



Guidelines for Contracts with Public Authorities

5th Edition



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2023 Update

Public
Procurement

5th Edition

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Disclaimer

The responses in this questionnaire are related to public procurement (PP) of goods and services (excluding works/infrastructure contracts) by the Union of India, which is also referred to as the 'Centre'. Each State follows its own regulations, although the fundamental principles of PP followed by the Centre and the States are broadly the same. The answers only capture the essence of the point at issue in very broad terms.

1. Does your legal system provide specific procedures for the award of contracts by contracting authorities?

India is a 'Union of States', presently comprising 28 States and 8 Union territories. According to Article 298 of the Constitution of India, the executive power of the Union and of each State extends to 'carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contract for any purpose.' The Union and the States are empowered to legislate on regulation of trade, business, and related activities within their respective jurisdictions.

As of now there is no specific statute governing PP by the central ministries, departments, and other entities administered by the Centre, all of which are hereafter referred to as '**procuring departments**.' (A Public Procurement Bill was introduced in Lok Sabha, the lower House of the Parliament, in 2012 but it was not enacted.)

In the absence of a specific Central Law, PP is governed by the General Financial Rules, 2017 (GFR 2017), as amended from time to time. The GFR 2017, promulgated by the Union Ministry of Finance (MoF), is the latest in the series of GFRs, issued first in 1947 and revised subsequently in 1963 and 2005.

GFR 2017 covers a wide range of subjects from budgeting to sovereign guarantees, but three of its chapters are generally considered to be relevant from the procurement perspective. These chapters relate to 'Works', 'Procurement of Goods and Services', and 'Contract Management'.

The chapter on Procurement of Goods and Services contains general rules applicable to all departments for procurement of goods and services required for use in the public service.

To address the complexities of procurement by some major departments, like the Ministry of Defence (MoD) and the Ministry of Railways, GFR 2017 permits individual departments to issue detailed instructions relating to procurement of goods, broadly in conformity with the generic rules contained in the aforesaid chapter if it is considered necessary by them.

Accordingly, MoF itself has promulgated the following three manuals which are followed by the procuring departments which have not promulgated their own detailed instructions, with such modifications, as deemed necessary by them:

- (a) Manual for Procurement of Goods, 2017;
- (b) Manual for Procurement of Consultancy and Other Services, 2017; and
- (c) Manual for Procurement of Works, 2019

As mentioned earlier, major departments can promulgate their own instructions on procurement within the bounds set by GFR 2017 (and its earlier versions). Consequently, MoD has promulgated the following procedural manuals for procurement of goods and services, keeping in view the complexities of defence procurement:

(a) Defence Acquisition Procedure, 2020 (DAP 2020)

(b) Defence Procurement Manual, 2009 (DPM 2009)

(c) DRDO (Defence Research & Development Organisation) Procurement Manual, 2020 (DRDO PM 2020)

[In addition, MoD has also promulgated Defence Works Procedure 2020 to regulate execution of civil/infrastructure development works.]

The Central Public Sector Enterprises (CPSEs) have promulgated separate procedural manuals, or issued internal instructions, to address the peculiarities of procurement specific to their organizations, broadly in conformity with the GFR.

Sometimes procurement related instructions are also issued by other branches of the Central Government, such as the Central Vigilance Commission and the Department for Promotion of Industry and Internal Trade (DPIIT), which too need to be followed by the procuring departments.

All the aforesaid manuals and instructions define the procedure for bidding and award of contracts in varying degrees of detail.

2. Do the procedures for the award of contracts depend on the kind of goods, services etc., which are to be procured?

The procedure for the award of contracts, though not necessarily in all cases, differs depending on the kind of goods and services to be procured, nature of expenditure, and/or the value of the contract, as illustrated below.

(a) As can be seen from the reply to Q No 1, the MoF has promulgated separate procedural manuals for procurement of 'goods', 'consultancy and other services', and 'works'.

(b) Apart from other instructions, GFR 2017 also provides for 'Electronic Reverse Auction' and e-procurement through Government e-Marketplace (**GeM**) portal which was launched in 2016.

(c) On the other hand, MoD has promulgated separate manuals: DAP 2020 for procurement of 'capital' goods and DPM 2009 for procurement of 'revenue' items for the armed forces and the Indian Coast Guard. The classification of items as 'capital' and 'revenue' depends on whether the procurement is aimed at asset/capability building or defraying expenditure on maintenance of the existing assets.

(d) Within DAP 2020, which is applicable only to capital procurements, separate procedures are laid down for acquisition of systems designed and developed by DRDO and Defence Public Sector Undertakings (DPSUs), Systems and ICT (Information and Communication Technology) products, Leasing, Shipbuilding, etc.

(e) Some other special procedures are also laid down in DAP 2020. These include a Fast Track Procedure, Other than Capital Procurement Procedure, and the procedure for execution of 'Make' projects which entail design and development of defence equipment.

(f) There are some exceptions to the general rule, as in the case of procurement under Inter-governmental Agreements, including the US Government's Foreign Military Sales (FMS) programme, which do not strictly follow the procedure laid down in DAP 2020.

(g) In contrast to (c) and (d) above, all procurements by DRDO are regulated by the DRDO PM 2020.

(Note: The examples given above are only illustrative.)

3. Do the procedures for the award of contracts and/or certain procedural regulations depend on the value of the goods, services etc., which are to be procured (thresholds) and if so, what are the thresholds?

The procedure could differ depending on the value of procurement. For example, as per GFR 2017, procurement of goods requires the procuring department to issue Advertised, Global, Limited, or Single Tender Enquiry, depending on the estimated value of procurement of goods, or subject to certain conditions. Currently the prescribed thresholds and conditions are as follows:

(a) Advertised Tender Enquiry (also referred to as Open Tender Enquiry): for procurement of goods if the estimated value is Rs 25 lakh (approx. US\$ 30,325*) or more;

(b) Global Tender Enquiry: It is similar to the Advertised/Open Tender Enquiry, but it aims at inviting bids from, inter alia, foreign firms;

(c) Limited Tender Enquiry: for procurement of goods if the estimated value is up to Rs 25 lakh (approx. US\$ 30,325); and

(d) Single Tender Enquiry: for procurement from a single source in the following circumstances:

(i) If only a particular firm manufactures the required goods;

(ii) In emergency, if the required goods are necessarily to be purchased from a particular source; and

(iii) For standardisation of machinery or spare parts to ensure compatibility with the existing sets of equipment.

The Global Tender Enquiry can generally be issued in the following circumstances and only if the estimated value of procurement exceeds Rs 200 crore (approx. US\$ 24.26 million)

(i) If goods of required specifications/quality are not available within the country and alternatives available in the country are not suitable for the purpose;

(ii) Non-existence of a local branch of the global principal of the manufacturer/ vendor/contractor;

(iii) Requirement of complying with specific international standards in technical specifications; and

(iv) Absence of a sufficient number of competent domestic bidders likely to comply with the required technical specifications, and in case of suspected cartel formation among indigenous bidders.

Subject to certain terms and conditions, the procuring departments can resort to direct procurement through locally constituted Purchase Committees for procurements valued between Rs 50,000 (approx. US\$ 606) and Rs 10,00,000 (approx. US\$ 12,130), provided the requisite items are not available on GeM. Purchases valued at less than Rs 50,000 (approx. US\$ 606) can be made without inviting bids, subject to the satisfaction of the competent authority that the goods are of requisite quality/ specification, the supplier is reliable, and the price reasonable.

(Note: The classification of Tender Enquiries is largely an internal matter of the procuring department; what matters from the bidders' perspective are the criteria mentioned in the tender documents concerning their eligibility to participate in the tender.)

** All values denominated in Indian Rupee (Rs) converted into US Dollars at the current conversion rate of Rs 82.44 to a US Dollar.*

4. In what way does the contracting authority have to inform the market about the intended procurement?

Subject to some exceptions, intimation to the market is given by the procuring authorities by way of advertisement of the tender enquiries, as explained in response to Q No 5. In some cases, the prospective vendors get to know about the intended purchase if the procuring department issues 'Request for Information' or solicits 'Expression of Interest', from them.

The MoF Manual for Procurement of Goods also stipulates that details of award of contract and name of the successful bidder should be mentioned on the Central Public Procurement Portal (CPPP) and also in the notice board/bulletin/website of the procuring department concerned. This requirement can, however, be dispensed with if publication of such information is sensitive from commercial or security angle.

5. Are calls for tender from contracting authorities published on a single or on multiple freely accessible website(s)? If yes, please name the website(s).

It is mandatory for all procuring departments to publish their tender enquiries, corrigenda thereto and details of bid awards on the CPPP and the departmental websites, with some possible exceptions for reasons such as national security.

Some portals provide this service on payment of the prescribed subscription. One such portal is:

<https://www.tendersontime.com/india/#:~:text=TendersOnTime%20is%20the%20most%20trusted,various%20Indian%20States%20and%20U>
[T.](https://www.tendersontime.com/india/#:~:text=TendersOnTime%20is%20the%20most%20trusted,various%20Indian%20States%20and%20U)

Industry associations like the Confederation of Indian Industry (CII) provide this service to their members. For more information, visit:

https://cam.mycii.in/know_more_business.html#Global_tender

[Note: It cannot be confirmed that all tender enquiries are captured by these portals.]

6. Does a potential bidder that is interested in the contract need to have a specific legal form, e.g., corporation, to submit a tender?

The MoF manuals define the term 'bidder' (including analogous terms like 'tenderer', 'consultant', or 'service provider' in certain cases), as 'any eligible person or firm or company, including a consortium (that is an association of several persons, or firms or companies), participating in a procurement process with a procuring entity'.

The definition may vary a little in the manuals promulgated by individual departments. For example, according to MoD's DAP 2020, an Indian Vendor (bidder) can be any legal entity, whether set up on incorporation, partnership, proprietorship, or any other type of ownership model, including societies, registered as per the relevant Indian Laws, and compliant with the applicable industrial licensing requirement and Foreign Direct Investment (FDI) norms.

In some defence acquisition programs, in addition to compliance with the above-mentioned requirements, the entity must also be owned and controlled by resident Indian citizens.

- A company is considered as 'owned' by resident Indian citizens if more than 50% of its paid-up share capital is directly or beneficially owned by resident Indian citizens and/ or Indian companies which are ultimately owned and controlled by resident Indian citizens.
- The expression 'control' implies the right to appoint majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights of shareholders agreements or voting agreements.

Generally, the specific criteria for a bidder to qualify for participating in a procurement process are indicated in the bid documents, such as the Expression of Interest, Request for Proposal, etc.

7. Are bidders allowed to submit joint offers, e.g., as general contractor and subcontractor or as bidding consortium?

In the context of PP, the term 'bidder' implies 'any eligible person or firm or company, including a consortium (that is an association of several persons, or firms or companies)'. Such bidders can participate in a tender singly, jointly or as a part of a consortium, depending on the qualifying criteria mentioned in the bid document by the procuring departments. However, in response to the Limited Tender Enquiries and Single Tender Enquiries, bids can normally be submitted only by the entities to which the enquiry is sent.

There are tax implications that need to be carefully evaluated when bidding jointly or as a part of a consortium, and professional tax advice should be taken to understand and structure such bids.

8. Do potential bidders interested in the contract need to have a registered office or branch office in your country or is it possible to submit a tender for the contract directly from abroad?

There is no bar on submission of bids directly by foreign bidders, unless the bid document specifies that only Indian bidders, or foreign bidders with a base in India, can participate.

9. If it is possible for foreign bidders to submit a bid for a contract to a contracting authority directly from abroad, does the foreign bidder have to consider certain additional aspects, such as having to provide certain additional supporting documents or whether domestic bidders receive preferences in the award of contracts?

Generally, the bidders are required to furnish the information and documents asked for by the procuring departments at the time of pre-qualification of bidders or at the time of submission of bids, as required by the procuring departments. The requirement may differ from one case to another, but generally information is solicited by the procuring departments regarding incorporation and activities of the company, and its financials, technical capabilities, experience, etc. Any additional information to be provided by a foreign bidder would also be mentioned in the notice issued for pre-qualification of bidders or the bid documents at the tendering stage.

As for the second part of the question, some weightage is given to the 'local suppliers' in accordance with the Public Procurement (Preference to Make in India), Order 2017, issued by the erstwhile Department of Industrial Policy and Promotion (now DPIIT), as amended from time to time.

The term 'local supplier' refers to a supplier or service provider whose product or service, offered for procurement, has the minimum 'local content', prescribed by the competent authority. The 'local content' means the amount of value added in India which is usually the total value of the item (excluding the net domestic indirect taxes) minus the value of imported content in the item (including all custom duties), as a proportion of the total value, in percentage terms.

Some individual departments follow a different model. The MoD, for example, gives preference to procurement of capital items from the Indian companies which may, however, collaborate with the foreign manufacturers to varying degrees for manufacturing the item, or providing a service, in India, depending on the category under which the item is being procured.

10. Is a multinational bidding consortium allowed to submit a bid?

Yes, if the notice inviting the bids specifically allows it or does not prohibit it.

11. In which language do the tenders have to/can be submitted and which form is required, e.g., written form, fax, e-mail, or digital?

Normally in a digital and/or written form, in English.

12. Are there any legal regulations governing the time within which bids have to/can be submitted to the contracting authority?

Since there is no Central Statute governing PP, there is no legal regulation governing the time within which bids must/can be submitted to the contracting authority. However, GFR 2017 requires that the bidders be given reasonable time to prepare and submit the bids, which in the case of Advertised Tender Enquiries, for example, is ordinarily three to four weeks. Accordingly, a reasonable timeframe for submission of bids is invariably indicated in the bid documents. Extension of the deadline for submission of bids, including at the request of one or more bidders, is not uncommon.

13. Can the bidders claim their costs for preparing their bid? If so what are the conditions for and the maximum amount of reimbursement?

No. Bidders cannot claim their costs for preparing their bid.

14. Are there any selection criteria set by law that bidders have to satisfy to in order to receive the award of a contract and can the contracting authority establish its own additional selection criteria?

In the absence of a specific central law on PP, there are no standard criteria that the bidders must satisfy for the award of a contract. However, in a broad sense, the universal requirement is that the bidder should be a legal entity, compliant with the licensing and FDI norms, if applicable, as well as other qualifying criteria -financial, technical, experience-related, etc.- which the procuring department may prescribe. It goes without saying that no contract can be awarded unless the goods and services offered by a bidder meet the technical and other requirements mentioned in the bid documents.

15. Does your legal system provide legal protection against the proposed award of a contract to a competing bidder even before the contract with the competitor is actually awarded (primary legal protection)? If so, please generally explain the proceedings. Is such a primary legal protection available to foreign bidders without any restriction?

There is no specific primary legal protection for a bidder against the proposed award of a contract to another bidder participating in the same tendering process. However, in practically all cases, the procuring department and the bidders have to sign a pre-contract Integrity Pact (**PCIP**) which binds them to “ethical conduct and transparency in all activities from pre-selection of bidders, bidding and contracting, implementation, completion and operation related to the contract”. The PCIP is overseen by Independent External Monitors (**IEMs**).

Every procuring department is required to maintain a panel of IEMs in consultation with the Central Vigilance Commission. Generally, the IEMs are retired officials who had held high positions in the civil service or DPSUs. One or more IEMs are nominated for each procurement exceeding a minimum monetary threshold which may vary from one department to the other. The particulars of the IEMs are mentioned in the bidding documents.

The IEMs are mandated to investigate complaints concerning violation of the PCIP, raised by a bidder or referred to them by the procuring departments themselves, after the issuance of the bid documents. To facilitate the investigation, IEMs are allowed full access to the records. While the IEMs function independently, their role is only advisory. This implies that the report submitted by them, containing their findings and recommendations, is not legally binding on the procuring department.

16. If primary legal protection exists in your country, does it depend on certain conditions, i.e., certain thresholds or the kind of goods, services, etc., to be procured? If so, what are the conditions?

There is no specific primary legal protection in PP in India. However, bidders who perceive bias or any other irregularity in the way their bids were evaluated, or the contract awarded to another bidder by the procuring department, do sometimes file a writ petition in the court of competent jurisdiction under the provisions of the Constitution of India, seeking a writ or direction to the procuring department to redress the petitioner’s grievance if the challenge is made before award of work, or to set aside the award of contract to the successful bidder if the challenge is to the award of contract.

Routinely two occasions arise for the court interference during a tender process where a government department is the prospective purchaser, namely:

(a) During the bid evaluation process i.e. after the bids have been submitted but before the award of the contract, where one or more bidders have a grievance either against competing bidders on account of their eligibility or against the procuring department for entertaining the bid of an unqualified bidder, or for bending the rules for one bidder, or for not following the rules of natural justice and fair-play in consideration of the bids, and

(b) Upon award of contract pursuant to evaluation of bids, where one or more bidders challenge the award of contract to a competing bidder by claiming unfairness, malafide, bias, breach of due process, etc. on the part of the State in the award of contract.

The extent to which the court will interfere in such matters, or in other words, the extent of 'judicial review' in such matters has been the subject of substantial judicial discussion from time to time, the net result of which can be summarized as follows:

(a) No bidder has a right to be awarded the contract. The only right a bidder has is for his bid to be considered by the same yardstick that is applied to all other bidders.

(b) Courts will interfere only if there is an overwhelming public interest in entertaining the petition.

(c) In order for his challenge to succeed, the petitioner must conclusively show that the procuring department had acted in an unfair, irrational or arbitrary manner which is serious enough to affect 'larger public interest', or there is substantial evidence of malafide and favoritism.

(d) In case of a challenge to the award of contract, the court will not sit in appeal but shall confine itself to examining whether the decision-making authority:

i) Had exceeded its power;

ii) Committed an error of law;

iii) Committed a breach of the rules of natural justice;

iv) Reached a decision which no reasonable tribunal could reach i.e. which is patently obnoxious or perverse or

v) Abused its power and there was evidence of such abuse.

The Courts are conscious that quashing a decision imposes heavy administrative burden on the procuring department, leads to increase in the budgeted expenditure, and causes delays due to retendering etc., and, therefore, judicial review has to be exercised with caution.

17. If there is no primary legal protection, is there legal protection granted after the contract has been awarded, e.g., through damage claims, etc. (secondary legal protection)? If so, what are the principal conditions that have to be presented to a court in order to receive a damage award?

There is no specific law in regard to secondary legal protection for claiming damages arising from participation in the tendering process. Participation in the bidding process is generally at the risk and cost of the bidder without any commitment on the part of the procuring department. This is specifically mentioned in the bid documents by many procuring departments.

18. Can your office

- i. give legal advice to foreign clients concerning the relevant formal conditions for preparing a proper bid, etc., and assist in the procurement procedure in your country?
- ii. represent foreign clients seeking primary and secondary legal protection before all public offices/courts in your country?
- iii. Please name a contact person within your office for questions of public procurement law

Our firm can advise foreign clients on the implication of the conditions stipulated in the tender/bid documents that need to be kept in mind while preparing a bid and the procurement procedure followed by the central government departments in the country, including the MoD, but not in the preparation of the bid itself which largely requires technical and commercial input. We can also represent foreign clients seeking primary and secondary legal remedies before the courts of law and tribunals, including the arbitration panels, but not before the government departments, though we can assist in framing representations to be made to such departments on disputes arising from the tendering process.

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