
THE PUBLIC PROCUREMENT PROCESS: AN ABETTOR TO THE INCREASING BID RIGGING IN INDIA

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ABSTRACT

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices".¹

The contemporary Indian markets are at stake with respect to the public procurement process in the country. The increased bid-rigging occurring at the state is creating an appreciable adverse effect on the market and resulting in a decrease in the welfare of the end beneficiaries, its citizens. The current public procurement process in India is playing a major role in this escalation of such anti-competitive practices. In India, there is no comprehensive law for public procurement, and one can be of the opinion that the convoluted system of public procurement in India is one of the prominent reasons for the increasing bid rigging in the public sector. The constitutional arrangements across the Union and State governments, autonomous and statutory bodies, public sector undertakings (PSUs), and the local governments (panchayats and municipalities) demand a broad range of requirements for providing public services. And for these arrangements, varied public bodies are involved in the procurement process, which in itself creates a complicated system of procurement. While comparing with the procurement framework of the United States, where they have designated well-trained bodies for the procurement process, in India, the efficiency of the authorities at many of the procurement processes is questioned, but many of them are commendable. Such anti-competitive practices curtail the competition among the players in the market, and at the end, the common people are the victims. There are different concerns cited regarding this increasing bid rigging in the country. All those concerns are pointing fingers at the public procurement process in India. The promotion of efficiency must be the primary agenda of an effective public procurement policy.

¹ Adam Smith, *An Inquiry into The Nature and Causes of the Wealth of Nations* (1776).

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Introduction

The basic idea of the public procurement process is that when a buyer calls for tender, different bidders bid for the tender floated by the buyer. And the least priced bidder will be given the contract. And in the case that instead of competing with one another the bidders collude between themselves and rig the bids, then in such cases, the bidding process will be distorted which will lead to manipulation of bidding outcomes. Such cartels take the form of bid-rigging or collusive bidding. The public procurement procedure is not designed to discover bid rigging. Since it is an administrative procedure, it cannot be interrupted just because the bid organizers suspect collusion. The evidence needs to be less solid for the bid organizer just to denounce the rig. Nonetheless, it is very difficult to occur bid organizers lack the incentive to fight a cartel.³

Public procurement in India: A complex process

An efficient procurement system appears as a strong element of the public expenditure management systems by helping an entity in taking appropriate budgetary decisions and identifying the required investment opportunities.⁴ In India there is no comprehensive law for public procurement and can be of the opinion that the complex process of public procurement in India is one of the prominent reasons for the increasing bid-rigging in public sector. The Article 53 of the Constitution of India, Government of India Allocation of business Rules, 1962 and Transaction of business rules, 1961 deals with public procurement's legal regulations. The financial powers of Government are vested in the Ministry of Finance, which are delegated to seven subordinate authorities under the General Financial Rules (GFRs) and Delegation⁵ of Financial Powers Rules (DFPR).

In India the process of public procurement is quite complex given the federal framework or public service delivery. The constitutional arrangements across the Union and State governments, autonomous and statutory bodies, public sector undertakings (PSUs), and the local governments (panchayats and municipalities) demand a broad range of requirements for providing public

² Adam Smith, *An Inquiry into The Nature and Causes of the Wealth of Nations* (1776).

³ Alberto Heimler, *Cartels in Public Procurement*, 8 J. COMP. L. & ECON. 849 (2012).

⁴ Hunja, 2003; McCrudden, 2004

⁵ DFPR, http://finmin.nic.in/the_ministry/dept_expenditure/notification/dfpower/index.asp

services. The very reason of the complex system of public procurement is because as the country does not have a comprehensive public procurement law guiding the procurement activities. In the absence of a comprehensive law, General Financial Rules (GFRs) allow the government entities to conduct procurement activities independently. While the basic principles of public procurement are respected, the system has resulted in diversity in the procurement system in the country. Many entities such as Defence, Railway, Telecom, Public Works Department (PWD), and Directorate General of Supplies and Disposal (DGS&D) separately issue procurement manuals to administer public procurement activities. In addition, the system in India is aimed at achieving socio-economic developmental objectives including promotion of MSEs through price and purchase preferences and reservation of sector-specific products. These lead to complexities due to multiple interpretations of rules and regulations at the discretion of the procuring entities.⁶

The public procurement framework in India has four broad features namely constitutional provisions, legislative provisions, administrative guidelines, and overseers. Within the constitutional provisions, Articles 298, 299, 300 and 300A authorize the governments to contract for goods and services. Similarly, Article 246 specifies the legislative powers in the federal structure of India into three lists namely Union List, State List, and Concurrent List. While Article 355 specifies the executive power, Article 282 directs the financial autonomy in public spending. Beyond that, it does not provide any guidance on public procurement principles, policies, and procedures.⁷

As there is no explicit procurement statute in India. The procurement process is regulated by different statutes currently available in India. They are, contract Act 1872, sale of goods act 1930, CAG duties, prevention of corruption act 1988, Central vigilance commission act 2003, powers and conditions of service act 1971, competition act 2002, Right to information act 2005, and information technology act 2000 etc. These statutes are at the union level. Different states also have adopted their procurement laws at the state level. Tamil Nadu Karnataka Rajasthan Andhra Pradesh and Assam have adopted their own procurement statutes. Even Kerala, Himachal Pradesh etc. have also presented their draft of public procurement. From time to time, the Ministry of Finance has been bringing out changes in the public procurement rules and regulations so that the administrative efficiency can be achieved.⁸ From these varied rules and regulations and the

⁶ Diagnostic Toolkit towards Competitive Tenders, Circular No. 32/2019

⁷ Bhabesh Hazarika and Pratap Ranjan Jena, Public Procurement in India: Assessment of Institutional Mechanism, Challenges, and Reforms, NPPF, Working Paper No. 204, July 2017.

⁸ *Ibid*

different regulatory bodies makes the procurement process a complex one. Corruption in each stage of procurement is inevitable. No system can be perfect when men of diversity work together. Hence when there is more number of authorities involved there will be more chances of corruption. Corruption in each stage will in turn end up creating a huge exploitation of interest of consumers and public at large.

Major Concerns in the Procurement Regime in India

Multiple procurement guidelines and procedures.

In the United States, the federal acquisition regulation code is adopted to govern the public procurement system. Whereas in India, there are multiple procurement guidelines. There is no comprehensive standard to deal with public procurement policy and these multiple guidelines will create chaos and confusion both to the procurers and bidders.

Even though there are various organisations in the United States they are only considered as supplementary to the FAR. Office of Federal procurement policy regulates all these operations and it is the central regulatory body that is responsible for all the matters relating to public procurement. There is also a committee that is headed by individuals of major procuring organisations. This is considered to be an effective system and India is in the need to adopt a similar procurement mechanism.

Absence of standard tender documents and contracts

There is no standard tender document in India. There are more than 150 formats used in the current public sector. Different agencies of similar work also use different tender documents prescribing their own pre-qualification criteria, the process of selection, settlement of the dispute and other financial terms and conditions. Such variations in tender documents and contracts lead to confusion and complications among bidders.⁹

Overemphasis on procurement procedures and guidelines

Even though there are so many policies governing public procurement, the regulatory is mainly giving importance to the stringent adherence to these policies rather than giving importance to the object or purpose of such policies. Before implementing any policy the regulatory body must

⁹ <https://sps.iitd.ac.in/PDF/SGP.pdf>

consider whether such policies and promotion of competition, transparency, accountability, fairness, etc., in the procurement system. Implementing such procedures without any clarity will lead to abuse of the procurement process by the bidders.

Absence of a transparent grievance reprisal mechanism

In India, if there is any grievance regarding the awarding of a contract then such irregularities can complain to the procuring agency. But the scope of transparency is very less in this case. In case where the procuring officials have participated in the manipulation of the outcome, chances are very low that the aggrieved bidder will get a fair hearing.¹⁰

Unskilled manpower and lack of training

In our nation, public procurement is considered an unskilled activity even though it has greater importance to the market economy. Many complex procurement processes are engaged in a very unprofessional manner. Railway and DGS &D have specialized staff for the procurement process. Whereas other organizations do not have experts in this area and there is a need to recruit specialized staffs. In India huge amount is being collected from the public in the form of tax for public procurement. But still, they do not have a dedicated institutional system that trains procurement related matters. Most of the training is done in-house and such training is considered to be of poor quality. This is not the case in the international arena. The United States has, for example, a dedicated Defense Acquisition University¹¹ for training on defense related procurements.

Frequent updates of manual

When there is an update of policies and manuals, such updates must be informed to the government officials otherwise it can lead to serious issues. If the officials are not updated with the policies then the execution of the procurement process will tamper.

Ambiguity and lack of clarity in manuals

If there is more ambiguity in the manner as prescribed for procurements the more will be the chance of manipulation in the process. Lack of clarity and ambiguity will in turn lead to multiple interpretations of the same.

¹⁰ Ibid

¹¹ www.dau.mil

Procurement posting not linked to qualification

In every country, the procurement officials are asked for certain qualification whereas in India many of the officials are not met with the standard or qualifications for the public procurement process.

Frequent transfers of officials

In India, it is common that the bureaucratic system will not allow a person to work in the same department for a period of time. So the frequent transfers of these officials leave the person incomplete to adhere to their professional expectation. For example, if one person is posted in a department for a term of 2 years and he was carrying out his duty on a certain procurement process, but if by that time if he is transferred to any other department the other work will be pending and the new official need to start from the scratch to build that. This will in turn discourage the specialisation of an official in a particular department.

Lack of avenues for knowledge building

In India, there is no avenue wherein the officials are mandated to get updated with the procurement policies and procedures. These officials themselves do not take any interest in getting updated with these procedures. Hence there is a chance of few officials getting updated and others not. This will affect the coordination of the department.

No centralised data sharing facility

There is no centralised data sharing facility that will help in uniformity and cost-effectiveness. In any system dealing in operational issues, crisis management or any other negotiations or training the data sharing facility must be effective and sustainable. The organised sector of government must have a robust data sharing facility.

The absence of Central authority for framing policies for public procurement

In the current scenario India does not have a comprehensive legislature as well as Central authority exclusively for ensuring compliance with the procurement process. Currently, these powers are upon the ministries or departments. If any department or ministry lack expertise then such procurement is carried out through DGS&D.

No authorities to regulate and ensure compliance with procurement policies.

As already mentioned the public procurement process is regulated by various agencies. In India, the government has framed different rules for the procurement of goods and services. Many authorities enjoy an ex Post facto role in the governance of public procurement in India. These bodies are the Central vigilance commission, comptroller and auditor general, the Central bureau of investigation etc. These authorities can exercise their power only if there is any allegation of irregularity or malpractices. From this, it is evident that there is no regulatory framework or machinery that will restrict these practices from their roots. Even the competition commission of India plays a significant role in the regulation of public procurement even though they are not mandated to investigate any alleged corruption practices done in undue benefit to some bidder.

CCI can only, intervene in cases where such calamitous practice has caused or is likely to cause an appreciable adverse effect on competition in India (AAEC). So, where corruption and anticompetitive practices get intertwined in a procurement process, multiple agencies may get involved in the investigation, in accordance with their own respective mandates, which may (though not always) result in a turf war of sorts, depending on how the mandate is interpreted by the concerned authority or agency.¹²

Lack of exclusive law dealing with public procurement

As already mentioned there is no explicit law for public procurement and such absence will lead to inconsistency in the contractual conditions and the obligations thereon. The public procurement Bill 2012 has been framed but it is still pending approval by the legislature. If this law has been enacted then it will be a great walkthrough to the public procurement system in India. Unfair and discriminatory conditions in tenders: In certain cases, the government procurers impose unfair conditions in the tenders floated, which curtails a significant portion of the contractors to participate in tender process thereby resulting in denial of market access, which (in cases where the procuring department is a dominant undertaking) is in itself an anticompetitive conduct under Section 4(2) (c) of the Competition Act, 2002.

Corruption

The malignant problem of corruption exists at every stage of the procurement process and at times, the very demand for a good or service is ‘artificially’ created by unscrupulous persons so as to

¹² http://indialawjournal.com/volume4/issue_4/article_3.html

benefit private parties; confidentiality of bids are abused; specifications are added or tweaked at the last moment before submission, to favor a particular bidder, after awarding the contract, corrupt officials may accept contractor's unjustified requests for increment of costs, thus benefiting the contractor and causing a loss to the Government.¹³

Public Procurement and Competition law

While achieving competitiveness, enhancing transparency, and reducing corruption remain the objectives of reform initiatives, particularly in developing and emerging markets, the results of the reforms have not been satisfactory.¹⁴

In a market, the buyers and sellers will interact with each other and thereby get mutually benefited from the outcomes. If there is high level of competition between the producers then only best economic outcomes can be expected from the markets. There are certain benefits if there is high competition in the market that has lower prices better quality innovations etc.

If the competition is less between the producers of suppliers then the buyers of the consumer need to settle for high prices with lower quality products and their lack innovations and thereby affect consumer welfare and overall health of the economy. Structural or behavioural aspects can be the reasons for less competition in the market. structural aspect in the means the oligopolistic market wherein there will be very few produce suppliers in the market for a specialised product and this will in turn have limited access to raw materials and create high barriers to entry to the technology or capital investment.

Even if enterprises enter into anti-competitive behaviour with other enterprises then it can also lead to hindering competition. If there is a Monopoly by an entity then in such a case the dominant player can abuse its dominance by pricing really high amount on the products and imposing unfair market access to the potential entrants. Hidden cartelisation by different enterprises or associations will lead to high prices and affect the output production and there will be also market allocations in product wise or geographical manner between them.

¹³ Shri Pratyush Sinha, Enhancing value in public procurement (CVC Conference on Competition, Public Policy and Common Men), 16th November 2009, https://www.cci.gov.in/sites/default/files/workshop_pdf/speechesbypratyushsinhacvc.pdf, 5 April, 2021, 22:53.

¹⁴ Odhiambo and Kamau, 2003; Jones, 2007; Tabish & Jha, 2011; Ambe & Badenhorst-Weiss, 2012; CUTS International, 2014

In case of public procurement, competition is inevitable and vital. In public procurement the goods or services are purchased through public sector where it is considered as a key economic activity of the government. Nearly 15% of the GDP worldwide accounts for the public procurement. In India, about 30% of the GDP constitutes government procurement.

As already mentioned the procurements are carried out by various department agencies ministries and other local bodies. It also includes statutory corporations and other public undertakings either at centre or at state level.

The promotion of efficiency must be the primary agenda of an effective public procurement policy. This will be achieved if the procurement process selects a supplier with the lowest price to achieve the best value for money. The end result for an ineffective public procurement will be mismanagement and waste of public money. If there is vigorous competition between the suppliers in the market this will help the government to realise these objectives. Otherwise if competition is curtailed then the suppliers engage in bid rigging hence taxpayers money is wasted as governments pay more than a fair price.

Considering all the challenges discussed, it can be concluded that the public procurement process in India is definitely an abettor to the increasing bid rigging in the country. The lack of a structured procurement statute and shortcomings in the administration and adjudication are contributing to this stage of bid rigging in public procurement. The public procurement process need to be strictly considered. There should be specialized trained procurement bodies under each departments, having expertise in the financial affairs. They should be assigned the duty of research and identification of the market and the players. Apart from that the authorities need to promote competition among the players to maintain a stable and healthy market. The contemporary societal demand is to ensure a legit and uncomplicated public procurement system in India, as the citizens are the ultimate sufferers or beneficiaries of the system.

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