PUBLIC PROCUREMENT POLICY IN INDIA AND COMPETITION ISSUES

Gaurang Meher Diljun
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This monograph is based on a study "Competition Issues in Public Procurement in India" conducted at TERI* and supported by IDRC.

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Abbreviations

AIR	All India Reporter
CAG	Comptroller and Auditor General
CCI	Competition Commission of India
CVC	Central Vigilance Commission
DGS&D	Directorate General of Supplies and Disposals
GDP	Gross Domestic Product
GFR	General Financial Rules
IDRC	International Development Research Centre
IEM	Independent External Monitor
IP	Integrity Pact
ITJ	Indian Trade Journal
JFTC	Japanese Federal Trade Commission
KFTC	Korean Fair Trade Commission
KONEPS	Korean Electronic Procurement System
LTE	Limited Tender Enquiry
MOP	Ministry of Public Works
MRTP	Monopolies and Restrictive Trade Practices
OECD	Organisation for Economic Co-operation and Development
OTE	Open Tender Enquiry
PAC	Public Accounts Committee
PSU	Public Sector Unit
RDSO	Research Design and Standards Organization
SC	Supreme Court
SCC	Supreme Court Cases
STE	Single Tender Enquiry
TC	Tender Committee
USAID	United States Agency for International Development

1. Introduction

Public Procurement, i.e., purchase of goods and services by the government, its agencies and Public Sector Undertakings (PSU), is a key economic activity of governments and constitutes a significant proportion of their spending. An estimate given by the Central Vigilance Commissioner[1] puts it at about 30% of the Indian Gross Domestic Product (GDP). In India, public procurement is decentralized and is carried out by various departments/ ministries, both at the Centre and State level. Some departments, such as Defence, Indian Railways[2] (IR), and Telecom, spend a major proportion of their budget on procurement. The primary goal of public procurement policy is to ensure "value for public money", i.e., to procure best goods and services at the best price possible. However, cartelization and bid rigging, often facilitated by corruption, is one of the key concerns in public procurement around the world. The impact of collusion, bid-rigging, and corruption is dampening in public sector because of the important nature of services provided by the public sector. Apart from the loss of public funds, inefficient procurements have a detrimental impact on the interests of the most disadvantaged in the society who rely heavily on public provision of infrastructure services. OECD (2010) notes[3], *"Distortion of the public procurement process is detrimental for democracy and for sound public governance, and it inhibits investment and economic development. Thus, deficiencies in public procurement impact on the wider economy in a way that does not occur with private procurement."* A well–devised public procurement policy and procedures can positively impact the overall competitiveness, economic efficiency and the pace of technological innovation.

TERI conducted a study in 2011-12 with the objective to analyse the impact of regulations, policies, and procedures in Indian public procurement on competition. The study focused primarily on procurement of standardized products[4] in select government departments and PSUs. Owing to the nature of services provided by these sectors, there are deep concerns for safety of the users. This could lead to public officials being highly risk aversive to avoid failures and accidents. Therefore, entry is highly regulated in these sectors leading to concentrated markets in many product segments. Moreover, selected departments/ministries has laid down its own procurement rules and procedures. Hence, an analysis of procurements by these departments was helpful in understanding the interface between sector specific regulation and the principles laid down in the General Financial Rules (GFR).

To identify and analyse the common anti-competitive practice, the study was based on the reports by the Central Vigilance Commission (CVC) and the Comptroller and Auditor General of India (CAG). Interactions with procurement officials, private bidders, policy makers, and lawyers were also undertaken to gain a deeper insight. However, it is to be pointed out that responses (to the audit findings) and Action Taken Reports by the concerned departments were not available at the time of the study and therefore, is not included in the analysis.

Cartelization and bid rigging is one of the key concerns in public procurement around the world.

OECD, 2010

2. Regulatory and Legal Framework

BOX 1

GFR, Rule 137: Fundamental Principles of Public Buying

Every authority delegated with the financial powers of procuring goods in public interest must conform to the following yardsticks :

- the specifications in terms of quality, type, etc., as also quantity of goods to be procured, should be clearly spelt out keeping in view the specific needs of the procuring organizations. The specifications so worked out should meet the basic needs of the organization 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 requirement 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 concerned must place on record, in precise terms, the considerations which weighed with it while taking the procurement decision.

The Constitution of India does not contain any direct provision dealing with public procurement. However, Article 299 stipulates that all contracts made in exercise of the executive power of the Union or the State shall be expressed to be made by the President or by the Governor as the case may be. One can discern two distinct phases as far as the judicial attitude on the exercise of discretion of power in entering into government contracts is concerned. Before 1979, the courts refused to inquire how the discretion was exercised. However, after 1979, the courts have become increasingly sensitive about the way in which this power was exercised. *In RD Shetty vs. International Airport Authority*[5], the Supreme Court held that the government could not award a contract in a discriminatory or arbitrary manner. The court observed, *"It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground"*.[6]

Prof. MP Jain summarises the following principles as the main points emerging from this case:

- The government does not have an open and unrestricted choice in the matter of awarding contracts to whomsoever it likes.
- The government is to exercise its discretion in conformity with some reasonable non-discriminatory standards or principles.
- The government is bound by the standards laid down by it.
- The government can depart from these standards only when it is not arbitrary to do so and the departure is based on some valid principle, which in itself is not irrational, unreasonable, or discriminatory.[7]

These principles are central to public procurement in India. There are a number of cases where the higher judiciary in exercise of its writ jurisdiction reviewed government contracts to see whether the manner in which these contracts have been awarded have conformed to these principles or not. The legal regime governing public procurement has to be analysed in light of this constitutional backdrop.

2.1. Legislation at central level

There is no national legislation on public procurement in India. The governing rule for public procurement at the Central level is the GFR. GFR is a set of executive orders issued by the central government. The legal basis for the issuance of such rules comes from Article 53 which vests the executive power of the Union in the President; and Article 77 which authorizes the President to make rules for the transaction and allocation of business. In exercise of that power, the President has promulgated the Government of India (Allocation of Business) Rules, 1961 and the Government of India (Transaction of Business) Rules, 1961. These rules vest the financial powers of the government in the Ministry of Finance which has issued GFR as a compendium of general provisions to be followed by all offices of

Government of India while dealing with matters of a financial nature. Chapter 6 of GFR covers procurement of goods and services(Box 1). These are general rules to be followed by all central ministries and departments[8]. However, detailed rules can be laid down by the individual procurement departments as well.

In addition to these specific legislations/rules, there are a number of general legislations applicable to public procurement, both at the central and state level. These include the Indian Contract Act, 1872; the Sale of Goods Act, 1930; the Central Vigilance Commission Act, 2003; Prevention of Corruption Act, 1988; and the Right to Information Act, 2005.

The government has introduced the Public Procurement Bill, 2012 (Bill 58 of 2012) in the Lok Sabha and is pending for its approval. The proposed law aims to replace the set of guidelines for public procurement at the central government level as defined in GFR. The Bill has been drafted with the objectives of ensuring transparency, fair and equitable treatment to bidders, promoting competition, and enhancing efficiency and economy in the procurement process. Once enacted, the Act will be supplemented by a set of rules for procurement of goods, works and services. The key highlights of the Bill addressing the issue of competition are as follows[9]:

- Open auctions stated as the most preferred channel of procurement.
- Transparent methods of registration and pre-qualification of suppliers, respecting the need for fair competition.
- No restriction on participation of bidders other than on specified conditions.
- Description of subject matter of procurement to be objective, functional, and generic with guidelines to be prescribed.
- Standard terms and conditions of contract to be prescribed.
- Documentary record of procurement proceedings mandated.
- Establishing a three-stage grievance redressal mechanism
- Statutory backing for electronic reverse auction, integrity pacts, e-procurement and framework agreements.
- Corruption, collusion, and anti-competitive behaviour by bidders to attract appropriate penalties, terms of imprisonment equal to that prescribed in Prevention of Corruption Act 1988.

2.2. Legislation at state level

Large–scale procurements are done by various state government departments. When it comes to the general legal framework, most of the states have a system similar to the central government. The procurements are governed by State Financial Rules/Codes. These rules are issued by the finance department of each state as executive orders. However, two states — Tamil Nadu and Karnataka — have come out with specific legislations on public procurement[10](Box 2). Some other states like Himachal Pradesh and Kerala are in the process of framing similar laws.

2.3. Monitoring and vigilance

The following key institutions are involved in monitoring the actions of public procurer and bidders in public procurement in India:

2.3.1. Comptroller and Auditor General (CAG)

The Constitution of India (Articles 148 to 151) appoints Comptroller and Auditor General (CAG) of India to audit (financial, compliance and performance) the appropriation and the financial accounts of the centre,

BOX 2

Case Study: Tamil Nadu

The Tamil Nadu Transparency in Tenders Act, 1998, was adopted to regulate public procurement at the state level. From the stakeholder discussions with procurement officials, private bidders, and lawyers who are involved in disputes under the Act, the following key points have emerged:

Appellate procedure is an empty formality: As per Section 11 of the Act, any tenderer aggrieved by the decision of the Tender Accepting Authority, can appeal to the state government. Lawyers practicing in the field feel that, due to lack of trust in the system, this has become more of an empty formality. Persons aggrieved finally end up in the high court filing a writ petition. The perception is that the enactment has failed to provide an alternative and efficacious remedy to the writ jurisdiction of the high courts.

Identical bids: Section 10 (5) of the Act makes it mandatory that in cases of identical price quotes by multiple bidders, the procurement officials should split the quantity equally among all the bidders. This raises the question if this clause is against the principle of competition by leaving little options to deter cartels even when there are clear indications of bid-rigging.

Act is more suited to works of civil nature: In the procurement of goods, compliance with the provisions of the Act is time consuming and the Act is suited for civil works as they generally span over a long period of time.

Mandatory requirement to negotiate only with L-I: The requirement of accepting the lowest tender, prescribed under Section 10 (2) of the Act, many feel that compromise the quality of work and competition in the process, especially in civil works.

BOX 3

Preamble to the Competition Act:

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

To achieve its objectives, the Competition Commission of India endeavours to do the following:

- Make the markets work for the benefit and welfare of consumers.
- Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.
- Implement competition policies with an aim to effectuate the most efficient utilization of economic resources.
- Develop and nurture effective relations and interactions with sectoral regulators to ensure smooth alignment of sectoral regulatory laws in tandem with the competition law.
- Effectively carry out competition advocacy and spread the information on benefits of competition among all stakeholders to establish and nurture competition culture in Indian economy.

Source: Competition Commission of India

states and of any other authority/ body which is established by the Parliament. Within its audit scope, CAG is empowered to examine any office/department and may demand for any relevant document or information. CAG is an independent body and its audit reports and recommendations are presented before the Parliament (Union Audit) and the legislature of the respective states (State Audit). Parliamentary committee called the Public Accounts Committee (PAC) reviews the audit reports and CAG's observations and accordingly makes recommendations to the Parliament.

2.3.2. Central Vigilance Commission (CVC)

Central Vigilance Commission (CVC) carries out investigations under the Prevention of Corruption Act, 1988. The primary focus of CVC is to regulate and monitor the conduct of public servants including procurement officials.

In addition, the CVC has also issued various guidelines and rules to bring in efficiency in procurement. These guidelines are issued under the power of superindence over vigilance administration, and thus are advisory in nature and therefore, are not legally binding on a department or ministry. However, the perception is that these guidelines are commonly followed. In addition, ministries/departments have their internal vigilance department, which are responsible for monitoring procurement related activities.

2.3.3. Competition Commission of India (CCI)

Monopolies And Restrictive Trade Practices Act, 1969 (MRTP Act),was enacted with the primary aim to control monopolies, prohibit monopolistic, and restrictive trade practices. Recognizing the benefits of competition, the government constituted a high level committee in 1999 to review MRTP Act, 1969, for shifting the focus of the law from curbing monopolies to promoting competition. Following the recommendations of the Committee, the Competition Act, 2002 was enacted. The preamble to the Competition Act is given in Box 3. The objectives of Competition Law have been further highlighted in a judgement delivered by Hon'ble Supreme Court as: *"The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources; productive efficiency, which ensures that costs of production are kept at a minimum; and dynamic efficiency, which promotes innovative practices."*(*Competition Commission of India v. Steel Authority of India Ltd*., 2010, 10 S.C.C. 744.)

The main objective of competition law is to promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences.

3. Policy Framework: Key Issues

BOX 4

Federal Acquisition Regulation in United States

The US has devised Federal Acquisition Regulation (FAR) that constitues the set of principle rules regulating the activities of government personnel in carrying out procurements. The key purpose of the FAR is to provide uniform policies and procedures for acquisition in procurement. The FAR is codified in Title 48 of the United States Code of Federal Regulations. The federal courts have held that the FAR and its agency supplements have "the force and effect of law".

All public departments (with few exceptions) are required to comply with the FAR; unfair allocation of a contract can be challenged and reserved if the aggrieved bidder can establish that either the contracting agency and/or the successful bidder did not comply with the contract.

A lack of transparent grievance redressal mechanism leaves little scope for transparency and trust in the system and may discourage participation by genuinely competing firms.

From the analysis of the regulatory and legal framework in procurement, the following key concerns have emerged which have a detrimental impact on competition and efficiency.

3.1. Multiple guidelines

There is no single central body that is dedicatedly responsible for defining procurement policies and procedures. General Financial Rules (GFR) 2005 is a voluminous document containing 293 rules, 16 appendices, and a number of forms for different purposes. In addition, a set of guidelines are issued by the Ministry of Finance (Manual on Policy and Procedures on Purchase of Goods). The CVC has also issued numerous guidelines and instructions dealing with model procurement practices[11]. Provisions are also available for the department/ministry to devise their own set of rules and guidelines.

This has led to a multiplicity of rules, guidelines, procedures, directives, model tender/contract documents, and orders issued by various departments. To add to the problem, all guidelines and documents are not available at a single source. This may, firstly, complicate and confuse the procurement officials about their role and duties, and secondly, leave enough gaps and loopholes for manipulation. Further, the guidelines are not legally backed and therefore are not enforceable in a court of law. This leaves ample scope to manipulate procedures and bidding documents to favour a predefined outcome. Countries like the United States of America (USA) and Germany have centralized guidelines backed by a law which defines the uniform policy for procurement of goods and services (Box 4).

3.2. Absence of a transparent grievance redressal mechanism

In case of any grievance against an award of contract, a complaint can be lodged with the procuring agency. The experience gained from the Tamil Nadu Act may be worth recalling in this context (Box 5). In case where procuring department is itself involved in raising unnecessary barriers to entry, chances are low that the aggrieved bidder will get a fair hearing. If unsatisfied with the decision of procuring body, the aggrieved bidder can appeal in the court. Given the high burden of pending cases in Indian courts, any legal remedy could only be achieved after a long delay. This is costly especially for small firms and long delays may make the remedy insignificant, with respect to the tender concerned. Therefore, a lack of transparent grievance redressal mechanism leaves little scope for transparency and trust in the system and may discourage participation by genuinely competing firms.

3.3. Absence of standard procedures, contracts, and tender documents

Absence of a central/state Act specific to public procurement has allowed diversity in procurement practices leading to complexity and arbitrariness. According to an estimate[12], more than 150 different contract formats are being used by the public sector. Even for similar work, different agencies issue different tender documents in terms of pre-qualification criteria, process of selection, settlement of dispute, financial terms and conditions, etc. Such variations in tender documents and contracts lead to confusion and

BOX 5

Transparent Grievance Redressal Mechanism

The Tamil Nadu Transparency in Tenders Act, 1998, contains the provision for appeal against an unfair tender outcome. The Act provides for a timebound appellate procedure for grievances regarding acceptance of tender. Any aggrieved tenderer can approach the state government within a period of ten days of the acceptance of the tender, and the government has to decide the matter within a period of 15 days.

Stakeholders opined that there are serious concerns regarding transparency and effectiveness of the system. Lawyers practicing in the field feel that this mechanism has become more of an empty formality. In the present mechanism, aggrieved bidder (bidder who has been wrongly deprived of a contract) is entitled to appeal to the procuring authority itself. If the authority itself has been involved in the fraud there is little scope that there will be any relief given to the aggrieved bidder/s. The persons aggrieved finally end up in the High Court filing a writ petition as there is lack of trust in the mechanism introduced in the Act. This has led to increased burden of cases in the High Court.

Therefore, there is need to devise a three-tier mechanism where the second stage is outside the scope of procuring authority. This will enhance trust in the system. The draft procurement bill introduced by MoF has a followed this approach. However, there is a need for states to amend their existing legislation or frame an efficacious Grievance Redressal Mechanism.

complications amongst the bidders. Various reports[13] have pointed out that the multiplicity of tender documents used by different public departments lead to inefficiencies. In the absence of standard documents and contracts (for similar goods and work), there is enough scope for manipulation and favouritism. Many countries like Germany and USA[14] have devised uniform guidelines and procedures.

3.4. Weakness of present monitoring mechanism

CAG audits the expenditure (including tendering process), however these audits are conducted well after the harm is done. External audits fail in their effectiveness as the findings often do not attract the required attention by the overworked Public Accounts Committees[15]. The CAG has powers to demand "Action Taken Reports" from the ministry/ departments concerned. There is no clause in the CAG Act[16] that makes it mandatory for the departments/ ministries to revert with action taken reports in a timebound manner. This has allowed for delayed and unsatisfactory responses limiting the effectiveness of CAG audits.

In addition, mechanism of internal audit in the respective departments has limited impact on ensuring integrity in public transactions. The Task Force on Internal Audit, set up by the CAG, observed various limitations in the present system of internal audits. The report stated that restricted mandate, absence of audit standards, and segregation of duties and responsibilities have dented the independence and transparency of internal audits.

3.5. Lack of emphasis on controlling fraud on the demand side

From the stakeholder consultation, it has been derived that there is a perception that fighting cartels and bid rigging is not at the core of public procurement policy and practices. In order to limit discretionary powers, restrained options are allowed at the disposal of procurement officials to fight anti-competitive practices. For instance, Section 10 (5) of the Tamil Nadu Transparency in Tenders Act, 1998, recommends that in cases of identical price quotes by multiple bidders, the procurement officials should split the quantity equally among all the bidders. This shows that principles of competition have not been imbedded at the core of public procurement policy in India. Lack of flexibility to react strategically when confronted with bid rigging (even when there are obvious indications) further strengthens the cartels. Moreover, with ample evidence existing against bid rigging and collusion, it is felt that public departments can act more stringently against misbehaving firms.

Section 10 (5) of the Tamil Nadu Transparency in Tenders Act, 1998, recommends that in cases of identical price quotes by multiple bidders, the procurement officials should split the quantity equally among all the bidders.

4. Procurement Practices and Entry Barriers

The reputation of the public sector is greatly dependent on the efficiency of their service delivery. Any failure on this front jeopardises their reputation and public support. Given this, the pressure of timely delivery of service on the public sector is enormous and therefore, they tend to avoid any risk of failure by raising high barriers to entry. There may be a tendency to avoid new entrants and stick with well established, big suppliers, which have been delivering the product/service over a long period of time. Corruption in public departments also adds to the problem. This leads to concentrated markets and eventually strengthens existing cartels. The present section focuses on certain common practices on the demand side (procurement procedures) that restrict competition by raising barriers to entry.

4.1. Channel of procurement: disregarding open auctions

In India, procurements are carried out through three channels of tender invitation, namely, Open tender enquiry (OTE), Limited tender enquiry (LTE), and Single tender enquiry (STE). LTE is recommended in the case of small value works or where the public department have established a pool of empanelled vendors. STE is recommended only under exceptional circumstances such as national calamities, emergencies, etc. The choice between these channels of procurement can significantly impact participation. Various vigilance reports suggest that public departments fail to utilize open auctions and tend to unnecessarily depend on LTE and STE. A CVC report[17] points out that *".....in the process (of neglecting OTE), the competition is restricted which in turn results in cartel formation, higher rates and favouritism to select firms."*

In the procurement of a public undertaking [18], in spite of the guideline to procure 20% of goods and services through OTE, the CAG audit has pointed out that OTE holds only a small share. The procurement data showed that over the previous three years from the date of the audit, OTE was adopted only in 0.07%–1.91% of the respective factories' order.

In addition, the same audit observed that even in product sectors where new suppliers were registered, the department concerned did not allow them to participate in the tenders. Another department registered many new suppliers over the past few years for providing different stores items; however, none of the tenders was issued to the new entrants despite their fulfilling all the requirements[19]. The action taken report by the department concerned (in response to the audit findings) were awaited at the time of the study.

Neglecting open auctions in public tenders lead to restricted competition which in turn results in cartel formation, higher rates and favouritism to select firms.

CVC, 2002

4.2. Approved vendors lists: shortcomings in registration process

It is a common practice in departments/ministries (especially where there are safety, expediency and security concerns) to maintain a list of shortlisted suppliers on technical and financial grounds. Such registered suppliers are exclusively eligible for consideration for procurement through restrictive

tendering (LTE or STE). A detailed analysis of this mechanism reveals various flaws that have led to severe barriers to entry for new participants.

The CAG in its audit reports has[20] stated that the misplaced procurement practises have suppressed competition by letting registered list to become barriers to entry for new participants. Often these lists are not updated periodically, even if there is only one supplier in the list over a long period of time. Moreover, many times approving authority imposes tedious process for participation resulting in enormous delays in getting approval.

This discourages many firms from enrolling themselves in the registered lists. Moreover, lack of willingness on part of the procuring authority to encourage relevant new participation in public tenders has led to concentrated markets over time in many product segments concerned.

The CAG audit of a public undertaking (Report No. 10 of 2010–11) pointed out that the department concerned had only single registered vendor in 1150 material groups with many other product groups having only two to three registered vendors. As per the procurement policy of the public department concerned, press advertisement must be issued periodically to enlist new suppliers. However, the audit found out that the department was not following the guidelines and sufficient effort was not being made to invite new participants.

4.3. Bureaucratic hassles and complex procedures

Excessively tedious process for participation sometimes poses severe barriers for participation. It was reported by bidders that on many occasions, tender documents are not available online and may have to be collected in person. Further, firms (bidders) opined that many times reputed firms refrain from participating in public tenders as getting payment for the services provided is very tedious in public sector and involves substantial efforts.

Where entry is restricted and requires technical and financial approval, new firms are required to go through lengthy administrative and procedural requirements[21]. The process may require substantial cost in terms of time and money, making it unattractive for small firms.

4.4. Restrictive pre-qualifying criteria in tenders

Incorporating pre-qualification criteria in the tender documents is a common process by which suppliers are screened against a given set of requirements. As mentioned above, public procurers may tend to incorporate stringent qualification criteria on the basis of financial strength or extensive past experience in order to favour large and reputed firms.

Audit and vigilance reports reveal that procurement officials knowingly or unknowingly incorporate restrictive pre-qualification/selection criteria that defeat the purpose of a competitive tender. A report on the *Common Irregularities/Lapses Observed in Stores/Purchase* by CVC notes that vague and inappropriately defined pre-qualification criteria result in award of the contract in a non-transparent manner (Box 7). The report further states that unnecessary criteria lead to supressed competition and gives undue advantage to select few firms.

4.5. Other restrictive practices

Limited advertising and vaguely defined requirements in tender documents could lead to barriers to entry.

Lack of willingness on part of the procuring authority to encourage relevant new participation in public tenders has led to concentrated markets.

BOX 6

Japanese Federal Trade Commission Tedious Procedures and Barrier to Entry

Japan enacted the Act Concerning Elimination and Prevention of Involvement in Bid Rigging in 2002. This Act enables the Japanese Federal Trade Commission (JFTC) to take actions against the public officials involved in bid rigging (so-called government-initiated bid rigging). In case, there is an involvement of a procurement official in a bid rigging conspiracy, JFTC enforces the Antimonopoly Act against the firms and simultaneously can request the head of the department concerned to investigate against the suspected official and to take all necessary measures that has to be in public domain (Article 3). Further, if the official is implicated in misconduct, compensation against loss of public money can be imposed on the involved official/s under the law (Article 4).

For a supplier, keeping track of all the tender invitations covering the country involves costs in terms of time and money. If these calls are not adequately advertised, these costs may restrict participation. Therefore, it is imperative to give adequate publicity of the tenders to invite maximum relevant participation.

Rule 150 of GFR deals with the advertisement of tender enquiry. It makes it mandatory to use advertisements for tender invites above a threshold limit. Advertisements should be sent to Indian Trade Journal (ITJ), and at least one national daily having wide circulation. Moreover, departments/ ministries with their own website must publish all their advertised tender enquiries on the web site and provide a link to the NIC web site.

However, the CVC has stated that on numerous instances, tender invites were not being adequately advertised. Even in cases where global tender notices were issued, the advertisements were published in local dailies (in regional language), and sometimes in evening newspapers. In few cases, CVC noted that *"although the tender notice being published in a leading national newspaper but not on the page dedicated to the advertisements for tenders, thus partly restricting the competition and defeating the purpose of issuing advertised tenders."* Often tender invitations are not publicised to favour few firms.

If there is little or no advertising or advertising is confined to local markets, few suppliers will be aware about the tender call. With little or no threat of entry, the incumbents will be more likely to reach and maintain a collusive agreement.

GFR, Rule 150 (v) states that the minimum time for submission of bids should not be less than three weeks (four weeks for Global Tender Enquiry) from the date of publication of the tender notice or availability of the bidding document for sale, whichever is later. However, it has been noted by audit agencies that on occasions the response time granted for bid submission was unrealistically short. This led to entry barriers as only a few firms which were acquainted with the functioning of the department concerned and had prior knowledge and preparation time were able to participate in the bid. Therefore, such a lapse led to added advantage to a small number of incumbents who were in constant touch with the procuring agency or were well acquainted with past pattern of requirements.

BOX 7

Unnecessary qualification criteria[22]

The CAG reported a case where a public department issued a "Global Tender Enquiry" for procurement of aluminium alloy plates by incorporating an additional and unnecessary condition, "bright smooth finish free from waviness and scratches". This condition was not laid down in the technical specifications (IS: 7371986). The audit also established that even according to the guidelines of the department concerned, brightness and shining were not essential, because the final product would be eventually black anodized. On the basis of arbitrary criterion, the lowest bidder was disqualified and supply order was placed on two suppliers who had quoted identical prices, 147% higher than the rate quoted by L1. The audit report stated that there was a clear indication of bid rigging by these suppliers and that the factory's decision to insert the unnecessary condition was arbitrary and irregular and against the spirit of the GFR. The action taken report by the department concerned in response to the audit findings were awaited at the time of the study.

Public procurers may tend to incorporate stringent qualification criteria on the basis of financial strength or extensive past experience in order to favour large and reputed firms.

5. Anti-competitive Practices

Audit reports submitted by the CAG of India to the Parliament in past years have been highlighting anti-competitive practices in many public departments' procurement. Interaction with stakeholders (private bidders, auditors, procurement officials in private and public sector, and policy makers) during the course of the study has also provided key inputs about the functioning of the cartels in public procurement. The key anti-competitive practices prevalent in Indian public procurement are as follows.

5.1. Bid rigging

In public procurements, horizontal agreements, i.e., agreements between competing firms, are common (Box 9). Bid rigging is a form of fraud with the purpose to fix price or/and share market demand, often adopted where contracts are determined by an auction. Bid rigging can be achieved under various alternative "terms of agreement" between the firms and almost always results in economic harm to the public department that is seeking the bids. Exception being in the case where the cartel rigs bid to jointly undercut prices to force exit or to restrict participation (Predatory Pricing). In such cases, the public department may actually benefit in the auction concerned. However, in the long run the cartel is able to recover short term losses and causes a greater economic harm owing to limited competition leading to greater market power.

In Indian procurement, the most common strategies adopted by bidders to rig the procurement system are as follows:

5.1.1. Bid rotation and complementary bidding

This type of bidding strategy involves illegally coordinating the bids amongst the cartel members, whereby the cartel decides (ex-ante) the winning bidder and bid and the remaining bidders submit bids that are higher. This kind of bidding strategy is more suitable for static/ stable and predictable markets where there is an assurance of future demand (call for tenders). In procurement markets where there are frequent tender invites, the cost of organizing and monitoring cartels is less and punishing deviation is easier. Therefore, such markets are more susceptible to long–term agreements between competing firms.

5.1.2. Market sharing

Under this bidding strategy, cartels agree to share single markets/tender amongst them in some pre-decided ratio. The cartel members can share a single market by bidding for less than the demanded quantity, thereby sharing a single order amongst them. Such a strategy is more favourable in markets where future demand may be uncertain. It is beneficial to share the order at hand as it is difficult for cartels to monitor and devise punishment strategy (for the deviating members) in unpredictable markets.

The practice of registering ghost firms under different names is prevalent in Indian procurement (CVC and CAG[23]). One of the reasons for doing so is to give a false impression of a competitive market. Moreover, the common practice to distribute order among different suppliers when quotes are identical,

BOX 8

Collusion and Bid-rigging

In 2004-05, tender for procurement of an equipment was issued by a government department. Out of the nine firms; eight Part-I and one Part-II (eligible for sample orders only) participated in the tender. 7 firms quoted for less than 50% of the quantity at a uniform price of Rs.99, 638 per unit, which was a clear indication of cartel formation. The remaining Part-1 firm quoted for the full quantity at a rate of INR 1, 05,000 per unit. The ninth RDSO approved Part-II firm quoted the lowest rate of Rs.87, 000 per unit for the full quantity.

In order to restrict market sharing, the department issued a directive for incorporation of 'clause against cartel formation' to restrict firms from quoting below 50% of the tender quantity. Discussion with relevant stakeholders revealed that 8 Part-I firms colluded in the tender including the firm quoting the highest price for the supply of the full quantity. Given the 'clause against cartel formation', seven firms with identical price were liable to be disqualified. To deal with the risk of losing the tender by the cartel (given the clause) the eighth firm in the cartel quoted for the full quantity at the highest price.

A possible subcontracting was possible later on to compensate the other cartel members. This case reflects the complex strategies (market sharing and complementary bidding) adopted by cartels. The audit report stated that the negotiations held with the seven firms (April 2004) were not successful and a major proportion of the orders was placed on the cartel members while only a small fraction of the orders was placed on the Part-II firm (as per department's rules).

also promotes such malpractices. An individual firm operating under false names can grab the major portion of the order in case of equal distribution of tendered quantity.

5.1.3. Boycotting tenders and bid suppression

Bid suppression involves eligible firms who, owing to a specific agreement in the cartel agree to refrain from a tender invite or withdraw a previously submitted bid. This is done to facilitate the victory of a pre-decided member of the cartel or to boycott a tender, if the public buyer concerned is trying to penalize the cartel members. Cases of bid suppression have been reported in a large government undertaking. In case of default on part of a cartel member, the remaining bidders refrain from bidding in the re-tendering stage limiting the organisation's ability to punish the defaulter. Further, while allocating geographical markets, cartel members refrain from participating in the bid in each other's regions [24].

5.2. Predatory pricing

Dominant firms in the public procurement system may use their incumbent power to keep away any new entrant into the market by indulging in predatory pricing. Predatory pricing is a strategy of selling a product or service at a very low price (below cost) with the objective to drive competitors out of the market, or create barriers to entry for potential new competitors. The Competition Act recognises predatory pricing as an anti-competitive activity.

A public undertaking invited open tenders with an aim to develop more sources of supply. The tender responses show that the price quoted by the firms ranged from (abnormally low) Re. 0.07 to Rs. 3,700.00 per unit (last purchase price paid by the factory was Rs. 4,401.90 per unit). Two incumbent firms (belonging to the approved list) had quoted a mere Re. 0.07 per unit for the product. Evidently, both of these companies had submitted identical fax number for a similar tender enquiry by another factory. The audit stated, *"... since both the firms were found technically acceptable and are regular suppliers to several factories, obviously such rates were quoted to block entry of other suppliers."*

Ignoring the obvious evidence that these firms are indulging in predatory pricing, all the orders were placed on these two firms. Eventually, no supply against this order had been received till the audit date.

BOX 9

Collusion and Bid Rigging: "tell-tale evidence"[25]

In a tender enquiry issued by a public undertaking, four firms participated. Of the quotations received from three specific firms, it was found that the email address and fax number of two firms were the same. The other two firms, which shared identical phone numbers, requested the tender documents to be delivered at the same address. Further examination of tender documents from the three companies revealed that all the quotations followed identical formats as they had been typed on same document/paper. Other sharp similarities indicating bid rigging, which should have warranted preventive action against these firms, were similarities in handwriting and similar style of filling up the required information. The audit report categorically pointed out, *"…. There was enough evidence to suggest that these firms are colluding with each other to suppress competition in the procurement process. Ministry's reply (to the audit findings) does not comment on the tell-tale evidence of such collusion."*

"There was enough evidence to suggest that these firms are colluding with each other to suppress competition in the procurement process."

The Comptroller and Auditor General of India
Audit Report No. 15 of 2010

6. Policy Recommendations

Based on the findings of the study, the following sections comprise of recommendations to promote competition in public procurement in India.

6.1. Procurement law

At present, there is no national legislation on public procurement in India. The government has introduced the Public Procurement Bill, 2012, in the Lok Sabha. The Procurement Bill will go a long way in mainstreaming procurement practices. The Bill has various commendable features (highlighted in Section 2.1) which will promote competition. However, the provisions of the draft Bill are applicable only to central government departments and PSUs at the central level etc. Given that the states also spend substantial amount of public money on the procurement of goods and services, their expenditure should also be brought under the purview of the proposed procurement legislation. As the entries relating to 'acquisition and requisition of property' (Entry 42) and 'contracts' (Entry 7) are in the concurrent list, the Parliament is empowered to enact such a law.

Ideally, a single law replacing the multiple and fragmented guidelines by various agencies may be enacted. Countries like the United States of America (USA) and Germany have centralized guidelines backed by a law which defines the uniform policy for procurement of goods and services. A uniform law will lead to higher transparency and accountability by defining uniform and mandatory obligations and duties across public departments in India. At the national level, this will directly enhance competition by reducing the scope for manipulation and simplify the procedures by reducing complexity and confusion for both bidders and officials. Alternatively, states can draft separate individual legislation drawing from the Procurement Bill.

Moreover, the existing laws at the level of a few states need reconsideration and should be aligned according to principles of competition (see Box 2).

6.2. Dedicated institutional setup for policy making

A dedicated institutional framework for overall supervision over procurement would go a long way in avoiding multiplicity and overlap. The Procurement Bill fails to establish such an institution. Many of the countries already have such an institutional setup. The functions of such an institution could include:

- Framing of procurement regulations and reviewing of certain procurements. In addition, the procurement policies of different entities may be reviewed by this agency to ensure that they are in conformity with the objectives of the law.
- Rationalization and standardization of procurement and of procurement practices. This role will involve devising standard tender documents and contracts that can be used by all procuring entities.
- Organizing training and raising awareness of procurement officers.
- Disseminating best practices.

BOX 10

Public procurement law in Germany

The German law largely focuses on the public sector as the buyer of goods and services by laying down clear and specific obligations governing public procurement process. The laws and regulations are set to preserve the principle of competition, transparency, non-discrimination, fair tendering procedures, and short and long–term economic efficiency. Three procurement tribunals, within the Federal Cartel Office (Bundeskartellamt), function as reviewer (appeal court against decisions of public procurement agencies) of public procurement procedure. In addition, federated states (Länder) have their respective public procurement tribunals. Upon request from an aggrieved party and above a certain threshold (based on the directive of European Union), these tribunals are responsible for examining whether laid down procedures were duly followed by the contracting entities. In case of a violation of law or guidelines, the tribunals have the powers to take suitable measures Different than other jurisdictions, total transparency is ensured as first level of review is conducted by independent tribunal rather than the contracting entity.

Given that the States also spend substantial amount of public money on procurement, their expenditure should also be brought under the purview of a legislation.

6.3. Allowing dynamism and flexibility on the demand side

When confronted with cartels which are dynamic, the procuring entity should be allowed the same dynamism in terms of adopting strategies and method of procurement. It is, therefore, important that the legislative and regulatory framework for public procurement be designed to allow sufficient flexibility and discretionary powers when confronted with anti-competitive practices[26]. For instance, open tender invites are highlighted as the most preferred mode of procurement; however, open auctions are neither the necessary nor the sufficient condition to guarantee competitive outcomes. Therefore, while procuring, flexibility should be given to the procuring entity to choose the best auction design given the features of the market concerned. Further, in case there is a suspicion of bid rigging or bid suppression the procuring entity may be allowed to reject all submitted tenders even if the colluding firms meet the requirement as per the tender call.

6.4. Grievance redressal mechanism

One of the most effective ways to review actions and procedures followed by the procurement officials is to provide for a right to appeal (to an aggrieved bidder) against an allocation of tender in the law. This will ensure transparency and confidence in the procurement system. We believe that the grievance redressal mechanism provided should be an efficacious and alternative remedy to the writ jurisdiction of the high courts.

A multi-level grievance redressal mechanism may ensure an alternative and efficacious remedy to the writ jurisdiction of the high courts. Such a mechanism has been incorporated in the revised draft Procurement Bill. We recommend creation of a similar three-stage grievance redressal mechanism at the state level.

- **Stage 1: *Appeal to the procurement department***

  The primary aim of providing for first-instance review by the procurement department is timely correction of any violations on behalf of the procurement department. We believe that such recourse would avoid unnecessary burdening of higher appellate institutions with cases that might have been resolved by the parties at an earlier, less disruptive stage. This will also save time and money.

- **Stage 2: *Appeal to an independent quasi-judicial body***

  This function could be undertaken by an appropriate body that already exists or a new body that is created under the law. This independent quasi-judicial body may exclusively focus on resolving disputes in procurement matters.

  This function could be undertaken by an appropriate body that already exists or a new body that is created under the law. This independent quasi-judicial body may exclusively focus on resolving disputes in procurement matters. This stage may ensure an alternative and efficacious remedy to the writ jurisdiction of the High Courts.

  To ensure transparency, it is important that this body is not influenced by the procuring entity in any way and is independent of any department that has a potential to influence. The German model

The German experience of establishing an independent tribunal outside the procuring agency to address complaints by aggrieved bidders may be a mechanism worth considering.

BOX 11

Korean electronic procurement system (KONEPS)

KONEPS is a web-based system, which processes electronically the entire procurement process (including registration, bidding, contract, inspection, and payment) and provides related information on a real time basis. According to the latest annual report through the data generated by the electronic tendering process, the Korean Fair Trade Commission (KFTC) is able to screen for bid rigging. The screening program (called BRIAS, Bid Rigging Indicator Analysis System) was introduced by the KFTC in 2006, which automatically carries out statistical and empirical analyses for the possibility of collusive biddings based on the information on bidding for public projects of the state, local governments, and government financed institutions.

of housing appellate tribunals within the competition authority is worth considering (Box 10). In the Indian case the Competition Appellate Tribunal can be an appropriate second tier appellate body. But given the number of appeals that may be filed from all over the country, we believe that an independent body with a provision for regional benches may be a better mechanism.

- **Stage 3:** ***Appeal to judicial institutions***
  Provisions may be made to provide for a right of appeal against the decision of the quasi-judicial body to a higher judicial body. The Indian practice in many statutes is to provide for an appeal to the Supreme Court. We believe that this could be replicated in the procurement law as well.

6.5. Modernizing procurement practices (E-Procurement)

Introduction of the electronic procurement system can promote competition by encouraging participation. It leads to reduction of participation cost, (incurred in tracking various tender invites in thousands of departments in India) in terms of money and time. It also limits information available to the cartels and their ability to monitor new entrants and deviation by the cartel members.[27]

States like Gujarat, Andhra Pradesh, and Karnataka have implemented e-Procurement at all levels. A study on the impact of e-Procurement on outcomes in cases of Andhra Pradesh found that on an average, participation has increased from 3 per tender in conventional mode to 4.5 in e-Procurement mode. Further, many reports have found a reduction in the incidence of cartelization and number of complaints against the procuring authorities, thereby implying improved transparency.[28] The departments have reaped significant cost savings of an average reduction of 20%, in cost for the procurement transactions done through exchange during the year 2003–04 and 12% in 2004–05 due to a competitive environment. To control bid rigging, it is imperative to consistently monitor the bidding activities and perform quantitative analyses on the bid data. E-Procurement can facilitate such monitoring as in the case of Korea (see Box 10).[29]

6.6. Raising awareness and bringing professionalism in procurement process

In decentralized public procurement system, as in India, many public procurement tenders are carried out by small agencies. The officials in theses departments may not be sufficiently equipped and trained to design an efficient procurement process keeping collusion in perspective. On many occasions they may themselves facilitate cartelization by raising barriers to entry. Previous sections have shown how a deficient design of the tender document/process can result in high concentration and raise barriers to entry.

Moreover, procurement officials are in the best position to detect signs of anti–competitive behaviour at the onset before severe harm is done. Raising awareness amongst the officials can alert them against suspicious bidding pattern, documents, and firms' behaviour helping in better enforcement of the competition Act. Educating procurement authorities on the provisions available in Competition Act, 2002 could help in restricting anti-competitive practices.

BOX 12

Provisions against Bid Rigging (Competition Act, 2002)

The Competition Commission, if convinced that there exists a prima facie case of bid rigging, shall direct the Director General to cause an investigation and furnish a report. The Director General, for the purpose of carrying out investigation, is vested with powers of civil court besides powers to conduct 'search and seizure'.

After the inquiry, under Section 27 of the Act, the Commission can direct the parties to discontinue and/or not to re-enter such agreement and/or to modify the agreement and/or impose a penalty. The penalty can be severe, and result in heavy financial cost on the erring party.

Penalty: In case the bid-rigging or collusive bidding agreement referred to in Sub-Section (3) of Section 3 has been entered into by a cartel, the Commission may levy a penalty of up to 3 times of its profit for each year of the continuance of such agreement or 10% of its total turnover for each year of the continuance of such agreement, whichever is higher.

Leniency: Under Section 46 of the Act, the Commission can impose lesser penalty to a party in a cartel if it makes true, full and vital disclosure leading to busting of the cartel.

Appeal: The Competition Appellate Tribunal is established under Section 53A to hear and dispose of appeals against any direction/order issued by the commission.

Around the world, many competition authorities are involved in advocacy efforts to raise the level of awareness of the risks of bid rigging in procurement tenders.

Around the world, many competition authorities are directly or indirectly involved in advocacy efforts to raise the level of awareness of the risks of bid rigging in procurement tenders. Many authorities have bid rigging educational programmes for procurement agencies. This is an area where CCI can play an extremely beneficial role by expanding their awareness programmes towards the procurement officials and policy makers in an effort to fight against bid rigging more effectively.

At the department, there is a need to build in-house expertise to monitor the market dedicatedly. Risk of collusion can be reduced by weighing options at each stage of the procurement process. There is no single rule that fits all kinds of procurement design and therefore appropriate alternatives must be adopted on a case-to-case basis. Selection of the auction mechanism, design of tender documents, and evaluation criteria must be devised judiciously and efficaciously. To achieve this it is imperative that efforts should be made to introduce professionalism in the process. Following recommendations should be considered at the different stages of procurement process.

6.6.1. Pre-tender Stage

There is a need to build in-house expertise to monitor the market dedicatedly. With prior information about the market features, officials will be better placed to monitor bids against abnormal bidding behaviour.

This will help procurement departments to acquaint themselves with the entire range of products and services available in the market and their currently prevailing prices. Therefore, adequate market research, before floating a tender is essential. Market research will also help procurement official to determine a reserve price, which will assist in achieving efficient procurement outcomes.

6.6.2.Tendering stage

Efficiency can be enhanced by ensuring sufficient and credible participation in the tender. However, it must be noted that merely having many bidders participating in the tender does not ensure a competitive outcome. Therefore, efforts should be made to give clear incentives to the firms to compete. One way to do this is by creating uncertainty among firms with respect to threat of new entry. Overall, the primary objective at this stage should be to ensure the following.

- *Maximizing participation of credible and competing firms*
  Unnecessary qualification criteria with respect to size, financial strength, composition, or nature of firm, which are irrelevant to the requirement at hand, should be avoided. The minimum requirement for participation should be carefully designed keeping in mind the size and content of the demand and features of market concerned.

  Adequate time should be allowed to prepare and submit bid and sufficient advertising should be done to attract eligible bidders. Cost of participation should be reduced by avoiding irrational bid guarantees, reducing the cost of tender documents,avoiding tedious procedures, and bureaucratic hurdles. The cost of submitting bids can also be reduced by standardizing tender and contract documents. If a tender is restricted to pre-shortlisted firms on technical specifications, then attempts should be made to update the list periodically.

BOX 13

Transparency Requirements and Collusion

Unnecessary transparency conditions can promote collusion indirectly by giving cartels necessary and essential information to react strategically to any deviation (by a cartel member) or entry threat.

For instance, regulation in some public departments in India make it mandatory to publish the names and contact details of all the approved sources (bidders) on its website. New entrants are first placed in the 'Part II' list and are eligible for restricted/limited supply. Only after the satisfactory performance over the minimum period of 18 to 24 months, can the firms be upgraded to regular supply category (i.e., Part I).

This practice of publishing the names and contact details of all potential entrants fails to induce incumbent firms to indulge in competitive bidding as there is no entry threat (i.e., threat of entry encourages bidders to reveal their true valuation for the order), and thus strengthen the existing cartels. With this information easily available on the web, the existing cartels can easily detect new entry and take appropriate steps (either negotiate with the new firm or indulge in predatory pricing to hurt the new entrant). By revealing the names and addresses of the all the potential bidders (entrants), the policy may strengthens the cartels by eliminating any surprise elements in the tenders.

BOX 14

Cooperation and Coordination

In 2008, the Chilean competition authority (the Fiscalia National Economica) established a dedicated taskforce to detect and curtail bid rigging at all levels. The interagency taskforce focused on reducing bid rigging in public procurement with initial partner agencies from different departments including the General Comptroller (CGR), the Internal Government Comptroller (CAIGG), Association of Public Procurement Officers (REDABA), the Ministry of Public Works (MOP), and Chile Compras (the federal online procurement system). The taskforce was later on joined by the Department of Housing and Planning, the Transport Supervisor, and the Pension Regulator. The key objective of the collaborative effort is towards building a joint guidelines and manuals and developing customized training programmes targeting members of various agencies involved directly and indirectly in procurements with an aim to help them-*"better identify bid rigging and institute practices that enable a trail of evidence to be obtained".*[30]

Even in the absence of formal information, CCI has the suo moto power to initiate action against cartels in the procurement process.

- *Minimizing flow of competition sensitive information*
  Rules and regulations in public procurement tend to focus significantly on corruption and therefore, impose many transparency requirements on the dealings of public departments. Various literature sources have highlighted that high degree of transparency requirements can promote collusion or strengthen existing cartels by providing them with necessary information. For instance, revealing the identities of the potential bidders before the bid submission could encourage firms to coordinate their bids on procurement, leading to collusive price-fixing behaviour (Box 13). Therefore, appropriate effort should be made so that the procurement process does not facilitate communication between competing firms. Therefore, care should be taken not to reveal unnecessary information. In this sense, e-procurement can help in reducing communication between potential bidders.

6.6.3. Evaluation of tenders

Evaluation/selection criteria adopted while short listing bidders or awarding contract is not only important for the tender concerned but also for ensuring long-term competitiveness. Unfair criteria for selection may negatively influence the future interest of potential participants. Therefore, the awarding criteria should be chosen carefully. Criteria that have an unfair bias towards large firms, incumbents or firms with extensive past experience should be avoided as it discourages participation of new entrants, especially small firms. The evaluation process should not overly favour incumbents, as this will lead to concentrated markets in the long run.

Attempts should be made to encourage entry by ensuring award of part of the demand to new participants/entrants, especially where market is concentrated. This will benefit long-term competitiveness in the market.

Most importantly, efforts should be made while evaluating bids to detect any signs of bid rigging or suspicious behaviour. The procurement officials evaluating bids should be regularly trained to identify such practices and must be made aware of corrective actions available to them under the existing laws. A number of countries (such as Switzerland, Sweden, Canada, and the USA) have devised comprehensive checklists to help procurement officials to identify signs of bid rigging. These can be accessed from the OECD website or their respective Competition Commission's website.

6.7. Cooperation and coordination between CAG, CVC, and CCI

On many occasions, the incidences of anti-competitive practices are facilitated by corruption in the public departments. Generally, the competition authorities are harmless against the illegal conduct of the public officials involved. Some countries have enacted specific legislation aimed at fighting collusion when public procurement officials are directly involved in orchestrating the bid rigging or raising barriers to entry (Box 6). Others countries like South Africa, Chile, and Singapore have established special communication mechanism between competition authorities and other agencies, which are responsible for monitoring

financial conduct, in accordance with the prescribed guidelines (Box 12). Likewise, there is a need to establish close cooperation and coordination networks at the national level between the Competition Commission, the auditors, anti-corruption agencies, and procurement departments.

The draft Procurement Bill (MoF) fails to establish a protocol/framework to bring these agencies on the same platform for better enforcement of anti-corruption and competition laws. Given the complementarities between the focus of both competition and anti-corruption agencies, cooperation will promote better understanding of different laws and regulation amongst the officials and will raise awareness and know-how to tackle bid-rigging.

Mechanism to induce fluid and systematic exchange of information between different agencies can lead to better enforcement of legal provisions (both competition and anti-competition) and improve the chances of detection and prosecution. Coordinated efforts will also facilitate better monitoring and vigilance over procedures and increase chances of success through joint investigations.

Moreover, given the trade-off between transparency requirements (i.e., flow of information to the cartels) and competition, interaction between the agencies concerned will assist in developing best practices with respect to laws, regulation, and procedures on common platform to simultaneously deal with corruption and collusion.

6.8. Strict enforcement of the Competition Act

Utilizing the provisions available in the Competition Act (Box 11), the CCI can levy firm penalties on cartels. This would act as a strong deterrent from indulging in such practices in future. Recently CCI has come out with two orders on 16 April, 2012. Both of them deal with bid rigging. In both instances, CCI has found violation of the provisions of Competition Act, 2002 and has imposed huge penalties. The first order *Coal India Ltd. vs. Gulf Oil Corporation Ltd.* is concerned with the cartelisation and bid rigging by the leading explosive suppliers. The second order relates to collusion and bid rigging in medical equipment procurements.

Even in the absence of formal information, CCI has the suo moto power to initiate action against cartels in the procurement process. The huge body of evidence detailing the presence and activities of cartels in the CAG and CVC reports can be used by CCI to order investigations. As the CCI has passed its infant stage, public procurement can be one focus area for future action.

ENDNOTES

[1] Enhancing value in public procurement, Mr. Pratyush Sinha, Central Vigilance Commissioner (16 November 2009).
[2] For instance, in 2009–10, IR procurement was Rs. 27,876 crore which is around 42% of the Ordinary Working Expenditure of IR (Annual Report of Indian Railways, 2009–10).
[3] Policy Roundtables, Collusion and Corruption in Public Procurement, OECD, 2010.
[4] Products that conform to the predefined technical specifications.
[5] AIR 1979 SC 1628.
[6] Ibid.
[7] M.P Jain, Indian Administrative Law, Vol. 2 (1996).
[8] Sustainable Public Procurements: Towards a low carbon economy, TERI, 2008.
[9] Ministry of Finance (assessed from http://finmin.nic.in on 2 January 2012).
[10] The Tamil Nadu Transparency in Tenders Act, 1998, and the Karnataka Transparency in Public Procurements Act, 1999.
[11] Dedicated to procurement, the study was able to collect 99 different circulars issued between 1982 to 2001 (assessed from http://www.cvc.nic.in/cte_menu.htm).
[12] India: Country Procurement Assessment Report, The World Bank (2003).
[13] India: Country Procurement Assessment Report, The World Bank (2003).
[14] The US has devised Federal Acquisition Regulation (FAR) constituting the set of principal rules regulating the activities of government personnel in carrying out procurements. The key purpose of the FAR is to provide uniform policies and procedures for acquisition in procurement.
[15] A study by National Institute of Public Finance and Policy, estimated that PAC only examines around 15–20 paragraphs out of 1000–1500 paragraphs included in CAG Audit report.
[16] The Comptroller and Auditor-General's (Duties, Powers And Conditions of Service) Act, 1971.
[17] Central Vigilance Committee (Government of India), 2002, Common irregularities/ lapses observed in stores/purchase contracts and guidelines for improvement in the procurement system by chief technical examiner's organization.
[18] The Comptroller and Auditor General of India, Chapter VI of Report No.10 of 2010–11, Performance Audit of Activities Public Sector Undertakings.
[19] The Comptroller and Auditor General of India, Chapter VI of Report No.10 of 2010-11, Performance Audit of Activities Public Sector Undertakings.
[20] The Comptroller and Auditor General of India, Chapter VI of Report No.10 of 2010-11, Performance Audit of Activities Public Sector Undertakings.
[21] Although, given the technical nature of many items required in some departments and concerned safety issues, monitoring is essential, but where the criteria for selection are subjective and dependent on individual whims and fancies, these costs may increase and could be prohibitive.
[22] The Comptroller and Auditor General of India, Chapter V of Report Number 15 of 2010–2011, Performance Audit of Union Government.
[23] The Comptroller and Auditor General of India, Chapter V of Report Number 15 of 2010-2011, Performance Audit of Union Government.
[24] The Comptroller and Auditor General of India, Chapter V of Report No. 5 of 2006, Performance Audit of Union Government.
[25] The Comptroller and Auditor General of India, Chapter V of Report Number 15 of 2010–2011, Performance Audit of Union Government.
[26] UNCITRAL Model Law on Procurement of Goods, Construction and Services with Guide to Enactment.
[27] Policy Roundtables: Public Procurement, OECD, 2007.
[28] Assessed from http://www.nisg.org/knowledgecenter_docs/A03060019.pdf?PHPSESSID=113330d6312e78943ddd455075cb9775.
[29] Policy Roundtables: Public Procurement, OECD, 2007.

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Public procurement constitutes a significant part of public sector budget. Public sector being a large purchaser of goods and services can influence the overall resource allocation, competitiveness, and economic efficiency in the domestic economy.

There is no national legislation on public procurement in India. Certain states like Tamil Nadu and Karnataka have framed legislations on public procurement. The government has introduced the Public Procurement Bill, 2012 (Bill 58 of 2012) in the Lok Sabha; pending for the same is approval. The provisions of the draft Bill is applicable only to central government departments, and PSUs at the central level. Given that the states also spend substantial amount of public money on the procurement of goods and services, their expenditure should also be brought under the purview of the proposed procurement legislation. As the entries relating to 'acquisition and requisition of property' (Entry 42) and 'contracts' (Entry 7) are in the concurrent list, the Parliament is empowered to enact such a law.

It is essential that the law is progressive and must not focus only on the demand side, i.e. , regulating the conduct of procurement officials. It is imperative that the law addresses the issue of anti-competitive practices on the suppliers' side and provide appropriate means to prevent them. Moreover, regulatory and procedural framework in public procurement should be designed efficiently and should not pose unnecessary regulatory burden or create entry barriers. The shortlisting process should be devised judiciously and must not limit participation on the basis of a criterion which is not directly applicable to the procurement concerned, nor should the process be unnecessarily tedious or costly, thereby discouraging small or new firms.

The efficiency of the procurement process critically depends on how the tender is designed and carried out. The danger of suppressed competition or anti-competitive practices in the tender process can be considerably reduced by cautious weighing up of options at various stages of tender invitation. With sufficient firms in the market, sustainable competitive outcomes can be achieved through a simple auction/tender mechanism. On the other hand, in markets with very few firms a more sophisticated mechanism may need to be adopted to achieve the same level of efficiency. E-procurement or e-auction has limited experience in India but the available evidence suggests that e-procurement improves efficiency by removing barriers and reducing cost of participation.

It is essential to treat procurement as a specialized job and training should be provided to the officials to usher in professionalism. Moreover, procurement officials are in the best position to detect signs of bid rigging and collusion before harm is done. Raising awareness amongst the officials can lead to better enforcement of the Competition Act.

There is a need for a strong enforcement of the Competition Act. Several reports of the CAG and the CVC highlight evidences of bid rigging and collusion. Even in the absence of formal information, CCI has the suo moto power to initiate action against cartels. This will deter firms from committing fraud in public tenders. Finally, there is a need to establish close cooperation and coordination network at national level between the Competition Commission, auditors, anti-corruption agencies, and procurement departments. Such a network can help in effective monitoring and enforcement of existing laws and regulation.

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