

COMMENTS ON PUBLIC PROCUREMENT BILL 2012

BY CUTS INTERNATIONAL

Section No	Provisions in Public Procurement Bill	Proposed Changes	Rationale for suggestions/comments
Amendments required for addressing structural weaknesses in the Bill			
Section 41 (8)	<p>“On receipt of an application under sub-section (1), the committee shall, after giving an opportunity of being heard to the procuring entity as well as the applicant, determine as to whether the procuring entity has complied with the provisions of this Act, the rules made thereunder and the terms of the pre-qualification, bidder registration or bidding document, as the case may be, and communicate its recommendations, including the corrective measures to be taken, to the procuring entity and to the applicant.”</p>	<p><i>“On receipt of an application under sub-section (1), the committee shall give an opportunity of being heard to the procuring entity as well as the applicant, determine as to whether the procuring entity has complied with the provisions of this Act, the rules made thereunder and the terms of the pre-qualification, bidder registration or bidding document, as the case may be. Where the Committee determines that there has been a breach or a failure as referred to above, the procuring entity will become liable for corrective action or compensation as determined by the Committee, for the loss or damages suffered by the applicant. The decision of the Committee will be communicated to the procuring entity and to the applicant.”</i></p>	<p>The grievance redressal mechanism has power only to recommend action to the procuring agency under the existing Bill, including the corrective measures to be taken. Since the procuring agency is itself a party to the dispute, its objectivity and willingness to act on recommendations of the grievance redressal tribunal is debatable. The position of the review body is much weaker than that under the WTO’s Government Procurement Agreement (Art XVIII), in that where the authority determines “that there has been a breach or failure” it can ask (and not merely “recommend”) that each party “shall adopt and maintain procedures that provide for ...corrective action or compensation for the loss or damage suffered...” The redressal mechanism under the UNCITRAL Model Law of Public Procurement also has similar powers as in the WTO GPA.</p> <p>One other major structural weakness from which the PP Bill suffers is that the</p>

			<p>grievance redressal mechanism is restricted only to review grievances arising at the stage of bidding or tendering, whereas the maximum disputes arise in the contract management stage, that is, post signing of the contract.</p> <p>At this stage, if there is no tribunal- like mechanism to which aggrieved parties can have easy recourse for adjudication/settlement of disputes, the only alternative left would be the usual time and cost consuming procedures of the courts and arbitration.</p> <p>The amendment is proposed to provide for recourse to courts only if the tribunal mechanism fails to redress grievances</p>
<p>Section 41(13).</p>	<p>“The procurement redressal committee may recommend to the procuring entity the suspension of the procurement process pending disposal of the application, if in its opinion, failure to do so is likely to lead to miscarriage of justice.”</p>	<p><i>“The procurement redressal committee, pending its final disposal of an application, may provide for rapid interim measures to preserve the supplier’s opportunity to participate in the procurement. Such interim measures may result in suspension of the procurement process. The procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account when deciding whether such measures should be applied. Just cause for not acting shall be provided in writing.”</i></p>	<p>It is important to provide for balance in this sub section between the interest of the aggrieved supplier and the public interest, hence the change in wording is proposed. Moreover, as brought out in the comments on 41(8), the role of the Grievance Redressal Committee is statutory and not merely recommendatory, in case it feels that suspension of the procurement process is necessary.</p>

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Section 16	<p>16. (1). “Subject to the provisions of this Act and the rules made thereunder, a procuring entity may opt to -</p> <p>(a) call for bids, if it is of the opinion that it is essential to evaluate the techno-commercial aspects before considering the financial aspect, in two envelopes, namely:—</p> <p>(i) the techno-commercial bid containing the technical, quality and performance aspects, commercial terms and conditions; and</p> <p>(ii) the financial bid containing the price and other financial details:</p> <p>(b) call for bids, containing the techno commercial aspects and financial aspects including the price in one envelope, if all the elements are to be evaluated together:</p> <p>Provided that in case of a procurement in which offsets are required, the bid relating to offsets may be called for in such manner as may be</p>	<p>After first Proviso to Section 16(1), add a second proviso as follows:</p> <p><i>“Further provided that where a procuring entity receives a tender with a price that is abnormally lower than the prices in other tenders submitted, it may verify with the supplier that it satisfies the conditions for participation and is capable of fulfilling the terms of the contract.”</i></p>	<p>Consultations held by CUTS International with trade and industry showed that “L-1” criterion is often wrongly used by procuring entities in such a way that quality norms are totally bypassed and the contract is awarded only to L-1, i.e. the lowest bidder. The above provision, which exists in both the WTO's GPA and UNCITRAL Model Law on public procurement is meant to guard against the over emphasis on lowest cost of procurement to the detriment of quality</p>

	<p>prescribed.</p> <p>(2) In case the procuring entity calls for bids in accordance with the provisions of clause (a) of sub-section (1), the techno-commercial bid shall be opened and evaluated first, including evaluation based on the provisions specified in sub-section (2) of section 21, if applicable, and the financial bid of only those bids which have been found techno-commercially acceptable, shall be opened and evaluated.”</p>		
<p>Section No: 34(2)(iii)</p>	<p>34(2) “Subject to the rules as may be made in this behalf, the procedure for electronic reverse auction shall include the following, namely:—</p> <p>(a) the procuring entity shall solicit bids through an invitation to the electronic reverse auction to be published or communicated in accordance with the provisions of sub-section (5) of section 30 or sub-section (2) of section 31, as the case may be;</p> <p>(b) the invitation shall, in</p>	<p>Modify 34(2) (iii) to read as follows:-</p> <p><i>"Norms for conduct of the auction, including the automatic evaluation method and the mathematical formula, that is based on the evaluation criteria set out in the tender documentation and that will be used in the automatic ranking or re-ranking during the auction."</i></p>	<p>This amendment is suggested in the interest of enhancing transparency and fair competition in electronic reverse auctions, which are a comparatively new form of bidding in India. This wording finds support also in Article XIV(a) of the WTO GPA.</p>

	<p>addition to the information as specified in section 15, include details relating to—</p> <p>(i) access to and registration for the auction;</p> <p>(ii) opening and closing of auction;</p> <p>(iii) norms for conduct of the auction;</p> <p>(iv) any other information as may be relevant to the method of procurement.”</p>		
Amendments required for addressing “Make in India” policy of Government in the Bill			
Section No	Provisions in Public Procurement Bill	Proposed Changes	Rationale for suggestions/comments
Section 11(2)	<p>11(2) “The Central Government may, by notification, provide for mandatory procurement of any subject matter of procurement from any category of bidders, or purchase preference in procurement from any category of bidders on any of the following grounds, namely:—</p> <p>(a) the promotion of domestic industry;</p>	<p>11(2) “The Central Government may, by notification, provide for mandatory procurement of any subject matter of procurement from any category of bidders, or purchase preference in procurement from any category of bidders on any of the following grounds, namely:—</p> <p>(a) the promotion of domestic industry;</p> <p><i>(b) the promotion of transfer of technology, improving balance of payments, increasing R &D capacity, including through stipulation of domestic content in supplies by non-domestic</i></p>	<p>There is debate¹ on the market access issues in the Public Procurement Bill 2012, in that Section 11 (1) of the Bill makes no attempt at limiting participation of bidders in the procurement process based on nationality. The Section 11(2) gives preference to domestic industry only in exceptional circumstances. This is against the trend of the "Make in India" policy of present Government, which seeks to give promote domestic</p>

¹See Sandeep Verma, ‘No “buy India” clauses for us, thank you’, Financial Express, May 05, 2012

	<p>(b) socio-economic policy of the Central Government; (c) any other consideration in public interest in furtherance of a duly notified policy of the Central Government: Provided that the reason and justification for such mandatory or preferential procurement the category of bidders chosen and the nature of preference given shall be specified in that notification”</p>	<p><i>suppliers;</i> (c) socio-economic policy of the Central Government; (d) any other consideration in public interest in furtherance of a duly notified policy of the Central Government: Provided that the reason and justification for such mandatory or preferential procurement the category of bidders chosen and the nature of preference given shall be specified”</p>	<p>manufacturing, (which at present, contributes only 16% of the GDP) and thereby enhancing employment potential. This is also opposite to the practice in most countries where government procurement being out of the purview of general rules applicable under the WTO, is closed to non - domestic bidders.</p> <p>But in the field of high technology items and to maintain the post -liberalization ethos of competition in the Indian economy, it is felt that it is important to keep the market open to foreign bidders.</p> <p>Thus, in India's special circumstances as an emerging economy, it is important to strike a balance between the two imperatives of promotion of domestic industry and maintaining openness and competition in the Indian market. Such a balance, it appears from media reports², is being proposed through the Ministry of Commerce proposal for a national offset policy (NoP) whereby it will be mandatory for foreign firms to source a part of their government or PSE contracts</p>
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² See report in the Millennium Post (page 12) of Friday 20 March titled 'Commerce Ministry to seek Cabinet nod on offset policy'.

			<p>from domestic manufacturers if they are participating in public procurement above a certain threshold, say Rs. 300 crores (which is above the threshold of coverage of Rs. 50 lakhs under the Bill of 2012). This proposal deserves to be supported as it will help to attract investment, promote acquisition of new technology, improve balance of payment, increase R &D capacity and probably also enhance exports.</p> <p>Even the WTO GPA (vide Article V(3)(b)) recognizes the need of developing countries to maintain offsets, so no policy change on this count may be required if and when India decides to become a member of the multilateral Government Procurement Agreement (GPA).</p> <p>However, certain sectors such as defence, atomic energy and space may not be covered by the policy, taking into account the inadequacy of domestic capacity.</p>
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Amendments required for strengthening sustainability provisions in the Bill

Section No	Provisions in Public Procurement Bill	Proposed Changes	Rationale for suggestions/comments
Section 21 (1)	<p>21. (1) “Save as otherwise provided in this Act or the rules made thereunder or in any other law for the time being in force, the evaluation criteria shall relate to the subject matter of procurement and may, as applicable, include—</p> <p>(a) the price;</p> <p>(b) the cost of operating, maintaining and repairing goods or works;</p> <p>(c) the time for delivery of goods, completion of works or provision of services;</p> <p>(d) the characteristics of the subject matter of procurement, such as the functional characteristics of goods or works or the environmental characteristics of the subject matter...”</p>	<p>A clarification may be added with regard to Section 21 (1)(d) to the effect that “A procuring entity shall, in accordance with the declared environmental policy of government, prepare, adopt or apply technical specifications to promote the conservation of natural resources or protect the environment. Life cycle cost may be taken into account for the purpose of evaluating the bid.”</p> <p>A further clause may be added to Section 16(1) to incorporate the concept of life cycle cost when adopting technical specifications to promote sustainability.</p>	<p>When sustainable development has become a model which countries are trying to promote, and where the UN Conference on Sustainable Development held in 2012 has categorised Sustainable Public Procurement (SPP) as one of the five initial sustainable consumption and production programmes for development in the next ten years, the SPP issue in Indian procurement deserves a serious look by the present government.</p> <p>SPP is specially a necessity as a sustainable initiative in view of the resource-intensive manufacturing practises followed in India and the fact that Indian industry is dominated by MSMEs which have poor capacity for adopting sustainability promoting technology. The Public Procurement Bill, 2012 has made a beginning in the direction of SPP by including in the Criteria for Evaluation of tendered items under section 21 not only the “functional characteristics” but also the “environmental characteristics” of the subject matter.</p>

			<p>However, this alone is not sufficient to give a substantial push to SPP in India. A certain degree of push has to be given through the procurement law and policy itself for government procurers to opt for products and services which impact on sustainability, such as recycled paper for use of government stationery as done in Brazil, energy efficient electrical fittings and fuel efficient vehicles for use by government offices.</p> <p>That this is doable in India and that, too, without environmental concerns becoming a barrier to industrialisation, is evidenced through the first ever OM based on SPP principles by the Department of Expenditure, vide its O .M .no 26/6/12/PPD dated 21st January, 2013, which directs all ministries/departments to ensure that while procuring appliances they carry the threshold star rating of energy efficiency indicated against each item in the O M or higher standards.</p> <p>This example of mandating sustainable procurement would get wider currency if supported by provisions in the legislation itself. And hence this recommendation for strengthening wording promoting sustainability in the Bill. The suggested</p>
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			<p>wording finds support in Article X of the WTO GPA.</p> <p>Also, in mandating value for money i.e. in mandating purchase of goods of specified quality at the most competitive rates, the emphasis has to shift from cost per se to 'life cycle cost' concept, in case where sustainable public procurement is the option. I.e. explicit provision has to be built into Section 16(1) for considering the financial gains of environmental alternatives through improved durability and lower operating costs over the lifetime of a product or service and its less harmful environmental impact.</p>