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India Country Procurement Assessment Report

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Acronyms and Abbreviations

ADB	Asian Development Bank
ASCI	Administrative Staff College of India, Hyderabad
CAG	Comptroller and Auditor General of India
CDC	Consultancy Development Centre
CIDC	Construction Industry Development Council
CII	Confederation of Indian Industries
CVC	Central Vigilance Commission
DFID	Department for Industrial Development, United Kingdom
DRB	Dispute Resolution Board
GDP	Gross Domestic Product
GOI	Government of India
GPA	Government Procurement Agreement
ICB	International Competitive Bidding
NCB	National Competitive Bidding
NICMAR	National Institute of Construction Management and Research
NIFM	National Institute of Financial Management
PSU	Public Sector Undertaking
PWD	Public Works Department
SBD	Standard Bidding Document
UNCITRAL	United Nations Commission for International Trade Law
WTO	World Trade Organization

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COUNTRY PROCUREMENT ASSESSMENT REPORT (CPAR)

INDIA

Phases I, II, and III

Center, States and Public Enterprises

Summary and Recommendations

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INDIA

COUNTRY PROCUREMENT ASSESSMENT REPORT (CPAR)

SUMMARY AND RECOMMENDATIONS

1.0 Preface

The Country Procurement Assessment for India commenced in January 2000. In view of the magnitude of the task and budget constraints it was divided into three phases. The first phase covered the Central Government and its agencies. The report was submitted to the Government in February 2001. The second phase covered three State Governments¹ selected as representative of the twenty-five States and Union territories. The reports were submitted by the Bank to the Government in October 2001. The third phase covered the 250 plus Public Sector Enterprises under the Central Government and the report was submitted to the Government in August 2002.²

The Government of India (GOI) agreed to the study subject to a few conditions, mainly that the exercise should not culminate in a 'risk rating' for India and the review of corruption should be confined to the public procurement sector (*see Annexure 1*). The study was carried out by Raghavan Srinivasan, former Chief Procurement Advisor in the World Bank in Washington D.C., assisted by local consultants. The governments, at the Center and States, provided all logistic support but did not directly participate in the study.

This report combines the five reports in the three phases, covering the Center, three States (including the state enterprises) and the Central Public Sector Enterprises, in the form of a comprehensive summary to present a total picture of public procurement in the country, its strengths and weaknesses and the recommendations for improvement and modernization.

2.0 Country and Political Setup

India became independent in August 1947 and adopted a written Constitution in January 1950 under which it is a sovereign, socialist, secular, democratic republic under a President. The country follows the parliamentary system of democracy on the British model. The national parliament is elected by adult franchise. The majority party forms the government under a Prime Minister. India is a Union of States comprising 25 States³ and 7 Union Territories. The national government is known as the Union Government or Central Government. Each State is under a Governor appointed by the President and has an elected legislature. The party in majority forms the government under a Chief Minister. The Constitution allocates some subjects to the Center and some to the States and some to both.

¹ Tamil Nadu, Karnataka, Uttar Pradesh

² At its request, a similar study was carried out in the state of Maharashtra in 2002

³ Three new States were created in November 2000

The country follows the common law system and has an independent judiciary. The Supreme Court of India is the apex court and its judges can be removed only by the Parliament. The Constitution provides for an independent audit authority under the Comptroller and Auditor General of India (CAG) who reports his findings directly to Parliament and State legislatures.

3.0. The Public Procurement Regime

3.1 Role and Importance of Public Procurement

At the time of independence in 1947, government activities were basically limited to maintenance of law and order and collection of revenues. Public procurement was confined to purchase of office equipment and construction of office buildings and roads. Since independence government activity has grown manifold, including setting up of a vast number of public sector undertakings in every sector of the economy in pursuance of the social democracy, planned development and command economy. Public procurement grew exponentially and now covers every type of goods and services and is carried out by a myriad of agencies all over the country. Since the nineties the government has changed course and is embarked upon an economic liberalization path including gradual disinvestment in the public undertakings. However the implementation is slow and government procurement continues to remain large in volume and all pervasive. Procurement of goods and services is carried out by ministries, departments, municipal and other local bodies, statutory corporations and public undertakings both in the Center and in the States. The total value of public procurement of all these put together is of the order of \$100 billion⁴ representing 13 % of the national budgets and over 20 % of the Gross Domestic Product (GDP). The public procurement policies, procedures and practices of the Center, States and the Public Enterprises have a tremendous impact on the economy and the business community, particularly in the construction sector, which depends largely on public works contracts. The public perception of integrity and efficiency of the government is to a large extent swayed by the transparency and integrity of public procurement.

3.2 Public Procurement Policies and Institutions

3.2.1 The Legal and Regulatory Framework

The Constitution of India authorizes⁵ the Central and the State governments to contract for goods and services and also requires the executive to protect the fundamental rights of all citizens to be treated equally (while soliciting tenders), but beyond that it does not provide any guidance on public procurement principles, policies or procedures. There is

⁴ Using an exchange rate of \$ 1=Rs 45.00 valid at the time of the study

⁵ Article 298

no Central or State legislation on public procurement either, except for two States (out of 25), Tamil Nadu and Karnataka, which have recently enacted Acts on 'Transparency in Public Procurement'.

The policies, procedures, guidelines and delegation of authority relating to procurement are issued by the executive branch of the government through primarily, the finance, but also through the industry and other ministries. Accordingly, it may be said that there is no legal authority to the public procurement procedural framework, which is essentially a set of executive directives. Government contracts are governed by the same laws that govern private contracts. There is no department or agency in the Center or State exclusively responsible for framing policies or regulating public procurement. Nor is any department entrusted with the responsibility of overseeing public procurement in respect to its compliance with the laid down policies and procedures, or its efficiency and transparency. The Comptroller and Auditor General of India (CAG) carries out ex-post audit of government expenditures including government and public sector procurements, essentially checking the budget authority for expenditures and adherence to laid down procedures. The CAG's annual and special reports highlight unauthorized and wasteful expenditures, losses to the public exchequer and unjustified departures from established procedures. The reports are published and are discussed in the Parliament and State legislatures.

3.2.2 Procedural Framework

The Ministry of Finance in the Center and the Department of Finance in the States lay down broad principles of financial propriety in incurring government expenditures including expenditure in the procurement of goods and services and leave it to the procuring agencies to expand these into detailed rules and procedures. Besides, Finance, other ministries such as Industry, Public Works, Environment, Agriculture, State Enterprises and others also issue directives on government procurement relevant to their portfolio, e.g., encouragement of small scale industry, environmental standards in government procurement, procedures for purchase of commodities, preferences for state owned enterprises and so on.

Initially the Ministry of Supply in the Center/the Central Stores Purchase Organization in the States and the Public Works Department (PWD) in the Center and the States served as the lead agencies to formulate detailed procedures for the purchase of goods and works respectively, which were followed by other departments, agencies and state undertakings. However as the government expanded its activities exponentially and set up multitude of state enterprises, each ministry, agency and particularly state enterprise introduced innovations, embellishments and improvements as they deemed fit and appropriate from their points of view.

The basic framework of rules and procedures require open tenders, open to all qualified firms without discrimination, use of non discriminatory tender documents, public bid opening and selection of the most advantageous tender taking all factors (preferably pre-disclosed) into consideration. Restricted or limited tenders are permitted if the value is

small or only limited suppliers are available and single tenders are permitted in the case of urgency, small value, and proprietary and in other exceptional circumstances. In this respect the basic procedural framework is no different from World Bank Guidelines or UNCITRAL⁶ model law or the GPA of WTO⁷ and other good models of public procurement. In the past two decades the procedures have been further influenced by the World Bank and the Asian Development Bank (ADB) and the tender documents used by the better agencies are modeled on their documents. Thus, there is a reasonably good framework of rules, procedures and documents and a few good practitioners as well.

However, there are thousands of agencies handling public procurement and most of them have added their own nuances and peculiarities, some consistent with the basic philosophy of non discriminatory open tendering, but many bending the basic principles to an uncomfortable degree, and few bending them beyond recognition. Since the genesis is the 'finance rules' and not a law, nothing prevents them in this exercise, nor has the auditor anything to say unless it finds fraud or malpractice or impropriety.

4.0 Performance of Public Procurement

By and large, the procurement by the Central Government ministries, departments and sub agencies works satisfactorily when compared to public procurement in other developing countries and when compared to the performance in the States. That a good part of procurements is carried out efficiently using fair and reasonable procedures can be attributed to a large extent to the basic framework of good procedures and documents, competent professional cadre in the major purchasing ministries and agencies, well educated support staff, an efficient ex-post audit mechanism and a competitive and aggressive business community. However, the good performance is marred by cases of mal-practices, pervasive corruption and occasional scandals of corruption at high levels.

The situation in the States is worse. Though the procedural framework is the same, the quality of the personnel is not as good and there is much more intervention by politicians and higher incidence of corruption. Negotiation is practiced routinely and contracts are divided up among many or all the bidders making a mockery of the tender process. In some States there is excessive use of annual 'rate contracts'⁸ which get extended year after year on some excuse or other, avoiding new tenders, thus favoring the current contract holders often for corrupt reasons.

Even among the States, some are better performers than others. Of the three states selected as representative samples, the southern states of Tamil Nadu and Karnataka were better than the northern state of Uttar Pradesh. In Tamil Nadu, pursuant to a high level

⁶ United Nations Commission for International Trade Law

⁷ Government Procurement Agreement of the World Trade Organization

⁸ Rate contracts are 'price agreements' usually valid for one year, awarded after open tenders, often to more than one firm (parallel rate contracts). All user departments can place orders without tenders on the rate contract holders. The procedure gets the benefit of bulking the requirements and securing a competitive price and saving of time for user departments by straightaway placing 'call off' orders

committee recommendation, the State passed an Act of the legislature (law) called ‘The Tamil Nadu Transparency in Tenders Act 1998’ (which came into effect only in 2000) complimented by a unified Rules of Procedure, which *inter alia* mandated the open (advertised) tender system and publication of tender notices and tender decisions in a weekly bulletins, and introduced an appeal procedure. Karnataka followed suit soon after, and enacted a ‘The Karnataka Transparency in Public Procurement Act 1999’ complimented by Public Procurement Rules. These measures have enhanced transparency and will hopefully improve public confidence. The performance of the central Public Sector Enterprises is on the whole better. The larger corporations called the ‘navratnas’ are more efficient, business like and use more sophisticated procedures, particularly in bid evaluation for evaluating factors other than price. The level of public complaints is less.

In spite of a major part of the public procurement proceeding satisfactorily, public’s general perception is not good. A few highly publicized scandals⁹ in the Center and States have resulted in disenchantment with and distrust of government procurement. Apart from favoritism in the selection of awardees, the execution of the contracts is often unsatisfactory, particularly in works contracts, due to absence of incentives in the contracts for good performance, indifferent supervision, malpractice, deep rooted corruption and the inadequacy of the current laws governing these contracts to effectively deal with delays, claims and disputes.

The Department for International Development of the United Kingdom (DFID) carried out a review of government procurement in the State of Andhra Pradesh in 2002 and issued a report titled “Government of Andhra Pradesh - Public Procurement Review 2002”. The report¹⁰, by and large, comes to the same conclusions.

Procurement in World Bank or Asian Development Bank projects have generally been of higher quality, mainly attributable to sound packaging of contracts, mandated bidding/contract documents, pre-disclosed clear evaluation and qualification criteria, better technical specifications, prohibition of negotiations and stricter supervision at all phases by the lending agency. However, delays and malpractice occur in these projects as well, albeit in much fewer number of cases.

As the object of this study is to identify the weaknesses and look for solutions as well as to explore avenues for improvement and modernization, the report discusses them in much greater detail in the succeeding paragraphs.

⁹ Telecom, Tehelka, Fodder, Tansi, etc

¹⁰ referred to as the DFID report in these footnotes

5.0 Weaknesses in the Regime

5.1 *Absence of a Dedicated Policy Making Department*

The absence of a central lead department or agency in the center, dedicated to policy and oversight of public procurement, has resulted in a multiplicity of rules, procedures, directives and orders issued by all ministries plus the CAG, Chief Vigilance Commissioner, Central Vigilance Commission (CVC), etc. In fact, it is difficult to assemble and check all current instructions on any one topic. Similarly, there is a multiplicity of tender and contract documents issued by each agency and enterprise. The situation is similar in the States. At one time the Stores Purchase Department and the PWD took the lead, but no more. Each department and state enterprise issues directives instructions, manuals on the subject. Also, the government procurement is more influenced by the focus to develop local entrepreneurs, small scale industries, backward regions, state enterprises, disadvantaged groups, unemployed engineers, etc., and loses sight of the main objectives, viz., economy, efficiency, transparency and accountability.

There is an urgent need both in the Center and in the States to establish a single dedicated department or agency to evolve, coordinate and oversee policies and procedures in public procurement¹¹ and simultaneously support other public policies such as development of industries and social goals, without compromising the main objectives of economy, efficiency, transparency and accountability.

5.2 *Absence of Legal Framework*

In the absence of a Central law or State act in public procurement, each ministry department, agency, local body and state enterprise, while following the basic rules of the open tender system, feels free to devise its own variations, with its own perceptions of public interest. The government is the same, the procurement objectives are the same, even the specific work/goods can be the same, the bidding community is the same but the procedures and policies practiced by each agency are different. This takes away the credibility and public confidence in the system. Secondly, the rules and procedures are viewed more as guidelines and do not have legal sanctity and are not enforceable in a court of law. The ministers and officials can override any of these procedures in the name of expediency and public interest, without a serious challenge from the public and the potential bidders. The possibility that the audit may criticize any such action in its report is 'post mortem' a few years later, and does not deter errant officials and politicians from manipulating the system.

A 'Public Procurement Law' complemented by a set of Public Procurement Regulations, to replace and consolidate the present fragmented rules, will improve the transparency of the process and accountability of public officials. The law would discourage political bosses and corrupt officials from short cutting procedures in the name of 'public interest'

¹¹ "There is no one government body in the State of Andhra Pradesh with overall responsibility for making procurement policy, developing standard documents....." quote from the DFID report.

unless the action could be defended in a court of law. The law can also define the precise scope for court intervention, thereby eliminating frivolous suits which waste time.

Some States have taken a lead on this initiative. Tamil Nadu has issued 'The Tamil Nadu Transparency in Tenders Act 1998'. The Karnataka Government has issued 'The Karnataka Transparency in Public Procurement Act 1999'. There are also international models to draw from. The UNCITRAL model law published in 1980 has served as the model for the procurement law being legislated in most East European and ex-Soviet Union countries, as well as in some developing countries in Africa and Asia. The Government Procurement Agreement of the WTO¹² is another model. In fact the WTO has set up a working group to examine the utility of and to draft an agreement on "Transparency in Government Procurement" to be applicable to all members.¹³

The acts and models referred above only cover the process upto award of contract to ensure transparency, but not the subsequent contract execution. The proposed law could usefully address the difficulties presently faced during contract execution, by introducing incentives and sanctions to encourage good performance. Thus it would deal with early completion, delays, claims, dispute resolution mechanisms and blacklisting of firms.

5.3 Absence of a Credible Complaint/Challenge/Grievance Procedure

In the present system, any grievance from a bidder that he was wrongly deprived of the award is reviewed by the superiors of the deciding official within the bureaucratic hierarchy. Apart from the natural tendency of officials to defend the action of their subordinates, the perception in the mind of the complainant will be just that, and hence, the process lacks credibility. The fact that the aggrieved bidder can approach the courts is an empty consolation as courts take years to hear a case, the costs are prohibitive and it is not good public relations for future business. The introduction of a quick, effective and credible challenge/appeal procedure would be the answer to assure integrity and build public confidence in the system. Most developed and some developing country systems provide for this. The recently legislated transparency Acts in Tamil Nadu and Karnataka provide for an appeal procedure, but the appellant authority is the government, which does not provide much credibility. The appellant authority should be totally independent of the government.

5.4 Absence of Standard Tender Documents

In spite of some initiatives to standardize tender documents using the Standard Bidding Documents (SBDs) of the World Bank as models, there continues to be a multiplicity of tender documents used by different ministries/agencies for identical procurements. This is more true in civil works contracting. According to one estimate, there are more than

¹² This is a plurilateral agreement. India is not a signatory

¹³ It is understood that the GOI's agreement with WTO requires introduction of a procurement law

150 different contract formats used by the government and its agencies. Obviously, this causes confusion in the minds of bidders and concern about the risks imposed on them. Also, some are of poor quality. Even when instructions are issued standardizing a document, each ministry/department has a penchant to tailor the document, add/subtract clauses, repeat the same provisions in different clauses or at least reword or rephrase some clauses, destroying the purpose of the standardization and introducing ambiguities and contradictions in the document. The situation in the States is much worse. In one State, for the same work, say, for construction of a road, the tender document is different if it is issued by the Public Works Department or the Municipal Corporation or the Metropolitan Urban Development Authority or the State Road Development Corporation. The qualification requirements, selection criteria, the payment terms, the dispute settlement mechanism are all different for no conceivable reason.

It is essential to develop and publish a set of Standard Tender Documents and Contract Conditions **for mandatory use** by all ministries, agencies and enterprises for similar procurements; any special concern should be addressed in the special conditions.¹⁴ The documents shall be readily available in the market and through internet.

5.5 Preferential Treatment in the Procurement

In the formative years of nation building and the prevailing socialist philosophy, government procurement became a vehicle for various industrial and social policies. Promotion of 'small scale' industries, which promotes employment and entrepreneurship, resulted in many items to be reserved for purchase exclusively from them and a preference margin of about 15 % in the purchase of the rest. When state enterprises were set up, government purchasers were directed to reserve some items exclusively for them, and to give a mark up of around 15 % in the purchase of other items. In the States, the public procurement gave preference to 'in State' enterprises over 'out of State', reserved items for developing backward regions, reserved items for socially disadvantaged groups and so on and so forth. Even though all such initiatives were intended to apply only for an initial period of gestation, vested interests and political pressure saw to it that these measures were never graduated out. In due course many such measures have become counterproductive. In the current economic philosophy of liberalization, disinvestment (privatization) and market mechanism, there is no room for the reservation and preferences, and it is high time that most, if not all of them, are gradually, if not straightaway phased out.

5.6 Negotiation

Negotiation in the Indian procurement system is to ask the bidder to reduce the quoted price without any change in the condition of the bid, technical or commercial. Instructions regarding negotiation of price with the lowest, or with others as well, are confusing. They are issued by many ministries and agencies, including the Chief

¹⁴ "Government is hampered by outdated overly complex regulations and by a lack of standard documents" quote from the DFID report

Vigilance Commissioner, CVC. Very strict reading of all current directives gives the impression that negotiation should be resorted to only exceptionally, and indeed, a few agencies and entities follow this good principle.

However, this is not the case with the vast majority of procuring entities. Negotiation with the lowest or with all bidders is routine. The officials and the auditors believe that negotiation results in savings to the public exchequer and in fact encourage negotiation, at least with the lowest bidder. The purchaser believes that he has saved public money and the auditor applauds him. They fail to realize that all bidders include a cushion in their bid price to give up when called for negotiation, but never give up more than what they have included, often less. Negotiation provides the best opportunity for corruption at the cost of the public exchequer. The bidder saves money by giving up less than what he provided, but part of it paid under the table. If all the bidders are absolutely sure that no negotiation will be held under any circumstance, they are forced to quote the lowest price to be competitive. There are innumerable examples to substantiate this – that a ‘no negotiation’ system produces lower prices - in World Bank procurement, in which negotiation to merely push down the competitively quoted price is prohibited.¹⁵

In some agencies, negotiations are carried out with all the bidders requiring them to ‘match’ the price of the lowest or quote a revised lower price, and then, the quantity in the schedule is divided up, making a mockery of the tender process in which the firm which offered the lowest responsive bid should be entitled to the full order.

Once the practice of negotiation (to merely push down the price) is stopped, it will close a major avenue for corruption and result in better prices and real savings to the public exchequer. Negotiation should be permissible only in exceptional cases and only by a committee, and based on mutual concessions.

5.7 Delay in Tender Processing and Award Decision

Delay in tender processing is the most pervasive problem in government procurement. The delay occurs at each stage, but mostly, at the time of evaluation and selection. The larger the contract value, the more is the delay due to multiple layers of scrutiny, evaluation, review and approval, with scant respect for the initial validity of bids. In procurement, the longer the time taken for the decision, the more are the problems. Bidders jockey for positions, political pressures develop, each layer of review becomes an opportunity for corruption and eventually, a decision becomes very difficult. This results in retender, probably the very outcome sought by those other than the lowest evaluated bidder. Good bidders are discouraged from participation. Those who bid increase the prices to reflect added risks and costs in waiting for a decision. Equally, there is delay in dealing with issues during contract implementation. Government officials and auditors do not have an adequate appreciation of the cost of delays. The average time taken in implementation of projects in India is much longer compared to

¹⁵ Negotiation under exceptional circumstances, e.g., single bid, very high prices, etc., are permitted but reduction in price can only be for reduction in scope and/or reduction of contractual risks

countries like China, Mexico, Indonesia and Brazil mainly due to delays in procurement. There is an urgent need to address the problem using a variety of reforms, e.g., delegation of approval powers and having only ONE tender evaluation committee at the right level which will send the recommendations directly to the approval authority, without intermediate reviews by officials and committees. If a decision is not taken, say, within six months from the bid opening, the tender should be cancelled and the government and the financing agency should consider cancellation of the funds. A novel suggestion is to print (as a background) the cost of each day of delay on all stationery dealing with tender processing, for officials to note.

5.8 *The Two-Envelope System*

The two-envelope system has caught on in practically every organization. Under the system, bidders submit all administrative, qualification and technical response in one envelope and the price in the second envelope. The first envelope is publicly opened first and reviewed, and all bids which are not in full compliance with tender requirement, are rejected. In the second sitting, the price envelope of the rest are opened publicly, evaluated and decided. The purpose of introducing the procedure was to obviate any pressure to consider non-conforming attractive bids, and hence, theoretically, the system assured a scrupulously perfect evaluation.

However the procedure suffers from serious disadvantages. In the first place, the delay in opening price envelopes which can be a week to months in many cases gives the purchaser the opportunity to switch envelopes, and hence, is not always trusted by bidders; the longer the delay less is the perceived integrity. Secondly, the tender conditions and technical specifications may be deliberately or otherwise skewed in favor of some bidders. In the first round, bids which do not strictly comply are rejected and their price envelopes are returned unopened. The approving authority and auditors are prevented from knowing the additional price paid for a trivial or minor or unnecessary or avoidable requirement.

5.9 *Works Contracting*

Public works contracting, on the one hand, has an established tradition and institution, but on the other hand, suffers from antiquated procedures that once had validity but have become out of date. The PWD manual is the bible for works contracting procedures for all government departments, agencies, corporations and enterprises. The manual outlines procedures that were relevant when contractors were mostly illiterate and essentially labor contractors. Some of the problems in works contacting are briefly discussed below.

Each PWD maintains a data book, some times district-wise, which provides the rate for each standard item of work. The rates are worked out based on material, labor and overheads. Departmental estimates for works and the Schedule of Rates for tendering are based on these rates in the data book. However, the data books are generally out of date. The situation varies. The central PWD is reasonably up to date. In most States, the data books have not been updated for years. Also, whenever taken up, often the rates are

merely updated for inflation but not reworked using the new materials, methods of construction, plant depreciation, overheads and reasonable profit. The result is that the departmental estimates are generally unreliable and out of date.

Works are taken up without adequate funding, often under political pressure, which languish for years. Contracts are awarded when land acquisition is far from initiation. Some PWDs even put the responsibility for land acquisition and clearance of the site on the contractor, a risk difficult to carry.

Advertised tenders are opened only to approved/registered contractors, whose qualifications and capacity have been verified. But the registration process has become a vehicle for political patronage and once a contractor is registered, he is automatically deemed qualified. Even for good qualified contractors, the works on hand and consequent available capacity to take on new works is not examined. Bad performers are not systematically eliminated from the list.

Powers of approval of awards are linked to the departmental estimates, based on data books, which as mentioned earlier, are outdated. This provides one excuse for negotiation to 'bring prices closer to the departmental estimate'. Even when prices are below the departmental estimate, negotiation is often resorted to 'to get further savings to public funds'.

Major contractors sub contract the entire works or a major portion to unqualified sub contractors with the silent support of the department. Most of the contracts are ad-measurement type. The payments are based on entries in "measurement books" in the handwriting of the supervising departmental engineer, and test checked by his superiors at the site (mostly in theory). Monthly bills are actually prepared by the departmental engineers but signed by the contractors. Every month, each item in the bill of quantities is reentered in the measurement book with full description, and then, the measured quantity. Even if an outside consultant is employed for works supervision, the measurement book is still entered by the department, as stipulated in the 'public works manual'. The whole system is antiquated, repetitive and based on technology and office systems available fifty years ago, with practically no modernization.

Contracts do not provide for adequate price adjustment mechanism and fair claim and dispute resolution mechanisms. Contract supervision is spotty and subject to pervasive corruption. In fact, there are frequent press reports of wide spread corruption in many PWDs.

5.10 Records Management

Government offices (and those of statutory bodies and public enterprises) have a tradition of maintaining and preserving original records such as bid documents, bids, etc., for years. In fact when you enter any public office, particularly the ministries, the first thing which strikes you is the row after row of steel shelves with papers between which the subordinate staff sit and work. However, not much use is made of such institutional

memory. Also, very little is done in the area of performance indicators and other exception statements for management to monitor and control. With the steady, albeit slow change over to electronic record keeping, the opportunities to produce such indicators and other analytical information is vast. In advance of moving to e tendering, the present database should be computerized and a set of performance indicators developed to monitor performance of the public procurement system.

6.0 Competence, Skills and Training of Officers and Staff

A good framework of policies, procedures and documents is essential, but the quality of procurement depends on the people who implement the system, their competence, training, intelligence, objectivity, motivation and ethics. The general level of education of both the senior officials and the support staff is high. However the subject of 'public procurement' is not taught in any university course, but rather acquired on the job or learnt through special training courses and seminars. Senior officials responsible for making policies, with exception, have no exposure to public procurement concepts and requirements, procedures in other advanced countries, international norms and practices,¹⁶ procurement policies and guidelines of the international financial institutions, etc., and hence are not equipped to frame policy. Working level staff is familiar with government rules but not their rationale, and hence, tends to apply the rules clerically, missing the objective of the procedure. The technical staff is not trained in the writing of specifications for competitive bidding, developing appropriate qualification and evaluation criteria and in dealing with issues such as maintenance and operating costs during bid evaluation and comparison.

There is an urgent need to establish systematic widespread training in all the aspects and topics mentioned earlier. With the assistance of the World Bank, courses on international procurement have been instituted in the NIFM¹⁷ and ASCI¹⁸, but they are essentially addressed to project implementers on World Bank/ADB procedures. There is a need to introduce 'public procurement' in the curriculum of the senior administrative training institutions, e.g., the National Academy in Mussorie, and more detailed tailor made courses in public procurement, international and national tendering procedures, contract management, contract law, etc., for procurement professionals, engineers and support staff. Universities and Management Institutes should be persuaded to include the subject of Public Procurement as part of engineering, business, and commerce courses.

The above steps would generate good policy makers and professionally competent and knowledgeable work force, and contribute to the quality and efficiency of public procurement.

¹⁶ as reflected in the UNCITRAL model law, the Government Procurement Agreement of the WTO, European Community Rules, etc.

¹⁷ National Institute of Financial Management, Faridabad

¹⁸ Administrative Staff College of India, Hyderabad

The creation of a competitively recruited class one cadre of procurement specialists in the Railways and Department of Supply in the early fifties has contributed to comparatively higher professional standards in both organizations, and needs emulation in other ministries and sectors. Creation of such cadres fosters professional growth, pride in the profession, cross-fertilization of ideas, etc. Alternatively, professionals belonging to these services should be entrusted with the procurement activity in all ministries.

7.0 Comptroller and Auditor General of India (CAG)

The Indian Constitution provides for the institution of Comptroller and Auditor General, responsible for auditing all revenues and expenditures of the Center and the States vis-à-vis the budget passed by Parliament and State legislatures, and compliance with government policies and procedures. The CAG submits its report annually to the national parliament and to state legislatures. The public accounts committee of Parliament (and the State legislature) conducts hearings and makes recommendations, including punishment to erring officials. The CAG has an extensive network of well-trained officers and staff. The audit, among other things, reports unauthorized expenditures, waste of public funds, abuse of procedures resulting in loss to public exchequer, etc. On the whole, the institution is well respected for its independence and even feared, curbing initiative and encouraging avoidance of decisions. However, the audit staff tends to take a clerical approach, demanding strict compliance of procedures, often missing the objective of the procedures. Minor aberrations and misuse of funds are highlighted while major systemic failures resulting in big losses to the public exchequer are not identified. Audit officers and staff need the same training recommended earlier for the government officials and staff, on public procurement concepts, objectives, processes and their rationale. The subject should be part of the probationary training in the Simla Institute for the Indian Audit and Accounts Services.

Most of the Public Sector Undertakings (PSUs) are governed by the Companies Act, under which, the audit is carried out by a commercial audit firm who certify the accounts and balance sheet. Being majority government owned, the CAG oversees the auditor and reviews his report, and also conducts a test audit. The larger corporations also have an 'audit board' which carries out a comprehensive review of the performance of the Corporation. The commercial audit does not focus on procurement. The CAG audit covers procurement, but only to identify malpractice or frauds.

8.0 The Private Sector Business Community

The business community needs to be equally efficient, competent, healthy, honest and vigilant, if public procurement is to function effectively. The community of manufacturers and suppliers of goods in the country is, by and large, well developed, sophisticated and aggressively competitive, at least in the domestic market. The larger firms are familiar with export formalities and international trade practices. However, in order to be more successful in the international market place, there is need to consistently raise the quality of goods and infuse confidence of the buyer on the quality front.

On the other hand, the construction industry is yet to develop to maturity. Except for a few large firms, the majority is mostly labor contractors, without adequate finance, equipment or professional staff and is mainly dependent on government contracts, unlike the suppliers of goods. The government's policies, the tendering and contracting procedures, documents and above all attitude (mindset) are mostly responsible for this state of affairs. Contractors have been treated as mere labor providers, with the government assuming responsibility for design, provision of materials and technical supervision, and even preparation of claim bills on behalf of the contractor. Also, for a long time, the government has tended to protect local contractors from foreign competition by packaging large contracts in small packages, which has constrained their growth. The industry needs a change of environment in order to grow to maturity.

For the bulk of smaller contractors, the government should promote training in all aspects of the business and expose them to modern/international practices and documents. The subjects should cover costing, risk assessment, different types of contracts, preparation of bids, logistics, construction insurance, contract and claims management, quality enhancement, dispute resolution, etc. The government should also promote creation of equipment leasing companies and expansion of project/construction insurance. In all these initiatives, the government should work together with existing institutions in the public and private sectors such as the CIDC¹⁹, NICMAR²⁰ and others.

As for the larger contractors, the government should promote joint ventures with more experienced foreign firms by suitable packaging of large contracts, so that local firms acquire logistics, contract management and other skills from such association. The government should also promote 'design and construct' in which the contractor assumes full responsibility as in a turnkey contract for industrial plant, and 'management contracting' under which an experienced firm would assume contractual responsibility providing planning, logistics, technical supervision and coordination, but execute the contract by numerous specialist sub contractors. This approach will exploit the advantages of large and small contractors at the same time and can cut down construction time appreciably.

The consulting industry is still nascent and underdeveloped in spite of the large availability of professional skills, if compared with countries such as Mexico, Brazil and Argentina, etc. The long tradition of building in-house expertise in the government for every activity is largely responsible for this situation. Even the handful of large consulting firms in the public sector are offshoots of the government, and discourage growth of the private sector by monopolizing government clients. Perhaps the time has come to privatize the large public firms and make them compete for government business. The vast majority of consulting firms in the private sector is small and need careful nurturing. The government should progressively shed activities such as design and supervision of works to consultants. The Consultancy Development Center (CDC)

¹⁹ Construction Industry Development Council

²⁰ National Institute of Construction Management And Research

should be supported for training initiatives for consultants, particularly in the preparation and presentation of proposal and negotiation of contracts. The insurance sector must be encouraged to develop professional liability coverage, which is essential for local firms to compete abroad.

9.0 Corruption²¹

As in many developing countries, corruption pervades all public activity and practically every public service requires a corrupt payment. This is not new, but has its roots from pre independence days. Of all the functions of the government, procurement provides the most fertile ground for favoritism and distribution of largesse²². The tendering and selection procedures can be manipulated to favor a particular bidder. Supervision of contract performance can be influenced for a consideration. In public works contracting, corrupt payments for timely and sympathetic inspection and for timely payments have been a well-established tradition for decades. Both the officials and the contractors, who were interviewed, confirm to its prevalence; but while the officials believe that it does not exceed 5 % of the contract price, the contractors assert that the amount may be as much as 15 % to cover all branches of the government (tax, customs, excise, etc., besides the engineering), and is built into the price.

The corruption in the States is more widespread than in the center, and some States are worse than others. No state or central agency or state enterprise is exempt.

It is very important to recognize that corruption in procurement is a two way process. The giver is equally to blame as the taker. Contrary to popular belief, corrupt suppliers and contractors are as much, if not more, to blame for the steady increase in public corruption, as they find it easier to do business through bribes than through honest competition. Honest officials are harassed and prevented from functioning honestly. The honest firms desist from competing for government procurement, if they can. The government has powers to blacklist corrupt firms, but this is rarely done for want of hard evidence. Payment of bribe is a criminal offence, but the prosecution is spotty, time consuming and ineffective. The business community has shown no leadership to fight public corruption. The public express outrage about corrupt politicians and officials, but rarely express even criticism of the bribe giver. The free press publishes sensational news about corruption at high levels, but has rarely mounted a 'campaign' to curb pervasive corruption at the working level and in service agencies , which affects the common public.

A Central Vigilance Commission (CVC) was set up in 1964 under the Home Ministry, to advise and guide the central government and its agencies in tackling corruption by public officials. A bill is before the parliament to bestow the CVC with an independent statutory status, as recommended by the Supreme Court in 1998. The CVC has a strong

²¹ The best definition of corruption for purposes of this paper is 'use of public office for private gain'

²² In a World Bank/Confederation of Indian Industries (CII) survey of 210 private sector firms carried out in 1999, 60% responded that a bribe of 2 to 25% of the price is necessary to secure government contracts

and dynamic leadership; but apart from investigation, provision of advice and supervision of the vigilance effort in various ministries, the commission has no powers to punish; it may merely suggest specific punishment. The departmental proceedings against indicted (charge sheeted) officials and subsequent court actions take years. More importantly, the CVC has no role in disciplining offending firms who are equally to blame.

A committee set up by the Central Government in 1966²³ recommended setting up of an ombudsman in the Center, and in each State, to investigate charges of corruption against officials and politicians alike. Some States have set up the mechanism, but others, and more notably the Center, have not done so as yet.

Introduction of a public procurement law, appeal/challenge mechanism, more open and transparent procedures, elimination of negotiation, tightening of accountability, etc., can **reduce** the opportunities and incentives for corruption, but cannot eliminate the disease. A concerted national effort initiated at the highest political level and with active participation of the business community and civil society alone can effectively address the malaise of corruption. **The full benefits of other reforms can be reaped only when the corruption issue is effectively addressed.**²⁴

10.0 Recommendations

Legal, Institutional, Procedural Framework

10.1 *Create a Dedicated Agency for Public Procurement Policy and Oversight*

The absence of a nodal agency in the government to evolve public procurement policies and to oversee their functioning has contributed to the present multiplicity of procedures, rules, practices and documents, and to the weak construction and consultant sectors in the country. It has also resulted in the absence of leadership in the government to deal with public procurement issues with the international financial institutions, bilateral donors and other international bodies.

It is recommended that a department or division or agency be created, in the Center and in each State, to exclusively deal with public procurement policies and related subjects. The agency should not be entrusted with any operational responsibilities.

²³ Santhanam Committee

²⁴ “Collusion and corruption on the part of some Government officials and firms is a major impediment to free and fair competition and to achieving value for money. It is a corrosive influence”. Quote from the DFID report

10.2 Introduce Public Procurement Law and Public Procurement Regulations

Introduce a Public Procurement Law which should, as a minimum, cover the objectives, substantive procedural requirements to achieve them, debriefing of unsuccessful bidders, publication of contract awards and an appeal/challenge mechanism. The law may also cover post award issues in contract implementation such as securities, timely payment, penalties and damages, dispute resolution and termination of contract for default or convenience.

The law should be complemented by a set of Regulations, which will replace the present multiplicity of rules and orders. The law/regulations should also enshrine the five fundamental principles of 'open tendering', which are, effective advertisement, non discriminatory tender conditions and technical specifications, public tender opening, evaluation only in accordance with pre-disclosed criteria and methodology and award to the lowest evaluated qualified tenderer without any negotiation on price or other terms. While outlining other methods of procurement to be chosen, when open tendering is inappropriate, consideration may be given to including 'participatory procurement' in which the project beneficiaries participate in contract implementation, and the circumstances under which this method would be appropriate.

This set of Public Procurement Regulations will be applicable to all ministries and agencies, and shall be widely published and made available to the business community and general public. The Law and Regulations shall also apply to all Statutory Bodies and State Enterprises which are majority owned by the government.

States may adopt the Central Law or introduce a State Act titled 'Public Procurement Act', complimented by a set of 'Public Procurement Rules and Procedures', applicable to all public institutions, including state enterprises.

10.3 Introduce a Challenge Procedure

Introduce an independent authority - Public Procurement Tribunal - outside the government, one for the Center, one for each State and one for Central Public Enterprises, to whom bidders can appeal or challenge an award decision. Appeals shall be subject to a reasonable fee, which would be forfeited if the appeal is declared frivolous. The appeal shall be filed within 15 days of the notification of intention to award, and shall be disposed in 15 days. Initially, the procedure may apply to only large contracts, say, over Rs. 100 million.

10.4 Introduce Debriefing Procedure

Unsuccessful bidders have a right to know why they were not successful, if that is not readily apparent. On request, say, within 7 days of award notification - the purchaser should provide a debriefing, essentially to help the bidder understand the evaluation process and prepare more responsive bids in future. Once the procedure is in place for some time, bidder confidence in the system will go up.

10.5 Publish Contract Awards in News Media and the Web

This is a very useful step to improve transparency. The public and the bidders have a right to know the outcome of a public tender. The publication will also reveal the time taken by the purchaser in finalizing the award, which will encourage quick decisions. The Tamil Nadu and Karnataka Acts provide for this. The publication can be in the official gazette, bulletin and web site, and for large contracts, in the press as well.

10.6 Introduce Mandatory Standard Bidding and Contract Documents

The government-center and states- should prepare and **mandate** a set of 'standard tender documents including contract conditions and forms for goods, industrial plant, works, buildings, and professional services. This step is of the highest priority and would improve the quality of procurement, minimize abuses and enhance transparency. These standard documents as well as various forms used in the tender process, should be made easily available in the market, and through the internet.

In 1998, the Government of India, Ministry of Finance, in consultation with the World Bank, developed a set of standard documents for National Competitive Bidding (NCB) in Bank projects, and circulated them to the central ministries and the States, advocating their use in non-Bank funded procurement as well. These documents can be the starting point, and can be updated in the light of experience gained in their use. In this exercise, World Bank's current SBDs for International Competitive Bidding (ICB), the CIDC document for works, the Indian Road Congress model document for roads and the CDC document for consultants can be inputs.

10.7 Initiate Regular Training Programs

To have a well trained work force is of paramount importance. Also, it is vital for senior officials and policy makers to understand the concepts, the international practices and the current developments in the subject. The courses, initial and refresher, structured separately for senior policy makers, auditors, engineers and procurement officials should be mandatory. The courses may be conducted by the existing administrative training institutions in the government as well as in the private sector. Universities and Management Institutes should be persuaded to include the 'public procurement' as a subject in the regular curriculum for commerce, engineering and business management.

Training courses for the business community is equally important, particularly for works contractors and engineering and procurement consultants. Universities and professional associations should be encouraged and supported to start such courses.

10.8 Simplify Review and Approval Process

The multi-layered review and approval process, particularly for large value contracts, should be simplified to expedite the process and minimize opportunities for malpractice

and corruption. The tender committee, at the appropriate level, alone, shall evaluate and compare the bids, and its recommendation should go directly to the approving authority with no intermediate reviewers. The approving authority may seek clarifications from the tender committee or reject the recommendation, giving its reasons for the tender committee to re-examine, but shall not itself re-evaluate the bids. If a decision is not reached within one extension of bid validity, the tender shall be cancelled.

10.9 Revamp and Enforce Blacklisting Rules

There is much zeal to punish corrupt officials, but not enough to punish corrupting firms. The prosecution of the criminal offence is difficult and time consuming, and hence, not effective. The government has every right to deal only with ethical firms. Business community should be required to adhere to a “code of conduct” if they wish to deal with public purchasers. Any infringement shall result in sanctions. The blacklisting rules need improvements permitting exclusion from public contracts for a period, or permanently, depending on the seriousness of the offence.

10.10 Introduce Electronic Tendering Progressively

The recent passage of the “Information Technology Act, 2000” has made electronic tendering possible by legalizing electronic bid and contract documents. Systems are now available to introduce electronic tendering in public agencies. This will, in one stroke, improve efficiency, and substantially reduce scope for mal-practices and corruption. Electronic procurement is ideal for large volume, low value procurements as in Public Works Department, Electricity Boards, Medical Procurements, etc.

10.11 Conduct and Publish Annual Opinion Poll on Corruption Perception

This is an extraordinarily effective²⁵ method to focus public attention on corruption and generate incentives for improvement in a competitive spirit. The poll should ask for corruption perception for different ministries, departments, agencies, public corporations and state enterprises, with a suitable questionnaire, and the results should be widely publicized.

10.12 Performance Indicators

A set of performance indicators should be developed and maintained, which will assist management to monitor the process time, price trends and efficiency of the procurement system in place, and take timely corrective action.

²⁵ The December 2002 report of Transparency International on ‘Corruption in South Asia’ confirms this view

10.13 Introduce the Following Reforms in Works Procurement

10.13.1 For all development projects, the executing agencies shall carry out procurement planning, logistics, contract packaging, scheduling and firming up of funds well before implementation commences.

10.13.2 The data book which is the basis for preparation of the Schedule of Rates should be reviewed and revised to reflect present day materials, method of working, use of machines and their productivity, overheads, etc., preferably using an outside consultant.

10.13.3 Registration of contractors shall apply only to contracts up to Rs. 10 million. Larger contracts shall be open to all contractors, irrespective of their registration status, who meet specific qualification criteria in order to be considered. Also registration of contractors should be centralized in one agency, say, the PWD.

10.13.4 An up to date computerized 'contractors past performance data' should be maintained for reference, prior to any award of contract.

10.13.5 Bid capacity in respect of finance, equipment, personnel and past performance should be mandatory criteria for selection of successful bidder. Specific requirements in this respect shall be pre-disclosed in the tender documents.

10.13.6 Price Adjustment should be mandated in respect of all contracts of value more than Rs. 5 million and a completion period of more than 12 months. Price adjustment should be made applicable from the date of opening of tenders.

10.13.7 The present system of measurement book and bill preparation should be reviewed and replaced by a more modern system using current information technology (e.g., computer print out).

10.13.8 Contracts above Rs. 2 million should have an Adjudicator, and contracts above Rs. 100 million should have a Disputes Resolution Board (DRB) for settlement of disputes, whose decision shall be binding for claims up to Rs. 2 million or 10 % of contract value, whichever is less. For higher awards if either party rejects the decision, the dispute will go to arbitration.

10.13.9 All contracts above Rs. 50 million, and smaller but complex contracts should have outside independent supervision.

10.13.10 'Lump sum', 'Design and Build' and 'Management Contracting' should be introduced wherever appropriate.

11. Next Steps

The Government of India has received the Phase 1 report relating to the central government in 2001, but is yet to initiate steps towards implementation of the recommendations. The States of Tamil Nadu and Karnataka have prepared agreed action plans, secured World Bank funding and are implementing the recommendations, supervised by Bank staff and consultants. The States of Uttar Pradesh and Maharashtra, which are covered by individual reports, are yet to discuss the recommendations and prepare an action plan. The States of Orissa, Punjab and Kerala having received copies of the reports for Tamil Nadu, etc., have initiated some steps towards reform. In Andhra Pradesh, which also received copies of the CPAR reports, a brief study was carried out by DFID²⁶ in early 2002, which identified similar issues. A more substantive review is being taken up by DFID to develop specific recommendations for reform in the context of the CPAR recommendations and the DFID study.

It is essential for the World Bank as well as other donors to emphasize the importance of implementing these recommendations in this critical area of governance, and provide technical support and resources. World Bank and other donors may also find it useful to fund some research on the effect of good and bad public procurement procedures and practices using the enormous data and material available in the myriads of purchasing agencies in the country. Such research and studies will assist donors in their dialogue with the developing countries, and in the development of sound public procurement policies and practices.

The Government of India conveyed its approval on November 11, 2003, to publish this report subject to a disclaimer that “CPAR has been discussed with the Government of India, but does not necessarily bear their approval for all its contents, especially where the Bank has stated its judgement/opinions”.

²⁶ Department For International Development, United Kingdom



V. Bhaskar
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D.O. No. 1/1/99-FB.II

भारत सरकार Government of India
विभाग नंबर Ministry of Finance
आर्थिक कार्य विभाग Department of Economic Affairs

दि 15 अगस्त 1999 New Delhi,
Date : 15th August, 1999.

Dear Mr Lim,

This is with reference to your letter of the 30th March proposing the Country Procurement Assistance Review (CPAR) study for India.

We have examined the proposal and have no objection to the study subject to the following:

- a) The convenience and consent of the GOI Ministries & State Governments who will be involved in the study. DEA will nominate a nodal officer for interaction by the consultant. The CPAR team will brief him on issues and developments on the study on an ongoing basis and seek Govt. guidance. However as envisaged in Para 4 of the proposal, no basic support services can be provided to the team.
- b) The exercise will not culminate in a risk rating being awarded to India.
- c) The Bank will not implement any change in procurement procedures for India, without obtaining the specific and prior approval of the Govt. Consequently, Para 19 of the CPAR proposal may be deleted.
- d) Issues mentioned in Para 11 of the CPAR proposal are extremely nebulous and subjective and difficult to assess in a rational and objective manner. Hence these areas should be excluded from the scope of the study.
- e) The CPAR recommendations should reflect the fact that a majority of WB assisted projects are implemented in the State sector, and any changes in procurement proposed/ suggested should be acceptable to the States.
- f) The Draft CPAR report (both volumes, in adequate number of copies) should, in the first instance be made available to DEA for sharing with the State Govts., Ministries of Govt etc.. The final CPAR report should incorporate the results of the discussions with and the final comments received from the Govt Ministries/ State Governments.
- g) It should be understood that the report of the consultant would be duly examined by the Government after it is submitted to them for such action as deemed necessary.

Regarding the proposal to combine this study with your earlier proposal on strengthening the regulatory foundation for preventing corruption and ways to increase transparency and accountability, we would like to point out that

issues of preventing possible corruption relating to procurement alone can be included in CPAR. In that background, it may like to examine the need or otherwise for continuing the earlier proposal with DaPT.

With regards,

Yours sincerely,



Mr Edwin Lim
Country Director
World Bank
New Delhi Office

World Bank User
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