) all Ministries and Departments of the Central Government, attached and subordinate bodies, and (b) autonomous bodies, except in those cases where the by-laws of an autonomous body provide for separate financial rules which have been approved by the Government.

## b. Which private entities are covered by the laws?

Any private entity participating in the competitive bidding or public procurement process to supply goods or services, or for that matter being awarded a project or contract by a government agency, will be covered by the law insofar as the bidding, qualification and award/rejection is subject to judicial review under well established common law principles of fair play and reasonableness (such as the principle of legitimate expectation, *pacta sunt servanda*, Wednesbury's reasonableness and proportionality, as have been incorporated into Indian law by the courts). Private entities claiming a wrongful denial have a right to seek redress through the courts of law.

## c. Are co-operations between contracting authorities exempted from public procurement law? If so, what are the conditions for the exemption?

There are no such exemptions contemplated under the GFR.

## d. Which types of contracts are covered?

The regulatory framework of the public procurement system is applicable to all types of contracts entered into by Ministries and Departments of the Government for the procurement of goods and services.

## e. How are changes to an existing contract dealt with? Do changes require a new procurement procedure?

Rules 225 (xiv) of the GFR states that the terms of a contract, including the scope and specification once entered into, should not be materially varied.

Wherever material variation in any of the terms or conditions in a contract becomes unavoidable, the financial and other effects involved should be examined and recorded, and specific approval of the authority competent to approve the revised financial and other commitments obtained, before varying the conditions.

All such changes should be in the form of an amendment to the contract duly signed by all parties to the contract.

Further, Rules 225 (xv) states that normally, no extensions of the scheduled delivery or completion dates should be granted except where events constituting *force majeure*, as provided in the contract, have occurred or the terms and conditions include such a provision for other reasons. Extensions as provided in the contract may be allowed through formal amendments to the contract duly signed by parties to the contract.

## f. What is the applicable regime for framework agreements?

The GFR does not lay down any specific requirements with regard to framework agreements.

## g. What is the applicable regime for public-private partnerships (PPPs)?

There is no single framework law or regulation specifically for public private partnerships. However, model bidding documents (including the request for qualifications, request for proposals, and concession agreements) have been issued by various public authorities (such as the National Highways Authority of India, Planning Commission, etc.) for the procurement and implementation of public private partnerships.

Further, public private partnerships are often subject to sectoral laws and underlying sectoral policies. Within this framework, various governmental instrumentalities and agencies, including ministries and departments (such as the Public Works Department, the National Highways Authority of India), have evolved their own system for entering into public private partnerships.

## h. How are concessions dealt with?

See the response to (g) above.

## i. Are there anti-avoidance rules (including laws on bid rigging)?

The Income Tax Act, 1961, contains rules for avoidance of tax on the transfer of goods and services between associated and connected enterprises. These rules are all encompassing and also apply to contracts for public procurement. Further, certain Government instrumentalities and agencies, including ministries and departments (like the Ministry of Defence, the Public Works Department, the National Highways Authority of India, et al), have evolved their own public procurement system in which such rules are found.

The Competition Act, 2002 prohibits any agreement which causes, or is likely to cause, appreciable adverse effect on competition in markets in India. Such agreements are void. Any agreement which evidences bid rigging or collusive bidding that shall be presumed to have an appreciable adverse effect on competition under Section 3 of the Competition Act. The Competition Commission of India may inquire into any alleged contravention of Section 3. The CCI, on being satisfied that there exists a prima facie case of bid rigging, shall direct the Director General to cause an investigation and furnish a report. Post inquiry, the Competition Commission of India can pass such orders and impose such penalty as it deems fit.

# 3. Procurement Procedures

## a. What procurement procedures can be followed?

The following are the types of award procedures available under the GFR.

*Purchase of goods without quotation*: Under Rule 154 of the GFR, goods up to the value of Rs. 25,000 (Rupees Twenty Five Thousand) may be purchased without inviting quotations or bids. A certificate is to be recorded by the competent authority as to its satisfaction that the goods purchased are of the requisite quality and specification and have been purchased from a reliable supplier at a reasonable price.

*Purchase of goods by purchase committee*: Under Rule 155 of the GFR, goods costing above Rs. 25,000 (Rupees Twenty Five Thousand) and up to Rs. 2,50,000 (Rupees Two Lakh and Fifty Thousand) may be purchased on the recommendations of a duly constituted local purchase committee consisting of 3 (three) members of an appropriate level as decided by the Head of the Department. The committee surveys the market to ascertain the reasonableness of rate, quality and specifications and identify the appropriate supplier. Before recommending placement of the purchase order, the members of the committee jointly record a certificate of satisfaction that the goods recommended for purchase are of the requisite specification and quality, priced at the prevailing market rate and the supplier recommended is reliable and competent to supply the goods in question, and is not debarred by the Department of Commence or the Ministry/ Department concerned.

*Purchase of goods directly under rate contract*: Ministries and Departments may directly procure rate contracted goods (as concluded by the Central Purchase Organization in accordance with Rule 148 of the GFR) from suppliers. In such cases, Rule 156 of the GFR mandates that the prices to be paid for the goods shall not exceed those stipulated in the rate contract and the other salient terms and conditions of the purchase should be in line with those specified in the rate contract.

*Advertised tender enquiry*: Rule 161 of the GFR mandates that except in the situations outlined in Rules, 154, 155, 162 and 166, as described above and below, invitations to tender by advertisement should be used for procurement of goods of an estimated value of Rs. 25,00,000 (Rupees Twenty Five Lakh) and above. The organization should also post the complete bidding document on its website and the Central Public Procurement Portal and permit prospective bidders to make use of the document downloaded from the website and the Central Public Procurement Portal. Where the Ministry or Department feels that the goods of the required quality, specifications, etc., may not be available in the country, copies of the tender notice may be sent to Indian embassies abroad and foreign embassies in India.

*Limited tender enquiry*: Under Rule 162 of the GFR, allows for a limited tender process to be adopted when the estimated value of the goods to be procured is up to Rs. 25,00,000 (Rupees Twenty Five Lakh). Copies of the bidding document should be sent directly by speed post/ registered post/ courier/ e-mail to firms which are included on the list of registered suppliers for the goods in question (as maintained by the Central Procurement Organisation under Rules 150 of the GFR). The number of supplier firms in a limited tender enquiry should be more than 3 (three). Purchase via this method may be adopted even where the estimated value of the procurement is more than Rs. 25,00,000 (Rupees Twenty Five Lakh), in the following circumstances:

Urgency of the demand where any additional expenditure involved by not procuring through advertised tender enquiry is justified in view of the urgency. The Ministry or Department is to record the nature of the urgency and reasons why the procurement could not be anticipated;

There are sufficient reasons (to be recorded in writing by the competent authority) indicating that it will not be in the public interest to procure the goods through advertised tender enquiry;

The sources of supply are definitely known and the possibility of fresh sources beyond those being tapped, is remote.

*Single tender enquiry*: Under Rule 166 of the GFR, procurement from a single source may be resorted to in the following circumstances:

Only one particular firm is the manufacturer of the required goods;

In a case of emergency, when the required goods must be purchased from a particular source. The reason for such a decision is to be recorded and the approval of the competent authority is to be obtained; and

For standardisation of machinery or spare parts to be compatible to the existing sets of equipment (on the advice of a competent technical expert and approved by the competent authority).

*Two bid system*: For purchasing high value plant, machinery etc. of a complex and technical nature, bids may be obtained in two parts as under: (a) Technical bid consisting of all technical details along with commercial terms and conditions; and (b) Financial bid indicating item-wise price for the items mentioned in the technical bid.

The technical bids are opened by the purchaser in the first instance and evaluated by a competent committee or authority. At the second stage, the financial bids of only these technically acceptable offers are opened after intimating them the date and time of opening the financial bid for further evaluation and ranking before awarding the contract.

*Two-stage bidding*: Ministry/Department may procure the subject matter of procurement by the method of two-stage bidding, if: (a) it is not feasible to formulate detailed specifications or identify specific characteristics for the subject matter of procurement, without receiving inputs regarding its technical aspects from bidders; or (b) the character of the subject matter of procurement is subject to rapid technological advances or market fluctuations or both; or (c) Ministry/Department seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs; or (d) The bidder is expected to carry out a detailed survey or investigation and undertake a comprehensive assessment of risks, costs and obligations associated with the particular procurement.

## b. What status do electronic means/procedures have?

Rule 160 of the GFR provides that it is mandatory for Ministries/ Departments to receive all bids through e-procurement portals in respect of all procurements.

## c. Where are contract notices, i.e. calls for bid, published?

Rules 159 of the GFR provides that it is mandatory for all Ministries/ Departments of the Central Government, their attached and Subordinate Offices and Autonomous /Statutory Bodies to publish their tender enquiries, corrigenda thereon and details of bid awards on the Central Public Procurement Portal (<https://eprocure.gov.in/cppp/>)

## c. Can certain prospective bidders be excluded from the competition?

There are general provisions in the GFR regarding when tenderers may be excluded from a procurement process. In particular, Rule 151 stipulates that a bidder shall be debarred if:

Such bidder has been convicted of an offence under the Prevention of Corruption Act, 1988;

Such bidder has been convicted of an offence under Indian Penal Code, or any other law for the time being in force, for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract;

The bidder has breached the code of integrity stipulated in Rule 175 of the GFR.

From time to time, due to sectoral policy considerations (like cross-holding restrictions between print media and broadcasting), as well as issues of national/public interest (for defence and strategic procurements), specific qualifications rules for specific transactions may have exclusionary impacts.

Rules 151 mandates that a bidder shall not be debarred unless such bidder has been given a reasonable opportunity to represent against such debarment.

Rules 151 stipulates that the debarment pursuant to points (a) and (b) shall not exceed three years, and pursuant to point (c) shall not exceed two years.

# 4. Bidder Selection

## a. Are there any rules on the selection criteria?

Rule 173 of the GFR requires that the bidding document should contain, amongst other things, the criteria for eligibility and qualifications to be met by the bidders such as minimum level of experience, past performance, technical capability, manufacturing facilities and financial position, etc.

Rule 173 of the GFR further provides that the bids received should be evaluated in terms of the conditions already incorporated in the bidding documents. No new condition which was not incorporated in the bidding documents should be brought in for evaluation of the bids. Determination of a bid's compliance should be based on the contents of the bid itself without recourse to extrinsic evidence.

Rules 173 of the GFR prescribes that the contract should ordinarily be awarded to the lowest evaluated bidder whose bid has been found to be responsive and who is eligible and qualified to perform the contract satisfactorily as per the terms and conditions incorporated in the corresponding bidding document.

## b. Is prequalification an option? If so, what are the requirements? What is the procedure?

Rule 163 also allows for a two-bid system for purchasing high value plant, machinery etc. of a complex and technical nature:

Technical bid consisting of all technical details along with commercial terms and conditions; and

Financial bid indicating item-wise price for the items mentioned in the technical bid.

In the first instance, the technical bids are to be opened by the purchasing Ministry or Department and evaluated by a competent committee or authority. Thereafter, the financial bids of only the technically acceptable offers are opened for further evaluation and ranking before awarding the contract.

Rule 164 of the GFR lays down that Ministry/Department may procure the subject matter of procurement by the method of two-stage bidding, if:

It is not feasible to formulate detailed specifications or identify specific characteristics for the subject matter of procurement, without receiving inputs regarding its technical aspects from bidders; or

The character of the subject matter of procurement is subject to rapid technological advances or market fluctuations or both; or

Ministry/Department seeks to enter into a contract for the purpose of research, experiment, study or development, except where the contract includes the production of items in quantities sufficient to establish their commercial viability or to recover research and development costs; or

The bidder is expected to carry out a detailed survey or investigation and undertake a comprehensive assessment of risks, costs and obligations associated with the particular procurement.

Rule 164 prescribes that the procedure for two-stage bidding shall include the following:

In the first stage of the bidding process, the Ministry/Department shall invite bids through advertised tender containing the technical aspects and contractual terms and conditions of the proposed procurement without a bid price;

All first stage bids, which are otherwise eligible, shall be evaluated though an appropriate committee constituted by the Ministry/ Department;

The committee may hold discussions with the bidders and if any such discussion is held, equal opportunity shall be given to all bidders to participate in the discussions;

In revising the relevant terms and conditions of the procurement, the procuring entity shall not modify the fundamental nature of the procurement itself, but may add, amend or omit any specification of the subject matter of procurement or criterion for evaluation;

In the second stage of the bidding process, the procuring entity shall invite bids from all those bidders whose bids at the first stage were not rejected, to present final bid with bid prices in response to a revised set of terms and conditions of the procurement.

## d. Do “blacklists” for bidders exist? If so, what are the conditions for unlisting?

In the matter of *Patel Engineering Limited vs. Union of India and Anr.*, (2012) 11 SCC 257, the Supreme Court observed that the State or its instrumentalities can decline to enter into a contractual relationship with a person or a class of persons on account of the undesirability thereof – the decision is called blacklisting. The only legal limitation upon the exercise of such an authority is that State is to act fairly and rationally without in any way being arbitrary – such a decision can be taken for some legitimate purpose. What is the legitimate purpose that is sought to be achieved by the State in a given case can vary depending upon various factors.

In the matter of *Raghunath Thankur vs. State of Bihar & Ors***,** (1989) 1 SCC 229, the Supreme Court of India observed that blacklisting any person in respect of business ventures has civil consequence for the future business of the person concerned. Therefore, it is an elementary principle of natural justice that parties affected by any order of blacklisting should have right of being heard and make representations against such order.

Further, in the matter of *Kulja Industries Ltd. vs. Western Telecom Project BSNL*, (2014) 14 SCC 731, the Supreme Court of India has held that any blacklisting cannot be permanent – the period thereof invariably depend upon the nature of the offence committed.

## e. Does the involvement of a company in the set-up of a procurement procedure exclude the company from said procedure due to conflict of interest?

While the GFR does not specifically address this issue, Bidders may be debarred if they contravene the code of integrity set out in Rule 175 of the GFR. The code of integrity, *inter alia*, prohibits any conflict of interest.

## f. Can bidders combine to submit a bid (bidder consortia)? What limitations apply?

The GFR is silent on this issue. However, it is common practice for bidders to form consortia for the purposes of a particular procurement.

## g. Can members of a bidder consortium be changed during a procurement procedure?

The GFR are silent on this issue. However, it is not uncommon for bidding documents to permit a change in the membership of a consortium subject to certain conditions which may, inter alia, include prior approval of the procuring entity.

## h. Do limitations apply for participation of related bidders in the same procurement procedure with competitive bids?

While the GFR does not specifically address this issue, bidders may be debarred if they contravene the code of integrity set out in Rule 175 of the GFR. The code of integrity, *inter alia*, prohibits any conflict of interest.

In this regard, it is noteworthy that the High Court of Delhi has, in the matter of *Shapoorji Pallonji Roads Pvt. Ltd. and Anr. vs. Union of India and Ors.*, 207(2014) DLT 385, held that conflict of interest provisions ensure that the competitive bidding *inter se* is not subverted or diluted by associations or relationship being formed between bidders which could affect their decision during the participation in the competitive bidding process.

## i. Is there a special regulation or a special requirement for a foreign company to participate in a procurement procedure?

The GFR do not stipulate any special regulation or special requirements for a foreign company to particulate in a procurement procedure.

# 5. Specifications

## a. Are there any rules on the specifications?

Rule 144 of the GFR states that the specifications in terms of quality, type etc., as well as quantity of goods to be procured, should be clearly spelled out, keeping in mind the specific needs of the procuring organisations. The specifications so worked out should meet the basic needs of the organisation without including superfluous and non-essential features, which may result in unwarranted expenditure. Care should also be taken to avoid purchasing quantities in excess of what is required to avoid inventory carrying costs.

Rule 173 of the GFR provides that the bidding document should contain:

The criteria for eligibility and qualifications to be met by the bidders such as minimum level of experience, past performance, technical capability, manufacturing facilities and financial position, etc.; and

Eligibility criteria for goods, indicating any legal restrictions or conditions about the origin of goods, etc. which may be required to be met by the successful bidder.

Further, the specifications of the required goods should be clearly stated without any ambiguity so that the prospective bidders can submit meaningful bids. In order to attract sufficient numbers of bidders, the specification should be broad-based to the extent feasible.

## b. Are bidders allowed to change the specifications or submit their own standard terms of business?

Rule 225 of the GFR stipulates that standard forms of contracts should be adopted wherever possible, with such modifications as are considered necessary in respect of individual contracts – modifications, if any, should be carried out only after obtaining financial and legal advice.

Ordinarily, save for the exception outlined in Rule 164 (the details of which are set out in the response to query 4(b) above), bidders are not permitted to change the specifications or submit their own standard terms of business.

## c. Is the protection of Small and Medium Enterprises addressed in procurement legislation? If so, how?

The Government of India has notified a procurement policy under Section 11 of the Micro, Small and Medium Enterprises Development Act, 2006. Pursuant to this law and the policy issued thereunder, the Central Government Ministries, Departments, and public sector enterprises are required to procure a minimum of 20% of their annual value of goods and services from micro, small and medium enterprises.

# 6. Contract Award

## a. Are there any rules on the award of contracts?

Rules 173 of the GFR stipulates that the contract should ordinarily be awarded to the lowest evaluated bidder whose bid has been found to be responsive and who is eligible and qualified to perform the contract satisfactorily as per the terms and conditions incorporated in the corresponding bidding document. However, where the lowest acceptable bidder against ad-hoc requirement is not in a position to supply the full quantity required, the remaining quantity, as far as possible, be ordered from the next higher responsive bidder at the rates offered by the lowest responsive bidder.

## b. Are there any limitations regarding the offered bid price?

There are no express guidelines regarding exclusion of abnormally low bids under the GFR. However, Rule 173(xvi) of the GFR does recognise that contracts should ordinarily be awarded to the lowest evaluated bidder whose bid has been found to be responsive and who is eligible and qualified to perform the contract satisfactorily as per the terms and conditions incorporated in the corresponding bidding document. However, where the lowest acceptable bidder against ad-hoc requirement is not in a position to supply the full quantity required, the remaining quantity, as far as possible, be ordered from the next higher responsive bidder at the rates offered by the lowest responsive bidder.

Furthermore, under Rule 173(xvi) of the GFR, only in exceptional circumstances, price negotiations may be resorted to only with the lowest evaluated responsive bidder against an ad-hoc procurement which may be necessary due to some unavoidable circumstances. However, as a rule, negotiations with bidders after bid opening is severely discouraged.

## c. Are there any rules on alternative bids?

The GFR does not have any provisions concerning alternative bids. The permissibility of alternative bids will depend on the tender document.

# 7. Exemptions to Competitive Bidding

## a. Are there any exemptions to competitive bidding, i.e. under what conditions is a direct award/single sourcing permissible?

In addition to the specific instances covered under our response to Section 3(a) above, the separate guidelines for defence procurement prescribe certain exemptions.

Rule 194 of the GFR permits 'Single Source Selection/Consultancy by Nomination'. The selection by direct negotiation/nomination, on the lines of Single Tender mode of procurement of goods, is considered appropriate only under exceptional circumstance such as:

tasks that represent a natural continuation of previous work carried out by the firm;

in case of an emergency situation, situations arising after natural disasters, situations where timely completion of the assignment is of utmost importance; and

situations where execution of the assignment may involve use of proprietary techniques or only one consultant has requisite expertise.

under some special circumstances, it may become necessary to select a particular consultant where adequate justification is available for such single-source selection in the context of the overall interest of the Ministry or Department. Full justification for single source selection should be recorded in the file and approval of the competent authority obtained before resorting to such single-source selection.

it ensures fairness and equity, and a procedure in place to ensure that the prices are reasonable and consistent with market rates for tasks of a similar nature; and the required consultancy services are not split into smaller sized procurement.

## b. What are the consequences for violation of the competitive bidding requirement?

While the GFR is silent on this issue, in the event any contract award is found in contravention of competitive bidding requirements, upon such tender awards being challenged before Courts, there is a possibility of the tender award being held invalid. Indian Courts have consistently emphasised that bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda.[[1]](https://resourcehub.bakermckenzie.com/en#_ftn1)

[[1]](https://resourcehub.bakermckenzie.com/en#_ftnref1) Meerut Development Authority vs. Association of Management Studies and Anr. (2009) 6 SCC 171

# 8. Remedies and Enforcement

## a. Are there any remedies and enforcement mechanisms in the procurement legislation?

The GFR does not provide for remedies and enforcement under the procurement process. However, Rule173 stipulates that the bidding document should make suitable provision for settlement of disputes, if any, arising from the resulting contract.

## b. Are remedies available outside the scope of procurement legislation, e.g. civil law damage claims?

A challenge to a tendering process or any disputes in relation to a tendering process can be brought before the courts of law in the same was as any ordinary civil dispute; in compliance with the Code of Civil Procedure, 1908. Further, disputes regarding the tendering process can also be subject to judicial review by a High Court or the Supreme Court under their writ jurisdiction, among other things, on the ground of arbitrariness, unfairness in action, mala fides or violation of the fundamental or legal rights as enshrined in the Constitution of India, which include the doctrine of reasonableness.

## c. Is there a specific forum before which procurement disputes are heard?

There is no specific forum before which disputes regarding a public procurement are heard. Disputes may be brought before the appropriate forum for civil disputes in accordance with the Code of Civil Procedure, 1908 or may be brought before the High Courts or Supreme Court under their writ jurisdiction.

## d. Are there any timing requirements for the review?

In terms of the courts' civil jurisdiction, the Limitation Act, 1963 prescribes the limitation period for filing an application in the appropriate judicial forum to redress a grievance. In most civil cases, including for specific performance of a contract and compensation for breach of a contract, the prescribed limitation period is three years from the date of the occurrence of the relevant cause of action.

In circumstances where the parties invoke the writ jurisdiction of the High Court or Supreme Court, no specific time limits are prescribed. The courts have developed the doctrine of laches, where expediency in seeking relief is warranted and those guilty of inexplicable or unreasonable delays may be deemed unable to bring a suit.

## e. What are the main preconditions for review?

Indian courts while dealing with the scope of judicial review in matters related to tenders and public award of contracts have been consistent in upholding the Government's freedom to enter into contracts of a commercial nature and make its own decisions. In *Tata Cellular vs. Union of India* (1994) 6 SCC 651 it was observed that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism[[1]](https://resourcehub.bakermckenzie.com/en#_ftn1). The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

While discussing the grounds for review in tender related cases, the Hon'ble Supreme Court in *Tata Cellular vs. Union of India* (*supra*) had observed that in such cases the duty of the court is to confine itself to the question of legality. The courts concern should be whether a decision-making authority:

exceeded its powers;

committed an error of law;

committed a breach of the rules of natural justice;

reached a decision which no reasonable tribunal would have reached; or

abused its powers.

[[1]](https://resourcehub.bakermckenzie.com/en#_ftnref1) *Asia Foundation & Construction Ltd. vs. Trafalgar House Construction (I) Ltd. And Others*, (1997) 1 SCC 738

## f. What are admissible grounds for starting a review proceeding?

In *Reliance Airport Developers (P) Ltd. vs. Airports Authority of India and Others*, (2006) 10 SCC 1, while dealing with the question of the grounds of judicial review in an administrative action, the Supreme Court of India had classified three heads, the grounds on which administrative action is subject to control by judicial review. The first ground is illegality the second irrationality, and the third procedural impropriety.

In *Siemens Public Communication Networks vs. Union of India* AIR 2009 SC 1204, the Supreme Court of India observed that when the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bona fide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.

## g. Does a review proceeding affect an ongoing procurement procedure or an awarded contract respectively?

In India, the trend points to judicial restraint in administrative action. Courts do not sit as a court of appeal but merely review the manner in which the decision was made.[[1]](https://resourcehub.bakermckenzie.com/en#_ftn1)

If however, infirmities are found in the procedure adopted by the contracting authority or if the Court finds the decision taken by the contracting authority arbitrary or unfair, the award of an ongoing tender may be the same may be reverted.

[[1]](https://resourcehub.bakermckenzie.com/en#_ftnref1) Tata Cellular vs. Union of India (1994) 6 SCC 651

## h. What are the consequences of a successful review proceeding for the affected procurement procedure or awarded contract respectively?

In the event of a successful review proceeding, there have been considerable instances in which the award of the contract has been cancelled and fresh tenders have been invited by the concerned authority. In some cases, without cancelling the entire tender process the contracting authority is required to re-evaluate bids.

## i. How long does a judicial proceeding for review take?

The time period or the culmination of a judicial proceeding depend on the specific circumstances of the case and depending on the nature of the claim, stakeholders involved and other factors a typical review proceeding before courts may take between 6 to 12 months or even more in some cases.

## j. Must unsuccessful bidders be notified before the award? If so, when?

Depending on the conditions of every tender, unsuccessful bidders are usually notified of the award and selection of the preferred bidder at the time of announcement of the result simultaneously with all other bid participants.

## k. Are review proceedings common?

While there have been isolated instances of review proceedings being initiated in relation to procedural infirmities in procurement procedures these may not be termed as common occurrences.

## l. Are damage claims in relation with procurement procedures common?

Please see the response to (k) above.

## m. What are the leading court decisions involving procurement disputes?

The Supreme Court's decision in *Ramana Dayaram Shetty vs. International Authority of India*, (1979) 3 SCC 489, is a landmark judgment on the issue of administrative action and is also applicable to public procurement. The Supreme Court observed that where the Government is entering into contracts or granting other forms of largesse, the Government cannot act arbitrarily at will and, like a private individual, deal with any person it pleases. Instead, its actions must be in conformity with standards or norms which are not arbitrary, irrational or irrelevant, and if the Government departs from such standards or norms in any particular case or cases, the actions of the Government are liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

In *Nagar Nigam, Meerut vs. Al Faheem Meat Exports Pvt. Ltd and Ors*., (2006) 13 SCC 382, the Supreme Court laid down that the law is well-settled that contracts by the State, its corporations, instrumentalities and agencies must normally be granted through public auction/public tender by inviting tenders from eligible persons. The notification of the public auction or for inviting tenders should be advertised in well known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, the subject-matter of auction, technical specifications, estimated cost, etc. The award of government contracts through public auction/public tender is to ensure transparency in the public procurement process, to maximise the economy and efficiency of government procurements, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned.

In *Raunaq International Ltd. vs. IVR Construction Ltd. and Ors*., (1999) 1 SCC 492, the Supreme Court observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. It listed out the following as being the commercial considerations which are of paramount importance in arriving at a commercial decision:

the price at which the other side is willing to do the work;

whether the goods or services offered are of the requisite specifications;

whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involve the engagement of substantial manpower or require specific skills to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

the ability of the tenderer to deliver goods or services or to do the work of to a requisite standard and quality;

past experience of the tenderer, and whether they have successfully completed similar work previously;

time which will be taken to deliver the goods or services; and often; and

the ability of the tenderer to take follow up action, rectify defects or to give post contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State, public body or agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

The overarching view, as stated by the Supreme Court in *Master Marine Services Pvt. Ltd. vs. Metcalfe and Hodgkinson Pvt. Ltd. and Anr*., (2005) 6 SCC 138, is that the Government must have freedom of contract – but considerations of fair play are necessary for an administrative body functioning in an administrative sphere. In *Global Energy Ltd. vs. Adani Exports Ltd.,* (2005) 4 SCC 435, the Supreme Court observed that it is well settled that the terms of an invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of a tender, as they are in the realm of contract, unless the terms are wholly arbitrary, discriminatory or actuated by malice. In a similar vein, the Supreme Court in *Tata Cellular vs. Union of India*, (1994) 6 SCC 651, noted that judicial review does not mean the court should take over parties' contracting powers. The parameters for interference in such matters would be (i) mala fides, (ii) bias, and (iii) arbitrariness to the extent of perversity. If none of these are present, the court should not interfere. It must be left to the authorities.

With respect to negotiations, the Supreme Court in *Nagar Nigam, Meerut vs. Al Faheem Meat Exports Pvt. Ltd and Ors.*, (2006) 13 SCC 382, has clearly opined that in rare and exceptional cases, having regard to the nature of the trade or largesse or for some other good reason, a contract may have to be granted by private negotiation, but normally that should not be done as it damages public confidence. In rare and exceptional cases, for instance during natural disasters and emergencies declared by the Government; where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., the normal rule may be departed from and such contracts may be awarded through private negotiations.

# 9. Other Relevant Rules of Law

## a. Are there any related bodies of law of relevance to procurement by public agencies?

The Indian Contract Act, 1872 and the Sale of Goods Act, 1930 are the major pieces of legislation governing contracts of sale/purchase of goods and services in general.

## b. Does a specific contract law apply for public contracts?

There is not specific contract law that applies to public contracts.

# 10. Industry sectors of special importance or with a specific procurement regime

## a. Are there any specific laws or practices that apply in the technology sector?

There are no laws specific to the procurement of technology in India. However, the Manual on Policies and Procedures for Purchase of Goods states that specifications should aim at procuring the latest technology and avoid procurement of obsolete goods. It is also provided that the period of a rate contract should normally be one year for stable technology products. In special cases, shorter or longer period may be considered.

## b. Are there any specific laws or practices that apply in the defense sector?

See the response to 1(d) above.

## c. Are there any specific laws or practices that apply in the health care sector?

There are no specific laws that apply to health care sector. As a standard practice, various tenders for procurement of medical goods are floated by the Department of Health, Ministry of Health and Family Welfare on the Central Public Procurement Portal (<https://eprocure.gov.in/>)

## d. Are there any specific laws or practices that apply to any other particular industry sector?

The Government of India has notified a procurement policy under Section 11 of the Micro, Small and Medium Enterprises Development Act, 2006. Please see the response under 5(c) above.

# 11. Looking Ahead

## a. Are there any proposals to change the law in the future?

The GFR have been updated and revised in 2017. There is currently no plan to change the law in the immediate future.

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