

Importance of Transparency in Public Procurement and Role of Integrity Pact

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Government procurement accounts for a significant part of the Indian GDP, and hence it is very important to ensure that the system is transparent and free of any corrupt activity. The Government has already taken various initiatives to ensure a clean and transparent process of procurement in India, but there is still a lot of room for improvement. Government procurement is important as it has direct effect on market behavior and hence procurement policy should aim to obtain 'value for money' by promoting fair competition among suppliers. In this article, the author urges the need for urgent reforms in public procurement process as also highlighted by many national, international and anti-corruption initiatives. The article also lays down the importance, usage and principles governing the Integrity Pact and its relevance for India.

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Introduction

The economies of the developing countries continue to grow tighter amidst the transitional phase of the public sector operating budgets. This has prompted many national and local government entities to acquire goods and services from the private sectors through a public procurement process. Also, in order to obtain better quality of goods at lower overall costs, as well as to shorten delivery and performance time, thus to streamline the system and reduce administrative costs, the government procures from private concerns. The procurement process involves mainly a definition of the procurement requirement, the budget, the solicitation of proposals and the final award of contract based on stated evaluation criteria and performance.¹

Meeting the objectives behind procurement from the private entities is dependent on a competitive system of awarding contracts based on transparency, efficiency, economy, accountability and fairness which is often challenged as it is one of the main areas where public and private sector interact financially and is bound to become a basis for corruption, cronyism, favoritism and bribery. In public procurement most of 'grand corruption' takes place and the damage it costs affects the development of poor and transition economies.² Hence, public procurement has been identified by many national, international and anti-corruption

initiatives as an area which needs urgent reforms.³

The Indian Story

The Indian public sector has always been ridden with scams and corrupt activities. As inadequate administrative rules and procedures work during government procurement in India, malpractices often go unnoticed or are ignored without appropriate penalties meted out. Such lack of accountability encourages corruption. Most of the time the aggrieved has no other option but to seek legal help and move to civil courts which is a time consuming procedure in India.⁴

The Government of India has established the Procurement Redressal Committee which can be accessed by any aggrieved bidder. Additionally, there is the Public Procurement Bill 2012, and adherence to it ensures a smooth and fair process of procurement in the public sector. But since the bill is mainly applicable for Central government entities, it is important that state level entities' volumes of procurement, should also come up with similar initiatives to ensure a cleaner and more transparent procurement system.⁵ So, a more all-inclusive system is required for addressing these issues.

Even though we have instruments to curb corruption, many incidents might go unnoticed. There is always a fear attached to reporting any ill activity as with an inadequate justice system there may be dire economic

¹ www.cipe.org/sites/default/files/publication-docs/matechak.pdf

² <http://jkvigilance.nic.in/Integrity%20Pact.PDF>

³ Ibid

⁴ www.cuts-citee.org/pdf/government-procurement-in-india_domestic-regulations-trade-prospects.pdf

⁵ www.unodc.org/documents/southasia/publications/research-studies/India-PPPs.pdf

repercussions of whistle blowing. Hence, the presence of an independent body outside the government hailing from the civil society is required to provide the victims the confidence to report any untoward incident. Integrity Pact (IP) fills this gap.

Integrity Pact

Integrity Pact (IP) was introduced in 1990s by Transparency International (TI) for monitoring corruption in public procurement. It is used in not just the public sector but business and civil societies and consists of an agreement between a government/government organization and bidders participating in a tendering contract. IP is both a legal document and a process and adaptable to many legal settings. If violations to the written agreement occur then certain sanctions such as loss or denial of contract, forfeiture of the bid or performance bond and liability for damages, debarment from future bidding or criminal/disciplinary action against employees of the government shall apply.⁶

The Integrity Pact helps companies in abstaining from bribing with the knowledge that their competitors are following the same route and the government entity will be practicing a transparent procurement process. The pact also helps the government by reducing the cost and delineating impact of corruption on public procurement, privatization and licensing and thereby creating a more favorable investment scenario. The pact also helps citizens in

observing and monitoring public decision making.⁷

Integrity Pact is a system of setting of limitations that neither side would indulge in any corrupt activity such as pay, offer, demand or accept bribes, and bidders will not collude or bribe to obtain the contract. If anyone gets caught indulging in any of the above mentioned activities, sanctions would apply. Penalties such as penal action for officials and cancellation of contracts, forfeiture of bond, blacklisting for bidders are meted out.⁸ Even though criminal conviction is not related to IP, but the penalties are strong enough to make any person who would like to stay in business cautious.

Monitoring is a key part of IP and the monitors can be considered the faces of IP. Some even term the IP as an ombudsman system where representatives of the civil society access all the relevant information and provides their assessment of the matter.

The IP has been adopted by several countries and large scale infrastructure projects involved in various industries. They consist of various clauses that prevent the organization and contractor from participating in any corrupt activity.

The IP consists of three players:

(i) The Principal or the Company: Signs an agreement with participating vendor/vendors for procuring some goods or services that the principal will not demand or accept any bribes, kickbacks, gifts, facilitation payment etc.

⁶http://archive.transparency.org/global_priorities/public_contracting/integrity_pacts#what_is

⁷http://archive.transparency.org/global_priorities/public_contracting/integrity_pacts#what_is

⁸ <http://jkvigilance.nic.in/Integrity%20Pact.PDF>

(ii) The Vendor: Gives an undertaking that it has not paid and will neither offer nor pay any bribe, kickbacks, facilitation payments, gifts, etc. in order to obtain or retain a contract.

(iii) The Independent External Monitor (IEM): Plays a role only if the obligations in the IP are not fulfilled by the Principal and/or bidders.

Salient features:

- (i) Creates a level playing ground for every stakeholder
- (ii) Independent monitoring system under the leadership of the civil society
- (iii) Adopted successfully in 15 countries
- (iv) Scope for entry into the private sector

Integrity Pact in India

On 10th May, 2005, a seminar was held at Hindustan Aeronautical Limited (HAL) attended by the top management of various PSUs and the CVC; where the CMD of ONGC announced that they would apply IP in more of their major procurement contracts. The Ministry of Defence made IP mandatory for deals of over 300 crores in its Defence Procurement Manual of 2005. CVC on December 4, 2007, recommended 'adoption and implementation of the IP in respect to all major procurement of the government organizations.' It was followed by circulars on 28th December, 2007, 17th May, 2008 and 5th August, 2008. Standard Operating Procedures were also issued with these circulars. On 16th June, 2009, DP&T released a circular addressing the Chief Secretaries of all states to recommend adoption of IP for the PSUs.⁹

There are various clauses mentioned in the IP that ensures that the Principal and the

Vendor do not indulge in any activity that is condemned under the Indian Penal Code.¹⁰

Commitments of the Principal:

(i) -First and foremost, there is this clause for the Principal, that no member of the Principal will directly or through his/her family demand or accept any material or immaterial benefit and treat all bidders with equity and reason. The same information should be given to all the bidders without any additional information given to any party through which they can obtain an advantage in the tender process. If anyone is prejudiced then they should be excluded from the tendering process.

If the Principal receives any information about any of its members who might have participated in a criminal offence under the Anti-Corruption Laws of India, or suspects so, then via the Vigilance office they should take disciplinary actions.

Commitments of the Bidder/Contractor:

- The Bidder will not directly or through any other person, offer, promise or give to any of the Principal's employees involved in the tendering process any material or immaterial benefit to which s/he is not legally entitled to, in order to gain any advantage over the tendering process. The Bidders would also not enter into any undisclosed agreement amongst themselves in regard to prices, specifications, certifications, subsidiary contracts, submission or non submission of bids or other actions to limit

⁹www.transparencyindia.org/resource/books/Implementation%20of%20Integrity%20Pact%20in%20India.pdf

¹⁰https://tenders.ongc.co.in/wps/PA_ONGC_Tender/staticContents/PROFORMA%20OF%20IP_Cir_01_10.pdf

competitiveness or form cartels in the bidding process.

- The Bidder will not commit any crime under the Anti-corruption Laws of India; and will not improperly use or pass on any information or document provided by the Principal.
- The Bidder will disclose any and all payments he has made, committed to or intends to make to agents, brokers or any other intermediaries related to the award of contract.

Among the various clauses that can disqualify people from the tender process and exclude them from future contracts, a few are reiterated below:

1. If the bidder has committed a transgression through a violation of the commitments s/he is supposed to fulfill, then exclusion from future contracts is established which can range from 6 months to 3 years.
2. If the Principal has disqualified the Bidder from the tendering process prior to award for some discrepancy following the Commitment of the Bidder, then the Principal can demand and recover from the vendor the liquidated damages equal to bid security. And, if the Principal has terminated the contract for some discrepancy following the Commitment of the Bidder, then the Principal can demand and recover from the vendor liquidated damages equivalent to the Security Deposit or Performance Bank Guarantee.
3. The Bidder has to declare that no previous transgression occurred in the last 3 years with any other Company in any other country or any other Public Sector Enterprise in India. In case of incorrect statements made, s/he can be disqualified from the tender process of the contract.
4. The bidder needs to demand from all his subcontractors a commitment in conformity with this Integrity Pact and submit it to the Principal before signing the contract. The Principal will enter into agreements with identical conditions with all Bidders, Contractors and Sub contractors. The contractors who do not sign it will be disqualified from the bidding process.
5. If the conduct of a Bidder or an employee or representative or associate of the Bidder or subcontractor is found to relate or suspected of relating to corruption then the Principal has to inform the Vigilance Office.
6. The Principal needs to appoint competent and credible Independent External Monitors (IEMs) for this pact. The monitors are not subject to instructions by the representatives of the parties and perform their duties neutrally and independently. The Monitor shall be provided sufficient information by the Principal and has the right to access without restriction all Project documentation of the Principal. If a violation is noticed by the IEMs, s/he will bring it to the notice of the management and suggest them to solve the violation and provide a written report to the Chairman of the Principal making recommendations for correcting the problematic situation.
7. The duration of the pact will start from the moment each party signs it and expires for the Contractor 12 months after the last payment and for all Bidders 6 months after award of contract.

8. The agreement is subject to Indian Law, and the place of performance and jurisdiction is the Principal's office. Changes, supplements and termination should be made in writing. If the Contractor is in partnership or consortium, then all the partners and members have to sign IP. In case of one of the provisions turning invalid the remainder remains valid.

Feedback from few IP compliant PSUs:

- Processing of contracts is faster
- Improvement in the image and general perception about the company
- Reduced lawsuits and arbitrations.
- All frivolous interventions and false complaints ceased.
- Competitive rates – no delay in payments, no bribing etc from vendors, improved vendor satisfaction ensuring overall efficiency and low cost of production.

If Integrity Pact is adopted sincerely in business dealings of Ministries & PSUs, it would certainly -

- introduce greater honesty, integrity and transparency
- enhance the credibility of the organization
- facilitate considerable reduction in the overall cost of the projects
- reduce considerable possibility of conflict between the Principal and the bidders
- minimize litigations due to IEM's involvement.

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