PUBLIC TENDER PROCESS PROTEST IN INDIA AND DEFENCE PROCUREMENT

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Defence procurement in India is subject to the legal and regulatory framework governing general public procurement. As a result, governmental procurement processes in India's defence sector must conform to all applicable public procurement laws, in addition to the guidelines set forth in the *Defence Procurement Procedure, 2011*, issued by India's Ministry of Defence. A key measure for ensuring transparency and accountability with respect to public procurement is an effective and independent administrative mechanism whereby participating vendors may challenge the lawfulness of the bid solicitation, review and/or award processes. For example, the UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994) provides for such a review process, and has served as a guide to legislative enactments in other developing countries. Given the absence of this administrative mechanism under Indian law, the judicial system remains the only viable avenue for relief for vendors seeking to challenge the conduct or outcome of the Indian public procurement process.

This article describes the prevailing standards for judicial review of public procurement decisions. An analysis reveals that the available grounds for setting aside a procurement decision — as set out by the Supreme Court of India — are fairly narrow, thereby leaving disappointed bidders with little hope for mounting a successful challenge to a procurement award. However, bidders tend to view procurement litigation as an effective means of delaying a final award so as to allow the unsuccessful bidder to pursue a second chance at the tender process. Assuming bidders can make out a prima facie case of malfeasance with respect to the tender process, bid protest litigation can be effective because lower courts tend to grant a plaintiff-bidder's request for an interim *status quo* order whilst the facts are established, even where allegations of process malfeasance or other misconduct are built upon scant or questionable evidence.

IMPORTANCE OF PUBLIC PROCUREMENT

The pace of global investment and trade with India is accelerating, particularly in the areas of defence and homeland security. India is viewed as a particularly attractive market in the Obama administration's National Export Initiative, which aims to double U.S. exports over the next five years. Since defence procurement almost exclusively involves purchases by state owned entities, such as public sector undertakings, ordinance factories and procurement wings of the armed services, businesses in the defence and homeland security sectors are, and will increasingly be, involved in the public procurement process.

UNIQUE CHALLENGES POSED BY DEFENCE PROCUREMENT

Defence procurement presents certain unique challenges when compared to other categories of public procurement. For example, technical specifications – particularly for weapon systems – often constitute the key determining factor in awarding a defence procurement contract. Conventional wisdom is that once the specifications are written, the "game" is almost over. As a result, bid protests in the defence procurement area tend to place greater emphasis on the early

stages of the procurement process, rather than simply the final outcome. Claimants typically allege that the ground rules governing the tender process were somehow unfair to the complainant. A typical "pre-award" protest might involve a claim that some aspect of the solicitation process effectively disadvantaged the claimant in its ability to compete fairly for the contract. Technically, of course, such protests are almost always "post-award," in the sense that claims tend to be filed only after the bidder is disqualified, or a competing firm is identified as the lowest bidder once the financial bids are made public.

Rules Governing Public Procurement

Defense procurement in India is centralized and conducted exclusively by the Ministry of Defence. General public procurement, in contrast, is decentralized, and most state, central and public sector agencies have their own procurement departments. Different procurement practices are applied at the central level and at the state level, and by public sector agencies and enterprises wherein the government owns a majority interest.

Selling to the Indian governmental or public sector often proves to be a frustrating experience for foreign suppliers. Indian governmental procurement practices routinely lack transparency and standardization. Moreover, there is no comprehensive law exclusively addressing public procurement in India. However, public procurement processes are subject to, and required to comply with, a variety of individual rules and directives issued by the central government, including the following:

- General Financial Rules, 2005 (GFR), which sets out general rules and procedures for financial management, procurement of goods and services, and contract management;
- Delegation of Financial Powers Rules (DFPR);
- Manual on Policies and Procedures for Purchase of Goods, issued under the GFR;
- Guidelines on transparency and objectivity in public procurement issued by the Central Vigilance Commission (CVC); and
- The Defence Procurement Procedure, 2011, and related manuals.

Public procurement bidding in India is generally divided into two stages, as bidders are invited to submit separate technical and financial-related bids (*see* GFR Rule 152). Technical bids are evaluated first, and are used solely to determine whether the bidder qualifies to continue the process. Once qualified bidders are short-listed, the financial bids are opened in the presence of all short-listed bidders, and the contract is awarded to the qualifying bidder with the lowest financial bid (*see* GFR Rule 160). The two-stage bid system is used even in more complex and less well-defined procurement processes, such as the award of concessions or the divestment of public sector undertakings.

Challenging the Procurement Award (Bid Protest)

India does not offer an established set of rules or a specialized tribunal for purposes of addressing protests and challenges to the procurement process. Due to the absence of an effective and independent administrative bid-protest process in

India, bidder complaints are rarely addressed in a timely manner. A specialized administrative and/or judicial process – modeled along the lines of India's income tax appeal process, for example – would likely offer timing efficiencies and increased consistency of adjudication with respect to similar claims.

For vendors seeking to challenge a procurement decision, the only meaningful avenue for redress is to petition a court for judicial review of the procurement decision on grounds that the procurement process was not conducted lawfully. Generally such claims may be filed only after specific action is taken by the procuring agency, such as announcing the short-list of qualified bidders, or opening the financial bids and identifying the lowest bid. A court will require as a threshold matter that there be such a specific administrative action giving rise to an actual (not hypothetical) case or controversy. The option of approaching the court prior to short-listing the qualified bidders or revealing the financial bids is generally not available. The inability to file such "pre-award" relief claims — for example, on grounds that the rules of procurement are unfair to the complainant — can prove particularly frustrating in defence procurement, where challenging the specifications used for the procurement is often a key ground of the bid protest.

Besides approaching the court, disappointed bidders can, of course, seek to resolve their concerns with key officials of the procuring agency and seek their intervention. Such attempts at privately negotiated relief rarely lead to a satisfactory resolution. Top officials of the relevant agencies typically prefer not to involve themselves in a procurement dispute out of fear of allegations of favoritism toward a particular bidder. Their inclination is to allow the dispute to be settled in a judicial forum, as the judicial process insulates officials from allegations of misconduct if their award decision is later questioned. On occasion, for less critical matters, the procurement agency may rely on a formal legal opinion of outside counsel certifying, for example, the validity of a decision to disqualify a particular bidder, or some other procurement-related action.

JUDICIAL REVIEW OF PROCUREMENT DECISIONS

Given the lack of an administrative review mechanism, challenges to a procurement decision are brought by filing a petition in the jurisdictional state high court. The legal basis for such petitions lies in Article 14 of the Constitution of India, which prohibits the state from denying to any person equality before law and equal protection of the laws. The relief sought by the challenging bidder is typically an interim order staying the award of the contract or continuation of the project and, ultimately, a plea to set aside the award (if made) and require a re-tender. Often bidders who have been disqualified in the qualification (first) round will challenge their disqualification on the grounds that it was improper.

Judicial review of administrative action generally

There is no statute governing the judicial review of administrative action, including, for example, defense procurement decisions. India lacks a specific legislative enactment that sets forth the grounds, scope and standards of judicial review of administrative action, such as the United States

Administrative Procedure Act. Accordingly, the law governing the judicial review of administrative actions has evolved through judicial pronouncements on constitutional doctrine, such as equality before law, protection of fundamental rights and separation of powers. The foundational pronouncement on the appropriate level of judicial review of the government's exercise of contractual powers is the Supreme Court's decision in *Tata Cellular v. Union of India*, AIR 1996 SC 11. In *Tata Cellular*, the court held that "shortly put the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(1) Illegality: This means the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(2) Irrationality — i.e., the so-called *Wednesbury* principle of unreasonableness (akin to inquiring whether the administrative action has some arguably rational basis; if so, it is acceptable).

(3) Procedural impropriety (or, as described by the court in *Siemens Public Communications Networks v. Union of India,* an "infirmity in the decision making process."

The court went on to clarify that "[t]he above are only the broad grounds but does not rule out addition of further grounds in course of time." Later decisions have largely followed the *Tata Cellular* decision, and have declined to expand the scope of judicial review.

Principles of judicial review of procurement decisions

Applying the foregoing principles of judicial review of administrative action in the context of a challenge to public procurement decisions, the court in *Tata Cellular* set forth the following six principles:

(1) The modern trend points to judicial restraint in administrative action;

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made;

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible;

(4) The terms of the *invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. More often than not, such decisions are made qualitatively by experts;

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by *mala fides*; and

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Later decisions of the Supreme Court have consistently applied the above principles in reviewing procurement decisions. See, e.g., *Siemens Public Communication Networks v. Union of India*, AIR 2009 SC 1204. Also the court has affirmed that the same principles apply where the grant of a licence is challenged (rather than the award of a tender). *Raunaq Int'l Ltd. v. IVR Construction Ltd.*, AIR 1999 SC 393.

No relief without a showing of mala fide and safeguarding public interest

As the foregoing principles have been applied over time, what has crystallized is that two elements must be satisfied in order for a court to intervene in a public procurement decision:

(1) there must be a showing of mala fide, ulterior motive, or favoritism ("when there has been no allegation of malice or ulterior motive and particularly where the court has not found any *mala fides* or favoritism in the grant of contract," it is not permissible for the court to intervene. *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.* (1997) 1 SCC 738); and

(2) there must be a substantial public interest to justify intervention by the court in the interim. Setting aside the award of a contract simply because there would be a saving of public money, for example, is not justified. *Sorath Builders v. Shreejikrupa Buildcon Limited*, Civil Appeal No. 1127 of 2009, SCT (2009).

With respect to the grant of interim relief, which is also governed by the Specific Relief Act, 1963 and the Code of Civil Procedure, 1908, the court will weigh the balance of convenience, public interest and the financial import of the transaction. Furthermore the party seeking interim relief will be required to provide security for any increase in costs as a result of the ensuing delay and any damages suffered by the opposite party in consequence of an interim order. The Supreme Court has required that "[i]n granting an injunction or stay against the award of a contract by the government, the court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. Furthermore, "any interim order which stops the project from proceeding further must provide for reimbursement of costs to the public in case the litigation fails. The public must be compensated both for the delay in implementation of the project and the cost escalation resulting from such delay. Unless an adequate provision is made in the interim order, the interim order may prove counter-productive." *Raunaq Int'l Ltd. v. IVR Construction Ltd*, AIR 1999 SC 393.

Lower courts more willing to intervene

Challenges to public procurement awards and the grant of some form of interim relief by the courts are common. Although the law as laid down by the Supreme Court permits judicial intervention in public procurement decisions only in relatively narrow circumstances, lower courts have been less restrained in granting interim *status quo* orders, which are

known to be disruptive and costly for defendants. Also challengers at the pleading stage frequently file claims alleging willful misconduct and unlawful influence in the procurement process, despite the absence of credible evidence to substantiate the claims. In such situations, it is not uncommon for a lower court to issue a *status quo* order pending a limited hearing on the merits, which hearing can take weeks or months to occur. The Supreme Court noted that "it is unfortunate that despite repeated observations of this court in a number of cases such petitions are being readily entertained by the High Court without weighing the consequences." *Ranuaq Int'l* cited above. As a guiding principle, the Supreme Court suggested the following maxim "if the government acts fairly, though falters in wisdom, the court should not intervene."

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