

“Government Procurement: Issues and Challenges”

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Abstract

In Today's scenario, Government procurement has been effectively used in the main multilateral rules of the WTO System. Although the concepts of fair trade and free trade have little to do with one another, in the context of public procurement, the two come in the same footing. Promoters of free trade argued that governments should act like private market actors when purchasing goods from the market; others hold that governments are obligated to promote justice and equality by way of procurement “linkages” To social policy like fair trade and does not do injustice with the foreign buyers and give them fair and reasonable opportunity. Trade, growth, good governance and sustainable development constitute essential ingredients to any solution, as is a case of fair distribution of trade. An important finding is that, from economic point of view, General market access commitments with respect to services, trade and commitments regarding government procurement of services are mutually reinforcing. It puts a great impact on the economy of any nation. This paper aims to provide insight of the GPA and its impacts on the market of free and fair trade and it also focuses upon the sustainability of government procurement by promoting Green procurement concept in the market.

Keywords: Agreement, WTO, GATT, Government Procurement Agreement (GPA), Public Procurement (PP), Corruption, Transparency, Competition, Sustainability, Trade and legal framework

INTRODUCTION

Government procurement, the process of acquiring goods, construction services or product by state agency procures, accounts for a substantial proportion of GDP. So it is well recognized that discrimination in this area creates significant barriers to trade. Thus government procurement is of considerable importance for domestic and international trade regimes, including the WTO. At the domestic level, this procurement provides essential inputs that enable governments to deliver public services and catalyze economic growth while at the international level it facilitates the opening up of cross-border trade.

The importance of government procurement has been enhanced by the increased importance of public infrastructure investment and other procurement activities as an aspect of world economic activity in the context of the recent economic crisis as a consequence of continuing high growth.¹ Although governments try to ensure the public purchaser obtain adequate value in return for the public funds but in order to pursue other objectives not connected to primary objective, such as

¹ Sue Arrowsmith & Robert D. Anderson, *The WTO Regime on Government Procurement: Challenge and Reform*, available at <http://www.nottingham.ac.uk/pprgdocumentsarchive/fulltext/articles/wtobookchapter1.pdf>.

the promotion of domestic industries, government end up discriminating against foreign suppliers. In an attempt to have conventional trade barriers and reduce procurement discrimination, international organizations, such as the World Trade Organization, have devoted attention to members' procurement practices.

The World Trade Organization (WTO) is currently the only global organization that deals with the rules of trade between nations. The WTO provides for various international agreements, which concern multiple issues of trade relations, such as the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS). Because government procurement is still largely excluded from the multi-lateral agreements, the GPA currently is the most important instrument of the WTO dealing with government procurement.² The opposition and lack of interest of some WTO members in developing initiatives at multilateral level, the GPA now seems poised for an increasingly important role for regulating procurement membership within the WTO and as an instrument of international economic law³.

The GPA entered into force on January 1, 1996, apply to any law, regulation, procedure or practice regarding any procurement by entities covered, includes services as well as goods, covers all contractual forms, such as purchase, hire purchase, leasing etc. and is applicable to sub-central entities and public utilities.

No doubt it has helped in achieving liberalization and expansion of world trade but many issues like lack of transparency, discrimination and corruption among states have cropped up. Though the WTO has included specific provisions in the revised text of GPA but it lacks efficient implementation. So some steps are required to be taken by the WTO and States to overcome such issues.

The paper attempts to delve into issues related to the WTO GPA. The following paper is divided into six parts. First part will deal with the history and evolution of the WTO GPA. It will explain the various agreements and stages through which it has passed. Second part deals with the WTO GPA in detail which will include provisions of GPA 1994. Third Part deals with the Status of Government procurement in India. Fourth part deals with the issues faced by the government in GPA and how they are going to overcome these issues. Last part concludes the paper by giving some recommendations.

² Harro van Asselt, *Green government procurement and the WTO*, available at http://www.sustainable-procurement.org/fileadmin/files/Other_publications/wto-gpa_environment.pdf.

³ Arrowsmith *Supra* note, 1 at 1

HISTORY

Government procurement traditionally tends to favor local suppliers; by limiting import competition, it has effects similar to other protectionist measures, introduces distortions that limit choice, increases prices and discourages economic efficiency⁴. In recognition of the costs imposed on national economies, efforts to bring government procurement under multilateral trade disciplines began after World War II⁵.

Many International efforts were made to develop disciplines that can govern and regulate government procurement procedure. The UNCITRAL Model Law on Procurement of Goods, Construction and Services developed by the UNCITRAL, the Guidelines for Procurement under IBRD Loans and IDA Credits by IBRD and IDA or the regional trade agreements like the European Union (EU) and the North America Free Trade Agreement (NAFTA) are some of the examples.

However in the Tokyo Round of Trade Negotiations 1979, a first effort was made to bring government procurement under internationally agreed trade rules thus fulfilling the gaps in the trading system resulted by discriminatory procurement policies.

The Ministerial Declaration that launched Tokyo Round had also aimed to reduce or eliminate non-tariff measures along with reduction or elimination of tariffs. A Sub-Committee on Government Procurement was established in July 1976 to provide a forum for negotiations in the area⁶. The final text of the GATT 1947 excluded “the procurement by governmental agencies of products purchased for governmental purposes” from the obligation of national treatment¹⁷ because it was resistant to the inclusion of such subject. The next important step was the receipt in GATT in December 1976 of the result of expert level work that had been going on in the OECD for 15 years⁷. The OECD draft formed the basis of the “Draft Integrated Text for Negotiations on Government Procurement” circulated in December 1977 by the GATT Secretariat to assist in the negotiations.⁸

These efforts resulted in the signing of the first GATT Agreement on Government Procurement (GATT GPA) in 1979 and which finally came into force in January, 1981⁹. Government procurement signatories were obliged to follow non-discrimination (national treatment and most-

⁴ <http://www.oecd.org/newsroom/1845927.pdf>, Available at: 15.01.2015.

⁵ *Id.*,4.

⁶ Anwarul Hoda and Suchi Bansal, Transparency in Government Procurement, Indian Council for Research on International Economic relations, working paper no. 129, 2004.

⁷ ANWARUL HODA, *supra* note 6

⁸ Michitaka Nakatomi, Plurilateral Agreements: A Viable alternative to the world trade Organization, ADBI Working paper Series 439, 2013.

⁹ ANWARUL HODA, *supra* note 6

favoured-nation treatment (MFN)) and transparency rules for procurement of goods by central government entities.

In 1987, the GATT GPA 1979 was amended by adding a limited number of services (such as construction services), reducing the threshold for contracts involving goods for central government entities from SDR 150,000 to SDR 130,000 and setting the threshold for construction contracts at a higher level of SDR 5,000,000¹⁰. The amended GATT GPA was entered into force in 1988.

In 1994 the Uruguay Round held where parties to the Agreement tried to extend the scope and coverage of the Agreement to sub-central government and quasi-governmental bodies, and also to services and construction services as well as incorporating a bid-challenge system¹¹. It resulted in the signing of a new GPA (WTO GPA) in 1994 which was entered into force on 1 January 1996.

After thoroughly revising previous agreement, a new Agreement on Government Procurement was signed in Marrakesh on 15 April 1994 which entered into force on 1 January 1996, one year after the WTO Agreement. The GPA is one of the "plurilateral" Agreements included in Annexed 4 to the Agreement Establishing the WTO, signifying that not all WTO Members are bound by it¹². A feature of the Agreement was that a number of Parties took recourse to sectoral non-application against other Parties in cases where they felt that they had not received reciprocal benefits in the listing of entities.¹³

In the First WTO Ministerial Conference at Singapore in December 1996 the United States proposed to develop multilateral disciplines to bring about greater transparency in government procurement operations of WTO members and EC and Japan proposed for trade and investment, trade and competition policy and trade facilitation. These four issues were referred to as the Singapore issues.

As a result a working group was established on transparency in government procurement with the mandate of conducting "a study on transparency in government procurement practices, taking into account national policies, and, based on this study, to develop elements for inclusion in an appropriate agreement"¹⁴. Other issues did not reach to some conclusions.

¹⁰ *Id.*,9

¹¹ *Id.*, 10.

¹² Eco labeling standards, Green Procurement and the WTO: Significance For world bank borrowers, Centre for International law, 2005.

¹³ ANWARUL HODA, *supra* note 6

¹⁴B Bhattacharyya, *Transparency In Government Procurement*, available at http://www.networkideas.org/feathmsep2003gov_proc.pdf

The Working Group between 1996 and 2001 did considerable work like discussion on the proposals of the definition and scope of government procurement, procurement methods, transparency, special and differential treatment and dispute settlement.

Still members remained deeply divided on the need for negotiations in each of the four Singapore issues until the Ministers met for their Fourth Ministerial Session at Doha to consider the launching of a comprehensive round of multilateral trade negotiations¹⁵.

Finally in the Fifth Ministerial Session held at Cancun in 2003, all four were put in one bundle of issues and either opposed or supported by individual members as a whole. Members found it difficult to support or oppose Singapore issues as whole bundle of issues because countries like Malaysia were willing to go along only in one respect of that bundle. Towards the end of the Ministerial Session, the EC seemed willing to drop its insistence on negotiations to be undertaken within the ‘single undertaking’ on two of the areas that were subject to the greatest resistance viz., investment and competition policy and was asking for agreement only in respect of transparency in government procurement and trade facilitation. Consequently no decision could be taken for commencing negotiations in any of the four Singapore issues¹⁶.

Finally on December 2006, negotiators for the Parties to the 1994 WTO Agreement on Government Procurement (GPA) (the ‘GPA 1994’ or ‘existing Agreement’) reached provisional agreement on the text of a revised Agreement (the ‘provisionally agreed revised Agreement’ or ‘revised text’), with the objective to embrace good governance in addition to traditional market-opening to replace and supersede the existing Agreement.¹⁷

WTO GPA 1994

The government procurement means the process by which a state agency procures a product or service for its own use. The new GPA apply to any law, regulation, procedure or practice regarding any procurement by entities covered, includes services as well as goods, covers all contractual forms, such as purchase, hire purchase, leasing etc. and is applicable to sub-central entities and public utilities. Unlike most WTO agreements, the GPA is a plurilateral agreement, meaning all the Members of the WTO are not bound by the GPA – only the Parties which have accepted it. Government procurement often accounts for a large proportion of a government’s total expenditure, estimated at an average of 10–15 per cent of GDP.¹⁸

¹⁵ ANWARUL HODA, *supra* note 6

¹⁶ ANWARUL HODA, *supra* note 6

¹⁷ Arrowsmith, *Supra* note, 1.

¹⁸ *Dispute Settlement*, available at http://unctad.org/docs/dm/misc232add27_en.pdf. Last visited: 10.01.2015.

The main objective of government procurement law is to give Government at central and sub-central levels and state-owned enterprises an adequate legal framework and equal opportunity for acquiring goods and services, to keep open, stable, predictable, transparent and non-discriminatory government procurement regimes for their own use while getting the best possible offers from potential bidders, to achieve greater liberalization and expansion of world trade and to ensure that best value for money is obtained. There are some secondary purposes which include some economic objectives like development of national providers and non-economic goals such as the raising of environmental or social standards.

PROVISIONS OF THE GPA, 1994

The provisions of the GPA apply only to governmental “entities” (procurers), products, and services specified by each party to the agreement in “coverage lists”¹⁹.

It contains a basic non-discrimination provision under Article III, which determines that parties to the GPA are required to give the products, services and suppliers of any other party treatment no less favorable than that they give to their domestic products, services and suppliers (national treatment obligation), and not to discriminate between products, services and suppliers of other parties (most-favored nation obligation)²⁰.

Furthermore, each Party is required to ensure that its entities do not treat a locally established supplier less favorably than another locally established supplier on the basis of degree of foreign affiliation or ownership and do not discriminate against a locally established supplier on the basis of country of production of the goods or services being supplied²¹.

The GPA under Article V, which contains provisions on special and differential treatment for developing countries, has tried to cater the needs of developing countries. Many of the provisions of Article V apply to all developing countries even if they are not the party to the agreement. All Parties are encouraged to “facilitate increased imports from developing countries.”²² Each developed country must, “upon request, provide all technical assistance which it deems appropriate to developing country Parties in resolving their problems in the field of government procurement”²³. Developed countries must assist developing countries in translating documents and solving technical problems relating to the award of contracts or any other problem they mutually agree to address²⁴.

¹⁹ *Supra* note, 12 at 6.

²⁰ Harro van Asselt, *Green government procurement and the WTO*, available at http://www.sustainable-procurement.org/fileadmin/files/Other_publications/wto-gpa_environment.pdf. Last visited: 15.01.2015.

²¹ Overview of the Government Procurement Agreement (GPA): Guidance 01, available at http://www.govopps.co.uk/guidance_db_files/guidances/guid_01.pdf. last visited: 10.01.2015.

²² BHATTACHARYA, *Supra* note, 14 at 6.

²³ BHATTACHARYA, *Supra* note, 14 at 6.

²⁴ *Id.*, 23

Article VI contains specific provisions related to tendering procedure. It does not give an exhaustive list of procedural rules, but only minimum procedural standards. It requires that technical specifications do not create “unnecessary obstacles to trade”, and that, “where appropriate”, these specifications shall “be in terms of performance rather than design or descriptive characteristics.”

Article VI (1) talks about technical specifications: “quality, performance, safety and dimensions, symbols, terminology, packaging, marking and labeling, or the processes and methods for their production and requirements relating to conformity assessment procedures”²⁵. Article VI also demands that “there shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words such as “or equivalent” are included in the tender documentation”²⁶.

Article VIII of the GPA contains provisions to determine the capability of a supplier to fulfill the contract. The procuring entity has to assess the qualifications of each supplier equally on the basis of these criteria, which include financial guarantees, technical qualifications and information necessary for establishing the financial, commercial and technical capacity of the suppliers²⁷. Qualifications could include the ability of the supplier to meet certain environmental or social criteria.²⁸

Article XIII (4) (b) of the GPA talks about award criteria. Basically, there are two criteria for the awarding of a contract. The first criterion, on which the award of a contract can be based, is that of the lowest (priced) tender. The other criterion is that of the most advantageous tender, a criterion which is based on specific evaluation criteria laid down in the notices or in tender documentation²⁹. Only tenders that fulfill the essential requirements of the tender notice and which complies with the conditions for participation can be considered for award.

The Agreement requires that disputes be settled in accordance with the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU)³⁰. It is provided that parties must hear the complaints of suppliers that suspect government procurement procedures of being in violation of the Agreement. It also can be reviewed before a ‘court or by an impartial and independent review body with no interest in the outcome of the procurement and the members of which are secure from external influence during the term of appointment.³¹. If a violation is found, compensation for damages, and other remedial measures shall be provided.

²⁵ *Id.*,26..

²⁶ *Id.*, 27..

²⁷ Bhattacharaya, *Supra* note, 14 at 6.

²⁸ *Supra* note 21 at 8.

²⁹ Bhattacharaya, *Supra* note, 14 at 6.

³⁰ Government Procurement, available at <http://www.meti.go.jp/english/report/download/files/gCT0013e.pdf>, last visited: 15.01.2015.

³¹ Arrowsmith *Supra* note, 1 at 1

STATUS OF GOVERNMENT PROCUREMENT POLICIES IN INDIA:

India has a federal based constitution, with the distribution of responsibility between the center and the state government. Legislative function in the Indian constitution is dispersed in 3 lists, i.e. the Union list, State list and the Concurrent list for center and state government. Parliament has all the powers to make laws on the subject enumerated in the Union list. Same as Centre, state has powers to make laws on the subject enumerated in the state list. In concurrent list both center and state has powers to make laws. Since Government procurement does not fall in any of the list, the parliament would seem to have full powers to enact laws on the subject. Companies or departments which were fallen under the first category in the list follow the procedures and rules of government procurement³².

GPA is a very important element for the growth of Indian economy. It is not only use for smooth operations for Governmental agencies and Departments but also a useful tool in promoting and sustaining economic growth of the country. Thus the issue of GPA in India became very complex as it addresses both social and economic concerns. Thus due to this, calls for a *Sui Generis* approach was suggested on coherent policy on Government Procurement³³.

In India, the status of Government procurement is just of observing nature. Basically India lacks an overarching government procurement policy, and as a result of this, its government procurement practices and its procedures are vary between the states, States and the Central Legislator and between different ministerial offices located within the central Government³⁴. If we observe the status of GPA in India, then it was observed that, GPA is not Transparent in India. Multinational companies and foreign firms were disadvantage in this kind of situation because when they competing for Indian Government contracts, the state owned enterprises would get preference, due to prevalence of such enterprises. India is not a Signatory nation to the WTO's Government Procurement Agreement³⁵, but became an observer to the WTO Committee on GPA in the year 2010.

Consistent with this approach, India Issued the Preferential Market Access (PMA's) notification in the year 2012, which required Government entities to fulfil their need for electronic products by purchasing domestically, manufactured products³⁶. Time to Time India revised their PMA's

³² Anwarul hoda, *Supra* note, 6 at 4.

³³ Archana Jatkar, Government Procurement in India: Domestic Regulations and trade Prospects, CUTS International, 2012. Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/186988/GovtProcurementinIndiaDomesticRegulations-1.pdf.

³⁴ Jane Earley, Green Procurement in Trade Policies, background paper prepared for the commission of environmental cooperation, Available at: <http://www3.cec.org/landora/item/1946-green-procurement-in-trade-policy-en.pdf>.

³⁵ Arrow Smith, "Transparency in Government procurement: The Objectives of Regulation and the boundaries of the World Trade Organization, 37 (2), JWT, 2003.

³⁶ Debroy and Pursell, "Government Procurement policies in India, law and policy in public purchasing, University of Michigan, 1997.

which continuously focuses on percentage of purchasing power of goods manufactured in the domestic market. Recently revised PMA policy also focuses on the same objective.

GPA in India comprises of about 25 to 30 per cent of its Gross domestic products (GDP). Given its Current initiatives for its strengthening and with its sufficient consideration to economic and social concerns, fosters positive change in several aspects: - first, it can sharpen the evolving competition regime of India, enhancing producer and consumer welfare through more trade and competition, which ensures better success to the essential facilities for its people³⁷. According to the report of World Bank (2003)³⁸, it says that the total value of as public procurement in India represents over 13% of the national budget and over 20% of the GDP. Consistent with this, planning commission of India in its draft of public Procurement had indicated the total procurement is around 1.5 lakh crore³⁹.

But, if we analyze the Indian Public procurement, we observe that the system is plagued with the number of issues such as: lack of Transparency and accountability, which hinders in effective and efficient functioning. Apart from these, there are also gaps and lacks of awareness which leads to poor performance of the system. If we see the size and market of Government procurement then the studies applies to both 20% and 30% of GDP Criteria, which was given by the World Bank and planning commission of India in their report.

In India, the research on procurement became more debatable, when in 2010 India attained the status of “Observer” of the Plurilateral agreement on GPA of WTO. India has included obligation on Government Procurement but share only restricted Information, in its free trade agreement, which may have transparency to its provisions on Government Procurement.

ISSUES IN GOVERNING GOVERNMENT PROCUREMENT AGREEMENT

TRANSPERANCY

In the area of government procurement, there are mainly 2 working groups who are working on the issue of transparency in the Government Procurement agreement. These groups are, working group on Transparency in Government procurement (WGTGP) and the working group on GATS rule (WGGR). As a result of this effort, in Singapore Ministerial conference happened in the year

³⁷ Bulbul Sen, “Government Procurement Scenario in India, Available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/186988/GovtProcurementinIndiaDomesticRegulations-1.pdf.

³⁸ The World Bank, India Country Procurement Assessment Report, 2003, Available at: <https://openknowledge.worldbank.org/bitstream/handle/10986/14596/278590IN.pdf?sequence=1> last visited: 15.01.2015.

³⁹ D. Malhotra, “Study on Government Procurement: Study for Evidence Based Competition Advocacy”, CUTS International, 2011.

1996, a mandate was established to study transparency in government procurement⁴⁰. During the first ministerial session of the WTO at Singapore in 1996, USA proposed that negotiation should be undertaken to develop twofold disciplines to bring about transparency in the Government procurement operation of WTO members⁴¹. Both goods and services are included in the discussion of transparency. After that the research was carried forward by the WGTGP which includes both goods and services in its discussion for transparency⁴².

In that ministerial conference, it was decided by WTO that, “Recognising the case for multilateral agreement on transparency in GPA and need for technical assistance and capacity building. It was agreed in the conference and said that the decision should be taken in the 5th ministerial conference. So by this amendment, the foreign parties would get benefited from that largely and also the rate of discrimination would decrease in GPA contract.

Developed and developing countries both are included in the list of finding issues in the procurement regime. But their priorities are different, developed countries focused on issues like transparency, competition etc. and whereas developing countries focusing upon just creating a limited agreement⁴³ for government procurement. After that the issue was further discussed in the 4th Doha Ministerial conference and many negotiations were raised but in the end it goes down⁴⁴. International organisation now found the way how to tackle corruption in Procurement, but the fight has not been over by implementing transparency technique, but it has to support non-discrimination issues in the procurement agreements.

Furthermore, only presence contributes to both domestic and legal framework policies. The perks behind this rule is that, Availability of transparency policies in PP reduce discretionary process and promote rules and procedures in the local levels and widen the scope for foreign competitors. By transparency in procurement, foreign competitors feel more comfortable and get fair opportunity to publicize their product in the market. But absence of transparency may create burden on the foreign competitors because they get less opportunity in dealing with the government and because of this vague practices result from legal and administrative lacunas. So because of lack of transparency in the PP, The result can be a substantial loss of public recourses, discouragement of local and foreign firms to participate in PP, loss of trust in the system and promotion of unlawful practices⁴⁵. Therefore we can say that lack of transparency in PP means social and systematic barrier to trade.

⁴⁰ Arrowsmith, *Supra* note 1 at 1.

⁴¹ *Id.*,105

⁴²Eco-Labeling Standards, Green Procurement and The WTO: Significance For World Bank Borrowers (March 2005), available at http://www.ciel.org/Publications/Ecolabeling_WTO_Mar05.pdf. Last visited: 10.01.2015

⁴³ HARRO, *supra* note 41.

⁴⁴ <http://www.oecd.org/newsroom/1845927.pdf>, Available at: 15.01.2015.

⁴⁵ Roberto Laguado Giraldo, A critic to the Objectives of the Global Public Procurement initiatives in the context of the WTO, 2005, Available at: http://www.javeriana.edu.co/juridicaspub_revinternacional_lawrevista_57.pdf.

It was raised in many debates on PP that, what is the base for focusing a global trade strategy in PP on the grounds of transparency measures? So it was contended that, transparency in PP server the interest of both domestic and foreign suppliers because of the predictability of procurement decisions and the observance of rules. Other thing is that, transparency fosters competition which in turn improves the economy and thirdly, transparency is known to serve the fight against corruption which serves problem in many of the developing nations⁴⁶. Also by implementing transparency strategy in the PP the domestic firms also get benefited, since bribery share is eliminated the value of public procurement for domestic firms would also get increased and they can lower their price to fulfil the expectation of the government.

In GPA, Transparency rules were defined in a broader sense under which it is given that the procurement is done through Tendering system. By tendering system we thought that it fosters competition and ensures cost effectiveness. So accordingly GPA favours those types of procurement. Tendering procedure is elaborately defined under the provisions of GPA under Article 7 of GPA.

In conclusion we can say that, “there is no guarantee that improving transparency will increase both welfare and market access simultaneously. If it is, then why should International organisation like WTO and GATS placing so much emphasis on promoting different policies for protection? The only WTO case dealing with either government procurement or the GPA is *Korea- Measures Affecting Government Procurement*⁴⁷ This case does not shed any light on the use of “secondary” objectives in government procurement. The case deals mainly with questions related to what the covered “entities” (governmental agencies or state trading enterprises) are and what a government’s general responsibilities (type of governmental activities, such as construction of aqueducts) are for market access purposes.

COMPETITON

During post-independence period and before MRTPC came into force, not much has been exist except GFR 1963, which stated about the Public Procurement. An appeal was made in the Supreme Court in *Nagar Nigam, Meerut V. Al Faheem Meat Export pvt. Ltd, (2006)*⁴⁸ had been very clearly stated in its judgment, the need of competition in Public Procurement. Earlier it was said that, the contract in procurement should be privately done and tendering process would not be allowed, but later on it was realised, that cannot be done as it hampers the public morality and justice. The law is well settled that contracts by the state, it corporation and agencies must be normally granted through public auction or inviting tender to the public and from that you choose the eligible party to whom you want to enter into the procurement contract. The tender notice or public notice should be properly published in a well-known journal, which can be

⁴⁶ CARROLINE, *supra* note 45.

⁴⁷ CARROLINE, *supra* note 45

⁴⁸2006(13) SCC 382.

reached to the normal corporates too. By this way we can ensure transparency in the government procurement and also we promote competition values in the market⁴⁹. This ratio was also adopted in the case of *Sachidanand Pandey V. State of West Bengal*⁵⁰, it was stated that, the state owned and public owned property is not to be dealt at the sole discretion of the executive but certain principle should be follow so that the public interest cannot be breached.

In the absence of any broad legislation on Procurement in India, the Supreme Court judgements have guided the procurement processes in India and put checks and balances on the procurement process efficiently. In case of *Erusian Equipment and chemicals V. State of West Bengal*⁵¹, Supreme Court laid the basic foundation of the law by focusing on the entitlement to equal treatment with others who offer tender quotation, it should have a public element and there should be some fairness in the procedure of giving Contract to the agreeing parties. Proper notification of tender should be reached to the public or other body corporate, so that the essence of fairness in the product should be maintained and Supreme Court is the one who would safeguard the rights.

In the similar case of *Raunaq International Ltd. V. I.V.R. Construction ltd. and others*⁵², Supreme Court decided that, if the tender condition permits relaxation and it is granted for bonafide purposes, then the court should hesitate to intervene.

After that, CCI (Competition commission of India) notifies in section 3 and 4 of the CCI Act, 2002, that CCI has acquires jurisdiction to deal with the anti-competitive actions of enterprises anywhere in India⁵³. Also public procurement because this fall under the criteria of enterprise, which was defined under section 2(h) of the CCI, 2002. There are few cases dealing with public procurement investigated by the Director General of the Competition Commission of India (CCI) wherein the investigation report found breach of Section 3 and 4 of the Act. Although no case is reported as on date wherein CCI has by majority found breach of any of the provisions of the Act in a case of public procurement yet some of dissenting opinions in these cases does reveal a great deal of competition issue in public procurements.

CONCLUSION AND RECOMMENDATIONS

The government procurement is of considerable importance for domestic and international trade regimes, including the WTO. The revised text on WTO GPA has tried to widen its scope more and to overcome the flaws in the previous Agreement. It provides essential inputs that enable governments to deliver public services, catalyze economic and facilitates the opening up of cross-border trade. Recently more and more countries are trying to join the GPA as their

⁴⁹ *Ram and Shyam Company v. State of Haryana and Others*, AIR 1985 SC 1147

⁵⁰ AIR 1987, 1109

⁵¹ 2 SCC 488 1990

⁵² 2 SCC 492 1999

⁵³ ANWARUL HODA, *supra* note 6

suppliers will have, unlike non GPA parties, assured access to other countries' procurement markets and may not encounter barriers to their participation in those markets.

The Agreement though contains provisions on issues of transparency and non-discrimination faces problem when it comes to its implementation. Following recommendations might help in getting over these flaws at least at domestic level and facilitate the trade further.

1. Basic reform of the public procurement system is required both in the Legal and Institutional framework. There is a need for a exhaustive law on public procurement in India because government undertakes public procurement on a very large scale and is susceptible to competition problems in the absence of a law.
2. Standardization is needed to be laid down for the procedures, tender documents and general conditions of contract should have an ample scope to consider suitable modifications to take care of the special needs of the ministry concerned. The specifications set out in the tender documents should be clear and provide no advantage to any one party.
3. A stronger antitrust and anti-competition agency with strong co-ordination with other law enforcement agencies will contribute to reducing the corruption in public procurements.
4. The risks for competition in public procurement can be reduced by careful consideration of the various auction features and their impact on the likelihood of collusion. Designing auction and procurement tenders with collusion in mind may significantly contribute to the fight against anticompetitive behavior.
5. The procuring agencies should be well-informed before designing tenders. They should collect information on the range of products and/or services available in the market that would suit the requirements of the purchaser, information on the potential suppliers of these products is the best way for procurement officials to design the procurement, their prices and if possible making a comparison of prices offered with neighboring geographic areas, information about recent price changes.
6. The Tender process should be designed to maximize the potential participation of genuinely competing bidders because sufficient number of credible bidders responding to the invitation to tender will lead to effective competition.
7. A well laid down advocacy agenda is very crucial for creating awareness about the risks and the benefits of inculcating competition in public procurement processes. This can be done through public education, modifying or eliminating sectoral and/or cross-sectoral

policies specific aspects of procurement policy and regulations that may suppress competition thus building support for healthy market economy, contracting rules and procedures.

8. The Competition Commission of India (CCI) entrusted with the task of undertaking competition advocacy should be implemented properly to create awareness, encouraging self-compliance and reducing the need for direct action against erring enterprises.

REFERENCE

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