



VOLUME 1 ISSUE 1

## **“Competition Policy and Public Procurement: An Analysis of Issues and Challenges”**

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### **ABSTRACT**

The present research seeks to analyze the public procurement mechanism in relation to competition policy, and outlines the anti- competitive issues involved in the mechanism of public procurement. Public procurement means (a) procurement of goods or assets for construction, expansion or maintenance of public infrastructure under Sales of Goods Act, 1930, and (b) procurement of services and work for installation of procured machinery, construction, security etc. under Indian Contract Act, 1872. The primary objective of any public or government procurement is to secure economic interests of national populous by purchasing qualitative goods and services at lowest prices. Public procurement nearly accounts to a quarter of gross- domestic product (GDP) of India. Public procurement involves a large stake of public wealth which when combined with the volume and value of goods and, services to be procured becomes vulnerable to corruption and collusion. The risk of corruption (abuse of public power for private gain) is high in the field of public procurement in India, primarily due to presence of anti- competitive agreements in the relevant procurement market. Anti- competitive and unfair practices involved in public procurement can have severe impact on competition in the relevant national as well as international market. Anti- competitive practices in public procurement like abuse of dominant position, collusive bidding, cartelization, fraud, corruption, abuse of confidentiality

etc. tends to eliminate competition from the relevant market which negates the basic purpose and true spirit of competition policy provided under Competition Act, 2002. Recent initiatives, particularly, the practice of e- procurement are a manifestation of more accountable, transparent and competitive procurement regime. However, the government initiatives taken in public procurement regime to establish a well functioning procurement mechanism suffers from several weaknesses. There is still a scope to bring more reforms in public procurement in order to yield best outcome from public expenditure.

**Keywords:** *Public Procurement, Anti- Competitive practices, e- procurement, Initiatives and Reforms, India.*

## 1. INTRODUCTION

The primary aim of any public procurement is to purchase goods and services of specified quality, and quantity at most competitive prices. A responsible, accountable and transparent public procurement regime aims at securing best value for the public money.<sup>1</sup> The Government procurement in India accounts more than 26% of GDP, which may be effectively utilized in promoting domestic economy and business culture.<sup>2</sup> Anti- competitive agreements and corrupt practices can occur at any stage of procurement, whether public or private. However, government procurement remains more vulnerable to anti- competitive practices because the public sector has to procure the goods and services in accordance to legislative acts, administrative regulations and judicial guidelines.<sup>3</sup> The administrative, legislative and judicial constraints tends to reduce the flexibility of public procurement mechanism as the public sector is not allowed to adopt any strategic policy beyond the boundaries of these constraints. The huge quantity of goods and services procured by a public sector renders monitoring over procurement impossible which creates a hike in likelihood of corruption. Bid- rigging or collusive tendering have served as the most frequent anti- competitive agreements in public procurement regime. For instance, Competition Commission of India (CCI) passed an order on October 05, 2017 imposing

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<sup>1</sup> OECD, *Competition and Procurement*, Key Findings (2011).

<sup>2</sup> <https://doe.gov.in/procurement-policy-division-0> (The Department of Expenditure is the nodal Department for overseeing the public financial management system in the Central Government and matters connected with state finances.).

<sup>3</sup> Organization for Economic Cooperation and Development, *supra* note 2, at 9.

a penalty of 2.09 crore, 2.30 crore and 1.88 crore on Aditya Birla Chemicals India Limited, Grasim Industries Limited and Gujrat Alkalies and Chemicals Limited for indulging in bid-rigging (or collusive tendering) in order to secure tenders of Delhi Jal Board for supplying water purification products.<sup>4</sup> Collusive tendering can eliminate competition among suppliers and increase the cost of goods or services to be procured.

Further, it becomes extremely difficult to detect bid-rigging because cartel members rarely conclude any written agreement to give effect to anti-competitive practices like bid-rigging. In *Foundation of Common Cause & Public Awareness v. PES Installations Pvt. Ltd. & ors.*<sup>5</sup>, the CCI while examining allegations of bid rigging by in a tender that was floated by Hospitals Services Consultancy Corporation for the supply, installation, and commissioning of modular operation theatre at Safdarjung Hospital, New Delhi, the Commission detected common mistakes made by bidders in their tender forms and treated commonality of mistakes as an indirect evidence indicating collusion among bidders. The CCI imposed a penalty of 5% of yearly average turnover on each contravening company. Therefore, screening tools of CCI shall be enhanced to promote competition in the relevant procurement market.

Transparency is another key factor in public procurement mechanism which provides an opportunity to bidders for collusion in order to have an edge over other bidders in bidding process. Transparency forms an indispensable tool in “*fight against corruption*”, however excessive transparency promotes formation of bid-rigging cartels. The collusion between potential bidders in public procurement limits opportunities available to the purchaser (public sector). An anti-competitive collusion occurs when bidders who in normal course compete with each other, forms a cartel in order to create monopoly in the relevant market, and ultimately attempts to raise the prices or reduce the quality of goods or services for the purchaser or both. Collusion between potential bidders is the most problematic issue in public procurement as collusion diminishes the competition in the procurement market.<sup>6</sup> Collusion between bidding firms in a public procurement provides an escape route to competition in relevant market. Collusion of bidders in order to retain the bid amount at a pre-determined level, is an illegal

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<sup>4</sup> Delhi Jal Board v. Aditya Birla Chemicals India Ltd. and ors, (2013), CCI (India).

<sup>5</sup> Suo Moto Case No. 02 of 2011.

<sup>6</sup> Organization for Economic Cooperation and Development, *supra* note 2, at 10.

practice prohibited under the section 3(3) of the Competition Act, 2002.<sup>7</sup> However, irrespective of prohibition of bid- rigging, business firms implement bid- rigging by using a spectrum of strategies. “Cover- Bidding”, “Bid- suppression”, “Sub- Contracting”, “Bid- rotation”, and “market allocation” are several bid- rigging practices that are quiet frequent.<sup>8</sup> Bid- rigging misappropriates public funds, reduces the quality and quantity of public infrastructure and services, and ultimately diminishes the public faith in governmental institutions and competition policy. Therefore, strengthening of competition law enforcement becomes inevitable in order to yield best value of public expenditure and promote lifestyle of individual citizens.

Furthermore, the lack of transparency in the process of procurement provides a channel to procurement officials to engage in corrupt and anti- competitive practices with one or more bidders. While ‘corruption’ and ‘collusion’ might appear to be distinct offences or civil wrongs, they constitute same effect on public procurement by diminishing competition from the relevant procurement market.

The federal framework of public procurement mechanism in India for “*public service delivery*”, makes it complex and vulnerable to anti- competitive practices.<sup>9</sup> Absence of a comprehensive public procurement law allows various government departments to conduct procurement independently with wide range of discretionary powers. In absence of a comprehensive public procurement code, public procurements are guided by-

- the Indian Contract Act, 1872;
- the Sales of Goods Act, 1930;
- CAG’s Duties, Powers and Conditions of Services Act, 1971;
- Prevention of Corruption Act, 1988;
- Competition Act, 2002;
- the Arbitration and Conciliation Act, 1996;
- Right to Information Act, 2005;
- Information Technology Act, 2000;

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<sup>7</sup> The Competition Act, 2002 S. 3 (3), No. 12, Acts of Parliament, 2003 (India).

<sup>8</sup> COMPETITION COMM. OF INDIA, PROVISIONS RELATING TO BID RIGGING (Comm. Print 2018).

<sup>9</sup> Bhabesh Hazarika and Pratap Ranjan Jena, *Public Procurement in India: Institutional Mechanism, Challenges and Reforms* 5 (National Institute of Public Finance and Policy, Working Paper No. 204, 2017).

- Central Vigilance Commission Act, 2003 etc.<sup>10</sup>

Furthermore, there are several specific rules in relation to procurement in specific sectors like Defence Procurement Procedure (DPP); Indian Railway e- Procurement System (IREPS); Electronic Products Policy (EPP); Electricity Act, 2003; Pharmaceuticals Purchase Policy 2013; National Telecom Policy etc.

Competition Commission of India (CCI) is among the five major public institutions to keep a check on public procurement process. The other four major institutions are Procurement Policy Division, Comptroller and Auditor General, Central Bureau of Investigation (CBI) and Central Vigilance Commission. CCI can effectively assist in eliminating “*collusion and corruption*” by strengthening the enforcement of competition law against anti- competitive practices which frequently occur in public procurement.

## **2. NEED TO STRENGTHEN COMPETITION LAW ENFORCEMENT IN THE REGIME OF PUBLIC PROCUREMENT**

An efficient and effective public procurement yields best outcome from the public expenditure. Therefore, every possible effort shall be made to promote competition in public procurement and to avoid waste of public funds. To strengthen public procurement mechanism, it becomes inevitable to ensure that procurement is not affected by anti- competitive practices like bid-rigging, fraud, corruption etc. The key factors which can be utilized to reduce and eliminate anti-competitive practices in public procurement have been summarized as under-

### **2.1 Political Commitment<sup>11</sup>**

A political commitment against corruption in public procurement is necessary to ensure the fair functioning of public procurement mechanism. No reform initiatives can succeed unless there is a political integrity in campaign for ‘corruption- free’ public procurement. Disclosure of state budgets and accounts of public procurement, can serve as efficient tools to eliminate corruption in public procurement. The “*culture of concealment*” shall be replaced by “*culture of*

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<sup>10</sup> *Id* at 6-7.

<sup>11</sup> TINA SOREIDE, CHR. MICHELSEN INSTITUTE: DEVELOPMENT STUDIES AND HUMAN RIGHTS, CORRUPTION IN PUBLIC PROCUREMENT- CAUSES, CONSEQUENCES AND CURES 20- 21 (2002).

*transparency*” in order to get rid of bid- rigging and collusion. Further, increasing the pay- scale of procurement officials and strengthening CCI to detect anti- competitive practices can also serve as a great reform in public procurement regime.

## **2.2 Comprehensive Procurement Act**

In absence of a comprehensive and unified public procurement code, individual government departments regulate their procurement procedure with a wide discretion. They formulate their procurement policy taking into account their perception of public interest which has resulted in multiplicity of procurement procedures across the country.<sup>12</sup> Although every public procurement procedure or manual shall be in compliance with constitutional provisions, administrative rules and judicial guidelines, still these procedures are prone to unfair practices in absence of a consolidated legislation. The procurement procedure and rules shall be made as simple and clear as possible because uncertain rules create an opportunity for misuse which ultimately gives room for corrupt practices.<sup>13</sup> In *Centre for Public Interest Litigation v. Union of India*<sup>14</sup>, the Supreme Court quashed the 2G spectrum licences issued to telecom companies by government. The court observed that the licences were issued on ‘first come, first serve’ policy, which is arbitrary and anti- competitive. The court held that an impartial auction is the best approach to allocate public resources. The 2G spectrum case has served as a milestone for formulating a comprehensive procurement policy. Thereafter, a Public Procurement Bill was introduced in Parliament. The Public Procurement Bill, 2012 seeks to create a statutory framework which will provide greater transparency, accountability and enforceability. The bill ensures that competition will be maximized in public procurement to secure the interests of economy, integrity and efficiency.<sup>15</sup> However, the bill is pending in the Parliament of India and there is no clarity of notification.

## **2.3 Appointment of external monitoring authority to mitigate anti- competitive and corrupt practices**

Procurement authorities have several times included non- competent clauses in the bidding agreements to favour a single bidder or unlawful cartel. For instance, Government of Goa has

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<sup>12</sup> National Institute of Public Finance and Policy, *supra* note 09, at 20.

<sup>13</sup> *Supra* note 11, at 30.

<sup>14</sup> (2012) 3 SCC 1.

<sup>15</sup> The Public Procurement Bill, 2012, , <https://pib.gov.in/newsite/PrintRelease.aspx?relid=82204> (last visited Dec 6, 2019).

been accused of formulating tender terms and conditions in order to favour one party.<sup>16</sup> Weak monitoring authorities have served as a potential agent responsible for the presence of such kind anti- competitive agreements and unfair trade practices in the relevant market of public procurement. Therefore, appointment of an authority to exclusively supervise and keep a check over the procurement process becomes the need of modern welfare state. CCI can serve as a great *ombudsman* over public procurement process. Therefore, CCI should be entrusted with appropriate authority and human resources to detect, discourage and prevent anti- competitive practices in procurement market.

#### **2.4 Affirmative action for domestic Micro and Small Enterprises (MSE)**

There always has been a low participation of domestic MSE's in public procurement because the presence of anti- competitive practices in public procurement creates an apprehension of pre-determined supplier to whom tender will be allotted. This apprehension reduces the number of potential domestic bidders from participating in public procurement bidding. Delayed payment by the government is also another key factor discouraging MSE's to participate in public procurement.

#### **2.5 Acquainting procurement officials with competent knowledge, awareness and skills**

Competition Commission of India (CCI) shall organize workshops or training programs for procurement officials with a motive to enhance skills of procurement officials to detect anti-competitive practices like bid- rigging, cartel- behaviors, unlawful conspiracies and manipulations among suppliers, frauds etc.<sup>17</sup> Recently, the Competition Commission of India organized a technical workshop on “Competition issues in the Healthcare and Pharmaceutical Industry” where various stakeholders in the health industries, Non- Governmental Originations (NGOs), regulators, service- providers etc., participated to make serious deliberations for eliminating anti- competitive practices from the health sector market.<sup>18</sup>

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<sup>16</sup> Jupiter Gaming Solutions Private Limited v. Government of Goa and anr. (2011) CCI (India).

<sup>17</sup> R. M. Abrantes, *Proactive vs Reactive Anti- Cartel Policy: The Role of Empirical Screens*, SSRN (Nov. 06, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2284740](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284740).

<sup>18</sup> *Fair Play*, The Quarterly Newsletter of Competition Commission of India, July- September, 2018, at 2.

## 2.6 Effective penalties

Enhancing screening tools for detection of unlawful cartel behaviors and imposing effective penalties on such kind of behaviors can have a deterrent effect on supply entities appearing tender bidding in the market of public procurement.<sup>19</sup>

The Competition Commission of India (CCI) has several times observed that the mechanism of public tendering has become vulnerable to corruption and collusion by bidders who tend to form cartel. Bid-rigging and cartelization are the primary elements causing immense harm to public procurement process. There is an eminent need to strengthen competition law enforcement in order to prevent anti-competitive practices in government procurement. Further, the CCI shall recognize the need of exploring new channels of increasing awareness about anti-competitive practices involved in public procurement among stakeholders in public procurement.

## CONCLUSION

Today, competition policy is considered as an essential element of any successful public procurement. Public procurement is considered as extremely crucial for meeting a country's fiscal commitments as it involves a large stake of public wealth. Public procurement involves a large proportion of public wealth, thereby, involves fierce competition among suppliers. Due to high gravity of competition, public procurement becomes highly vulnerable to anti-competitive practices. In fact, several ministries, like Railway and Telecom, allocate approximately 50 % of their financial budget for public procurement purposes. Taking into consideration large amount of public money involved in public procurement, the procurement mechanism shall be made effective enough to diminish the chances of 'corruption and collusion' among suppliers as well as public procurement officials. The research observes that effective monitoring (by CCI), adequate accountability, training of various stakeholders, promoting the whistle blower mechanism, imposing effective penalties on cartel behavior, and most importantly enacting a comprehensive procurement policy can serve as most pre-dominant factors in strengthening an effective procurement process. Further, the "competition policy and public procurement" is an area yet in academic infancy, therefore, this area requires urgent attention in academics as well as practice in order to yield best results from public expenditure.

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<sup>19</sup> *Supra* note 18.



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