

Make in India: Impact on Public Procurement

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Public procurement has been long used as a tool to attain social outcomes. Some of the preferential practices arise due to extending protection to certain PSUs, small Scale Industries, KVIC, and handloom sector as a feature of a country's Public Procurement Policy. This is done through application of preferences and reservations in public procurement. These preferences obviously are in conflict with the basic principles of 'transparency' and 'value for money', and therefore need to be continuously reviewed as to their necessity and continuation.

With the recent 'Make in India' policy in picture, this article suggests that modifications in public procurement policies of the government to accommodate make-in-India should be based on reflections upon existing procurement tools and practices, manufacturing strengths in a particular sector, legal opinions and position of government of India and other stakeholders.

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Government of India (GoI) and other state governments use public procurement also as a tool to attain social outcomes through preferential treatment in procurement, to promote indigenisation, and protect industries like MSMEs, cottage, khadi, handloom, state PSUs, and those belonging to schedule castes and tribes. This is done through application of preferences and reservations in public procurement. There is nothing new or unique in GoI applying preferences and reservations in public procurement. Protective reservations exist even in the developed countries. Most foreign countries also place a number of *de facto* requirements with a view to discourage foreign manufactured goods and services (and by implication, foreign bidders) and for example both reservations (set asides) and price preference (price evaluation adjustment) are available for small businesses in USA. These preferences obviously are in conflict with the basic principles of 'transparency' and 'value for money', and therefore need to be continuously reviewed as to their necessity and continuation. Similarly reservations that may promote unethical practices need to be constantly reviewed.

As the slogan of 'Make in India' is catching on, Government of India may be tempted to prescribe strong incentives for domestic content to be provided by contractors in large contracts for equipment. No clear and concise national policy has so far emerged except in Department of Information Technology (DIT) and in Defence. A civil servant in his personal capacity has dwelt on various possibilities.¹ He has followed it up with more FAQs specifically on the DIT directives on the subject.²

Extracted below are some relevant portions from the two articles for a proper appreciation of the subject:

- Almost all developed countries have traditionally used a complex variety of policy tools aimed at: (i) encouraging domestic bidder participation; (ii) enhancing indigenous

domestic content in government supplies; and (iii) in clever use of services and outsourcing contracts for encouraging local employment.

- The size of India's public procurement market offers a unique opportunity for its leveraging for kick-starting the *Make in India* mantra of the new Government: an idea most developed countries have been rigorously following for decades, but one that hasn't really taken off in India. Simultaneously, there may be a genuine need for rapid capacity building amongst senior policy-makers and procurement officials on strategic design of RFPs and projects so as to maximize their potential for enhancing domestic manufacturing and provisioning of services by the Indian industry. This rules framework also requires individual Ministries and Departments of GoI to publish lists of *nongeneric* electronic/ telecom products where similar dispensation would be provided to domestic manufacturers, but till the time of writing this note, such 'additional' lists were not available on the Department of Electronics and Information Technology (DeITY) webpage on the subject. However, as *per* a recent PMO press release, the Committee of Secretaries (CoS) has directed all Ministries/ Departments to urgently notify such lists; and GCOs may therefore need to frequently visit Deity's official webpage on the subject to keep themselves abreast of further developments and notifications. Separately, GCOs must remember that they are not prevented under the procurement rules framework in India from imposing minimum domestic content requirements for electronic/telecom products *other than those contained in the DoT/ DeITY lists issued under the DMTPs/DMEPs policies*, given that their authority to impose domestic content requirements arises from independent policy documents such as the NMP and their general discretion available under the GFR-2005 (laying out technical requirements for supplies sought)/ MPPPG (splitting of tenders amongst two or more bidders) that have been

issued under executive authority of the GoI.

There is the related issue of 'Offset' which is probably meant for the Defence sector but could as well be extended to other departments.³

There is a need to consider whether Make in India should be applied in an ad-hoc/holistic manner in all sectors without examining feasibility and sustainability. It may be relevant in the Defence sector but in other sectors financial analysis should precede any decision. Normally any decision which has financial implications is examined with pros and cons discussed with experts. Do all countries in the world manufacture all items domestically?

India is well placed to make steel locally as resources are available locally. Likewise the "Make in India" decision should be sector specific. Our Industry never puts enough money in R&D. So apart from others, things built in obsolescence should be kept in mind. Take the recent case of Solar Energy Procurement, where already there is some confusion and WTO dispute. Can our local manufacturers continue to sustain themselves without innovations and subsidised inputs in other countries? On the issue, reproduced below is an independent legal opinion, and GOI's views on the subject.

Legal opinion:

"A domestic content requirement will always be found to be foul of the national treatment obligation and as the Canada renewable energy case shows, exempting such requirements from scrutiny under GATT Article III (8) is difficult, unless the generated solar energy is purchased by the government, for government use. But as the same case also shows, a challenge under ASCM may be more difficult to establish due to the challenge of using an appropriate benchmark for purposes of benefit determination. Therefore in light of the above discussion we conclude that a policy relating to Domestic Content Requirement or

local content requirement under JNNSM Policy, Phase II, Batch I will almost certainly infringe the national treatment obligation under the WTO rules. If challenged, a country enforcing such requirement is unlikely to be able to defend the challenge unless there is an element of government procurement involved. At the same time, there are several instances wherein domestic content requirements have not been challenged because their challenge has been rendered moot due to the willing participation of global manufacturers in such programs. In the context of the Indian solar energy sector a domestic content requirement will be successful if it is backed by incentives strong enough to encourage even global manufacturers to set up manufacturing capacity in India."

GOI's Position:

"In our case, production is for Government procurement, which cannot be brought under WTO discipline. Besides, in phase-II of the solar mission, we propose to divide the 750 MW capacity put on offer into two. Some projects would mandate domestic content, and some would be open for use of imported products," as claimed by a senior official from the Ministry for New & Renewable Energy.⁴ It is not known if a final decision has been reached so far.

Then there is the issue of the 30% domestic content. Is it local raw material or labour or consultancy services or does it even include profits? The other question is 'Why 30 %' and not less or more? These need to be analysed industry wise.

Finally it is unclear whether make in India policy is in line with free market thinking of NITI Aayog.

Conclusions:

The author feels that modifications in public procurement policies of the government to accommodate make-in-India should be

decided based on manufacturing strengths in a particular sector, legal opinions and position GOI takes on WTO requirements preferably after discussing with all stakeholders.

1. Verma, Sandeep (2014): "Embedding the 'Make In India' Vision within India's Public Procurement Frameworks", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2543204
2. Verma, Sandeep (2015): "The Procurement Flyers: Procurement of Domestically Manufactured Electronic/Telecom Goods and Products", *The Procurement Flyers*, 1(2), March 2015,

available at

<http://ssrn.com/abstract=2577148>

3. Verma, Sandeep (2014): "More Love in the Time of Cholera: Staying Clear of Black Holes, Whirlpools, Vices and Other Sins in Offset Policy Design", available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2594320
4. 'India Worried over WTO's Verdict on Ontario Solar', *Hindu Business Line*, New Delhi, May 19, 2013. Available at www.thehindubusinessline.com/economy/india-worried-over-wtos-verdict-on-ontario-solar-case/article4730318.ece

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