

Legislative Brief

The Public Procurement Bill, 2012

The Bill was introduced in the Lok Sabha on May 14, 2012 by the Minister of Finance.

The Bill was referred to the Standing Committee on Finance (Chairperson: Mr. Yashwant Sinha). The Committee was expected to submit its report by August 28, 2012.

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Highlights of the Bill

- ◆ The Bill seeks to regulate and ensure transparency in procurement by the central government and its entities. It exempts procurements for disaster management, for security or strategic purposes, and those below Rs 50 lakh. The government can also exempt, in public interest, any procurements or procuring entities from any of the provisions of the Bill.
- ◆ The government can prescribe a code of integrity for the officials of procuring entities and the bidders. The Bill empowers the government and procuring entity to debar a bidder under certain circumstances.
- ◆ The Bill mandates publication of all procurement-related information on a Central Public Procurement Portal.
- ◆ The Bill sets Open Competitive Bidding as the preferred procurement method; an entity must provide reasons for using any other method. It also specifies the conditions and procedure for the use of other methods.
- ◆ The Bill provides for setting up Procurement Redressal Committees. An aggrieved bidder may approach the concerned Committee for redressal.
- ◆ The Bill penalises both the acceptance of a bribe by a public servant as well as the offering of a bribe or undue influencing of the procurement process by the bidder with imprisonment and a fine.

Key Issues and Analysis

- ◆ The Bill exempts certain procurements from the specified process, besides allowing the government to limit competition in certain cases. It is unclear why the government has been given further powers to exempt any procurement or procuring entity from the applicability of the Bill.
- ◆ The Bill specifies Open Competitive Bidding as the preferred method of procurement, without defining the term. The UN Model Law and an earlier draft procurement Bill describe equivalent terms in detail.
- ◆ In cases where procurement from a particular supplier is necessary to ensure standardisation or compatibility with existing systems, the Bill does not require certification from a competent technical expert. Such a certification is required by existing regulations and model laws.
- ◆ In a departure from existing regulations, the Bill does not restrict use of cost-plus contracts, which provide no incentive for efficiency.

PART A: HIGHLIGHTS OF THE BILL¹

Context

The value of public procurement in India, i.e. procurement by governments and their entities, is estimated to be Rs 12-15 lakh crores per annum, or 15-20% of the GDP.² The Planning Commission notes that globally, procurement is vulnerable to misconduct, and losses due to inappropriate procurement procedures range between 20 and 30%.²

Currently there is no single law specifically governing procurement by the Central Government (the government). Instead, public procurement is regulated by the General Financial Rules, 2005 (GFR) and guidelines issued by the Central Vigilance Commission (CVC) and respective ministries, departments and Public Sector Undertakings (PSUs).³ Any misconduct is prosecuted under the provisions of the Competition Act, 2002 and the Prevention of Corruption Act, 1988 (PCA). Two states, Karnataka and Tamil Nadu, have enacted their own laws on public procurement – the Karnataka Transparency in Public Procurements Act, 1999 and the Tamil Nadu Transparency in Tenders Act, 1998 (TN Law) respectively.

A Group of Ministers appointed the Committee on Public Procurement (CoPP) in January, 2011 to suggest measures to ensure transparency, efficiency and economy and strengthen practices in public procurement.⁴ Separately, the Planning Commission drafted a Public Procurement Bill (Draft Bill, 2011) based on the United Nations Commission on International Trade Law's model procurement law (UNCITRAL Law). The Public Procurement Bill, 2012 is based on the CoPP's recommendations and shares various features with the UNCITRAL Law and the World Trade Organisation's Agreement on Government Procurement (GPA).³

Key Features

Applicability of the Bill

- The Bill is applicable to all central government ministries, departments, central PSUs, constitutional and statutory bodies and other organisations owned, controlled, or substantially funded by the central government.
- The following procurements are exempted from applicability of the Bill: (a) procurements whose value is below Rs 50 lakh; (b) emergency procurement for disaster management; and (c) procurements for national security or strategic purposes. Further, the government may exempt procurements made under foreign aid programmes. In addition, the government may exempt any procurement, or class of procurements or procuring entities from the application of any of the provisions of the Bill through a notification.

General principles

- The Bill entrusts the procuring entity with the responsibility to ensure certain norms for procurements. These include: (a) efficiency, economy and transparency; (b) fair and equitable treatment to bidders; (c) competition; (d) prevention of corrupt practices; and (e) reasonable price and consistent quality in procurement.
- The government can prescribe a code of integrity, applicable to officials of a procuring entity and bidders. The Bill lists provisions to be included in the code and states that the procuring entity is empowered to take action against a bidder for violating the code.
- The Bill allows the government to impose requirement(s) for offsets* in the procurement contracts. The government can also mandate procurement from, provide purchase preference to, or limit competition to any category of bidders on account of: (a) promotion of domestic industry; (b) socio-economic policy; (c) any other duly notified government policy; and (d) public order, morality or safety, among others.

Procurement process

- The Bill permits a procuring entity to engage in a pre-qualifying process to identify qualified bidders before inviting bids. The entity may also register reliable bidders for a recurring or commonly procured item.
- The procuring entity shall specify the evaluation criteria in bid documents. The successful bid will be selected on the basis of lowest price and/or most advantageous bid as specified in the bidding document.
- The procuring entity may enter into a framework agreement or rate contract with bidders for items needed on a recurring/urgent basis, using open competitive bidding or any other method provided in the Bill.

* Offsets are condition(s) attached to a procurement, aimed at development of domestic content.

- The Bill allows a procuring entity to use the following methods of procurement:

Table 1: Methods of procurement, their applicability and features

Method	Conditions for use	Key Features
Open competitive bidding	Preferred method of procurement.	Procuring entity to invite bids by means of wide publicity. Reasons for using any other method to be recorded.
Limited competitive bidding	Where (a) only a limited number of bidders can supply; or (b) the time and cost for open competitive bidding is high; or (c) there is an urgent need for procurement.	Procuring entity shall invite bids by writing directly to all bidders or an adequate number of bidders. It can also invite registered bidders.
Two-stage bidding	Procuring entity is unable to frame detailed specifications at the onset, and needs bidders' inputs.	Only the bidders qualifying in the first (technical) stage will be considered for second (financial) stage.
Single source procurement	Where (a) a particular bidder is the only supplier; or (b) there is an urgent requirement; or (c) procurement from an earlier supplier is needed for standardisation or compatibility; or (d) use of any other method is not appropriate for the protection of national security.	The procuring entity shall solicit a bid from a single prospective bidder with the option to engage in negotiations.
Electronic reverse auction	Where it is feasible to formulate a detailed description and where high participation from bidders is likely.	Procuring entity to conduct reverse bidding using an electronic platform.
Request for quotations and spot purchase	Where there is (a) an existing market for the required goods or services; or (b) an urgent requirement for maintenance or repairs. The value of the procurement should be less than the prescribed amount.	The procuring entity shall accept only one quote per bidder and select the lowest priced quote. The procuring entity may undertake spot purchase through a committee comprising three members.

Sources: Public Procurement Bill, 2012; PRS.

Transparency mechanism

- The Bill mandates the establishment of a Central Public Procurement Portal for posting matters relating to public procurement. These include pre-qualification, registration and bidding documents, clarifications and modifications, details of participating, excluded and successful bidders and, decisions on grievance redressal.
- The procuring entity has to maintain a record of its procurement proceedings and communications, as per the provisions of the Right to Information Act, 2005.

Grievance redressal and penalties

- The Bill allows an aggrieved bidder/prospective bidder to ask the procuring entity for a review of the decision. The aggrieved bidder may further approach the concerned Procurement Redressal Committee (PRC) in case of delay in review by the procuring entity or if he disagrees with the review's outcome. The procuring entity must communicate the reasons for non-acceptance of PRC's recommendation(s) to the bidder and the PRC.
- The Bill penalises acceptance of a bribe by a public servant in connection with a procurement process with imprisonment between six months and five years and a fine. It also penalises bribing or undue influencing of the process with imprisonment up to five years and a fine up to 10% of the value of procurement.
- The government may debar a bidder from all public procurements for three years, if he is convicted under the PCA, Indian Penal Code or any other law. The procuring entity may debar a bidder for two years for violating the code of integrity, unapproved withdrawal from the process, failure to sign a contract or poor performance.

PART B: KEY ISSUES AND ANALYSIS

Power to exempt procurements from provisions of the Bill

The Bill exempts certain procurements from the specified process as well as transparency and grievance redressal mechanisms. It also permits the government to limit competition in order to achieve certain objectives.

The Bill also allows the government to exempt any procurement, or class of procurements or procuring entities from any of the provisions of the Bill through a notification. The government has to state in writing, why such exemption is in public interest, and table the notification in Parliament. It is unclear why the government has been provided with further powers to exempt any procurement or procuring entity from the applicability of the Bill.

Clause 3(3),
Clause 4(1)
and Clause
11

Clause 59

Ambiguities regarding procurement methods and contracts

- Clause 30 The Bill specifies “Open Competitive Bidding” as the preferred method of procurement, but does not provide a clear definition or description of the term. On the other hand, the UNCITRAL Law and Draft Bill, 2011 describe in detail “Open Tendering” or “Open Competitive Bidding”.
- Clause 32 The Bill allows a procuring entity to engage in Single Source Procurement (SSP) if sourcing from a particular supplier is necessary to ensure standardisation or compatibility with existing systems. However, in contrast to the GFR, GPA and the TN Law, the main Act does not explicitly mandate a technical certification from a competent technical expert, before undertaking such procurement.
- Clause 25 and Clause 26 Cost-plus contracts are contracts where the price payable for supplies or services is the sum of actual cost and a pre-determined profit. Since the supplier or contractor gets an assured profit, there is no incentive for efficiency in such contracts. The Bill does not place any restrictions on the use of cost-plus contracts. In contrast, both the GFR and the Draft Bill, 2011 discourage procurement through these contracts.

It may be pertinent to note that all the above issues can be addressed in the Rules.

Comparison with other laws and regulations

The following table compares key features of the Bill with GFR, UNCITRAL Law, GPA and the Draft Bill, 2011.

Table 2: Comparison of laws and regulations regarding public procurement

	GFR, CVC guidelines	Public Procurement Bill 2012	Draft Bill, 2011	International model laws
Applicability	All central government offices.	All central government offices, PSUs and government funded/controlled organisations.	All central government offices, PSUs & government funded/controlled organisations.	UNCITRAL: All public procurement. GPA: Specified by signatories.
Exemption	(a) During war; (b) Handicraft & small scale industry products; (c) Purchases below Rs 1,00,000.	Procurements that are (a) made under foreign aid agreements; (b) below specified value; (c) for disaster management; (d) towards national security or strategic purposes; or (e) exempted by a notification.	Procurements that are (a) for emergency disaster management; (b) towards national security or strategic purposes; or (c) exempted by a notification.	GPA: Procurements below a threshold value or made under international aid agreements. UNCITRAL: Procurements made under foreign aid agreements.
Code of integrity	No provision.	Specifies code of integrity.	Specifies code of conduct.	UNCITRAL: Specifies code of conduct.
Exclusion of bidder	No explicit provisions.	For violating code of integrity.	For bribery or conflict of interest.	UNCITRAL: For bribery and unfair competitive advantage.
Publication of tenders	In Indian Trade Journal and one national newspaper.	On the Central Public Procurement Portal, procuring entity's website and as per regulations.	One prominent newspaper, government website and as per regulations.	GPA and UNCITRAL: As per procurement regulations.
Price negotiation	Not allowed after bid opening except with lowest bidder.	Allowed only for single source procurement.	Only for SSP, Request for Proposals (RFPs) & competitive negotiations.	UNCITRAL: Only for SSP, RFPs & competitive negotiations.

Sources: General Financial Rules, 2005; CVC guidelines on public procurement; Public Procurement Bill 2012; Planning Commission's Draft Public Procurement Bill, 2011; UNCITRAL Model Law on procurement; WTO Agreement on Government Procurement; PRS.

Notes

1. This Brief has been written on the basis of the Public Procurement Bill, 2012 that was introduced in the Lok Sabha on May 14, 2012.
2. “Draft for Discussion – The Public Procurement Bill, 2011”, Planning Commission, September 2011. http://planningcommission.nic.in/reports/genrep/public_pro_bill.pdf.
3. “Draft Public Procurement Bill, 2011”, Ministry of Finance, November 30, 2011. http://finmin.nic.in/the_ministry/dept_expenditure/ppcell/draft_pp_bill_2011.asp.
4. Rajya Sabha, Unstarred Question no. 995, Ministry of Personnel, Public Grievances and Pensions, March 22, 2012.

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