

# **General Principles of Procurement under Public Procurement**

## **Bill 2012 – A Study<sup>×</sup>**

By

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1. There were a number of scams and shady transactions in the earlier Government headed by Hon'ble Manmohan Singhji. The then Government was exposed to number of questionable transactions which almost lowered the prestige and image of Manmohan singh's Govt., (for example coal scam, 3G and others). In order to find a suitable defence as well as to show that the then Government was interested in providing transparency and accountability in all its transaction, Bill 2012 was introduced. However, the Government did not show any further interest in getting the said Bill 2013 passed, just like the great interest evinced in passing the Right to Information Act, Right to Food Act and the Telangana Bill. The criticism that the then Government was merely motivated to get re-elected by the measures passed and the genuine will be provide transparency in its dealings was conspicuously absent. It is now for the Modi Government which is really interested in providing transparency and corrupt-free Government to get the Bill 2012 passed, as it contains a number of provisions to ensure absolute transparency and fairness in public procurement.
2. There are a number of decisions of the courts aimed at fairness, honesty and transparency relating to procurement of materials needed for Government Departments and its instrumentalities and its corporates

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<sup>×</sup> Introduced in Lok Sabha as Bill No. 58 of 2012 herein after referred to as 2012 Bill.

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including varied types of public corporations. A summary of some of the leading decisions are given below:-

- i) Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by public interest;<sup>1</sup>
- ii) Public interest has to be determined in the light of present need and prevailing circumstances;<sup>2</sup>
- iii) Acting within the bounds of reasonableness, it may be legitimate for the State to take into consideration national priorities and considered trade and foreign policies for awarding contracts to foreigners;<sup>3</sup>
- iv) Payment on the exchange rate as on the relevant data is an established mode of international transaction and valid;<sup>4</sup>
- v) An agreement to remunerate a person in order that he may exercise his influence to secure an employment is void on the ground of public policy and outlined in Sec 23 of Indian Contract Act;<sup>5</sup>
- vi) Transfers in contravention of statutory provision is invalid as opposed to public policy;<sup>6</sup>
- vii) In a standard form of contract where the bargaining power of the parties is unequal to an extent that one party virtually left without no freedom to contract, the courts have to come to the rescue of the weaker party;<sup>7</sup>

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<sup>1</sup> LIC of India Vs. Consumer Education and Research Centre, AIR 1995 SC P.1821.

<sup>2</sup> Bakatawar Singh Vs. State of MP, AIR 1992 MP P.318.

<sup>3</sup> Thomas CSE Vs. National Airport Authority of India, AIR 1993 Del P.262.

<sup>4</sup> M/s. Damania Industries Ltd., Vs. state of Orissa, AIR 1998 Orissa P.9.

<sup>5</sup> Ranjeet Singh Vs. Ramlal Shivlall, AIR 1951 MB 113(1).

<sup>6</sup> Jauamma Vs. Maria Bai, AIR 2004 SC P.3960.

<sup>7</sup> National Building Construction Corporation Ltd., Vs. State of Haryana, AIR 2007 P & H P.112.

- viii) No legal relationship will come into being from an agreement offending a statute or public policy;<sup>8</sup>
- ix) If there is a clause in the contract which empowers the Government to unilaterally terminate the arrangement or revoke the grant without assigning any reason whatsoever, it was held enforceable at any time by the Government<sup>9</sup>, (It should atleast be in public interest) the sentence within the bracket is of the author and
- x) The State even in matters of contractual relationship is supposed to act in just, fair and reasonable manner.<sup>10</sup>

The above decisions will be of great help in understanding the general principles of procurement under 2012 Bill.

3. The 2012 Bill has the following objectives:-
  - i) Ensuring transparency, accountability and probity in the procurement process;
  - ii) Fair and equitable treatment of bidders;
  - iii) Promoting competition;
  - iv) Enhancing efficiency and economy;
  - v) Maintaining integrity and public confidence in the public procurement process; and
  - vi) Matters connected and incidental to the aforesaid objectives.
4. One of the method by which the objectives of the Bill 2012 is sought to be achieved by laying down the principles of procurement.<sup>11</sup> These principles may be summarized as follows:-

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<sup>8</sup> Nutan Kumar Vs. Addl. Dist., Judge, Bandu, AIR 1994 All P.298 (FB).

<sup>9</sup> Hajee S.V.Mohd. Jamaluddin Bros &Co., Vs. Govt., of Tamil Nadu, AIR 1997 SC P.1371.

<sup>10</sup> Thakur Kanaiyalal Rasiklal Vs. state of Gujarath, AIR 2003 Gujarath P.24.

<sup>11</sup> Principles of procurement laid down in Section 5 to Sec37 of the Bill 2012.

- i) The procuring entity shall in relation to a public procurement, have the responsibility and accountability for the following:-
  - a) To ensure efficiency, economy and transparency;
  - b) To provide fair and equitable treatment to bidders;
  - c) To promote competition;
  - d) To ensure that the price of the successful bid is reasonable and consistent with the quality required; and
  - e) To evolve mechanism to prevent corrupt practices.

In order to give effect to the above principles suitable rules be framed and necessary guidelines may be laid down to all procuring entities<sup>12</sup> to be mandatory followed. Deviation must be viewed seriously and the person concerned must be subjected to penal consequences.

- ii) Procuring entities as well as bidders are required to act in accordance with the code of integrity as may be prescribed by the Central Government.<sup>13</sup> The code of integrity must be drafted carefully with a view to find any escape route to violate any of the principles of procurement. Section 6(2) provides that the Central Government may provide in relation to matters in the code of integrity.<sup>14</sup> The present Central Government may examine this code in order to provide for things which have not been included in it, for instance Sec 6(2) (b) disclosure of conflict of interest as per latest Srinivas's case of Board of Control for Cricket in India (BCCI).

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<sup>12</sup> 'Procuring entity' to be notification issued under Sec 3(1)(f) by the Central Government specified as such and being an entity that receives substantial financial assistance from the Central Government in so far as the utilization of such assistance towards procurements.

<sup>13</sup> See Section 6(1) for details.

<sup>14</sup> See Section 6(2) for details.

- iii) In order to avoid excess purchases not required or inadequate purchases not satisfying the needs, the procurement entity is required to determine the need (including anticipated requirement) for the subject-matter of procurement<sup>15</sup> and the estimated cost has to be decided by relevant factors being taken into account.<sup>16</sup> Obligation relating to determination of the value of procurement is also laid down.<sup>17</sup>
- iv) Sec 9(1) stresses the need for pre-qualification document relating to description of the subject-matter of procurement. The pre-qualification document should state
- a) essential needs of the procuring entity;
  - b) it should be objective, functional, generic and measurable;
  - c) set out the technical, qualitative and performance characteristics
  - d) care to be taken not to indicate a requirement of a particular trade mark, trade name or brand.
- v) Section 10 requires that the procuring entity should adhere to the time-limit specified and if modified, reasons to be recorded for such modification. This is necessary to ensure timely utilization of the procured material and not to make the organizations to suffer for want of supply in time.

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<sup>15</sup> See Section 7 (1).

<sup>16</sup> See Section 7(2) for details.

<sup>17</sup> See Section 8 for details.

- vi) Bill 2012 provides for mandatory procurement from any category of bidders or purchase preference in procurement from any category of bidders on the following grounds:<sup>18</sup>
- i) the promotion of domestic industry
  - ii) socio-economic policy of the Central Government;
  - iii) any other consideration in public interest. However, the Central Government has to specify the above in the procurement notification.
- vii) Section 15 of 2012 provides for the contents of a bidding document as well as conditions.<sup>19</sup> The model of bidding document for various types of procurements must be prescribed by the Central Government. It is necessary for the present Central Government to examine the provisions and specify the details that are necessary in the model bidding document.
- viii) It is interesting to observe the time-limit to be prescribed by the procuring entity for submission of bids. In case of extension, it shall be notified to be taken advantage of, by all those who are interested to bid.
- ix) Section 21 provides for the evaluation criteria for the subject-matter of procurement. This must be provided as guidelines to all procuring entity.
- It must be for evaluating the best quality of materials at competitive rates.

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<sup>18</sup> See Section 11 of the 2012 Bill

<sup>19</sup> See for details Sec 15 (1) and (2) of 2012 Bill.

- x) The procuring entity has the power to exclude the bids on specific grounds. Care to be taken to exercise this power judiciously.<sup>20</sup>
- xi) The Bill 2012<sup>21</sup> provides for cancellation of bidding. It should be exercised judiciously and in accordance with fair play and justice.
- xii) Procuring entities are required to maintain the confidentiality of information.<sup>22</sup>

Section 29 to Section 37 deals with the methods of procurement. Necessary rules may have to be framed to give effect to the purposes laid down in Sec29 to Sec 37.<sup>23</sup>

- 5. Sections 38 and 39 provide for transparency mechanism which has to be observed without any deviation.
- 6. In conclusion the following suggestions are made:-
  - i) Bill 2012 be thoroughly examined and suitable modifications be made before it is passed by the Union Parliament;
  - ii) The Bill 2012 should be enacted into law without further delay;
  - iii) A standard form of contract be provided for procurement contents as a model  
It may vary according to the nature of procuring material;
  - iv) Principles of procurement must be issued as guidelines to all departments and procurement entities to ensure compliance. Failure to follow should lead to penal consequences;
  - v) Code of integrity must be re-examined and new provisions be added which the present Government feels necessary to do so;

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<sup>20</sup> See for details Sec 22 of 2012 Bill.

<sup>21</sup> See Section 24 for details.

<sup>22</sup> See Section 28 of 2012 Bill.

<sup>23</sup> Section 29 to 37 of 2012 Bill provides for methods of procurement.

- vi) Rules may be framed, guidelines to be issued and model forms be provided, soon after 2012 Bill becomes law and
- vii) In the meantime, procuring entities may be required to follow the provisions 2012 Bill after getting clarification and guidelines from the Central Government.