



Annexures

Hierarchy Level	Annexure 1: Procurement Guidelines (Refer Para 1.1)
I – Statutory Framework	The Constitution of India
	Indian Contract Act, 1872; Sale of Goods Act, 1930 and Mercantile Laws
	Laws relevant to Public Procurement (Right To Information Act, 2005; The Micro, Small and Medium Enterprises Development Act, 2006; Prevention of Corruption Act, 1988)
II – Rules and Regulations	General Financial Rules, 2017
	Delegation of Financial Power Rules
	Any other financial, vigilance, security, safety, counter- trade and other regulatory aspects; orders and guidelines of the Government on the subject of Public Procurement
III –Ministry of Finance’s Manuals	Ministry of Finance’s Manual for Procurement of Goods, Works and Consultancy Services & other Services
IV – Procuring Entities’ Codes/ Manuals and Standard Bidding Documents	More Comprehensive and detailed Codes and Manuals for Public Procurement for various categories issued by ‘Procuring Entities’ for their own use
	Standard Bidding Documents for Procurement of Goods/ Works/ Consultancy Services etc.

Remarks: The documents at Hierarchy Levels I and II above are of fundamental and generic nature. Documents at lower levels of hierarchy must conform to the Documents higher up in hierarchy. Relationships of Bidders/ Suppliers/ contractors/ service providers with procuring entities are solely governed by the law of the land and the relevant bid/ contract/registration document(s). Other documents at hierarchy levels II and III mentioned above shall have no locus standi in such relationships.

Annexure 2A: Delegation of Financial Powers – Indents, Contracts and Purchases for public service

(Excerpts from DFPR, Refer Para 1.4)

DFPR Rule 21 of the Delegation of Financial Power Rules**	DFPR Rule 21(a) Minister in Charge of the Department	DFPR Rule 21 (b) Secretary of the Department
For open or limited tender contracts	Full Powers	Rs. 20 crore@@
For single tender including resultant single offer or proprietary contracts		Rs. 5 crore
For agreements or contracts for technical collaboration and consultancy services		Rs. 2 crore

*** DoE, Ministry of Finance No.F.1(17)-E.II(A)86-No.F.1(15)-E.II(A)88 Dated: 16th September, 2003*

@@ Secretary, D/o Commerce would have powers to approve rate contracts of DGS&D of value upto Rs. 100 crore in each case (DoE, Ministry of Finance No.1 (5)/E.II(A)/2009 Dated: the 24th December, 2009)

Notwithstanding anything as above, in cases where the award of contract or purchase or consultancy is inseparably linked with the project or scheme and forms a part of the proposals for Standing Finance Committee (SFC) or Committee on Non-Plan Expenditure (CNE) or Expenditure Finance Committee (EFC) or Cabinet, the same will be processed as per the financial limits laid down for sanction of such schemes or projects by the Competent Authority.

Explanation- In this rule, the word "contract" includes miscellaneous contracts, such as handling contracts and leases. Leases for hiring accommodation for office, residential and other purposes shall, however, be regulated under item 16 of the Annexure to Schedule V. If a contract extends over a period of time, the total value over the entire period of currency shall be taken for the purpose of applying the limit. Further a limited or open tender which results in only one effective offer shall also be treated as a single tender contract."

Annexure 2B: Suggested Structure of Schedule of Procurement Powers (SoPP)

(Refer Para 1.4)

A suggested structure of SoPP⁵⁶ is given below. However individual threshold values (wherever not given in GFR/ DFPR) would depend on the respective circumstances of various Organisations.

Levels of Powers -> Level 1 is entry level and Level 5 is highest e.g. Secretary	Threshold Value in Rupees (Lakh)				
	Level -1	Level-2	Level 3	Level-4	Level-5
Procurement Proposal initiation, approvals and Signing: Including formulation of ToR/ Activity Schedules and Cost Estimates					
In Principle Approval, initiation and approval of Procurement Proposals for Services					
Initiation, Approval of Terms of ToR/ Activity Schedules and Cost estimates for Services					
Final Administrative, Budgetary Approval for Starting Procurement					
Approval for Floating of Tenders of Various Types including					
Approval Selection of System of Selection of consultants – other than LCS – QCBS					
Approval for Selection by nomination of Services					

⁵⁶ indicate value threshold above which consultations with/ concurrence/ vetting from IFD would be required

Preparation and Approval of Bidding Documents and floating of Tenders – EoI/ RfP for services					
Approval of Retendering of a discharged tender after second attempt					
Competent Authority (CA) for Evaluation and Acceptance of Tenders					
other services - Procurement without calling Quotation					
other services - Procurement Through a Purchase Committee					
Direct Approval of Tenders Without Tender committee					
Tender Committee/ CEC Composition (including Member Secretary thereof) as well as designated level of CA for Acceptance of TC/ CEC Recommendations for Various Slabs of Estimated Tender Value – EoI/ RfP for Services					
Slab 1 (Rs 10 Lakh to 30 Lakh) – Level 2 officers' TC, Acceptance by Level 3 Officer					
Slab 2 (Rs 30 Lakh to 2 Crore) – Level 3 Officers' TC acceptance by Level 4 Officer					
Slab 3 (Rs 2 Crore 25 Crore) – Level 4 officers' TC acceptance by Level 5 Officer					
Higher levels and other type of TC to suit local requirements, Acceptance at Sec level					
Formulation and Placement of Contracts					
Contracts after following Tendering Process					
Acceptance of Special Conditions with concurrence of Finance before Award of Contract as per recommendation of TC/ CA					

Acceptance of Advance Payments					
Other Variations demanded by Bidders in special circumstances.					
Post Contract Powers, including					
Bill Passing and Payments, Handing over assets/ equipments/ material/ utilities to Contractor; Extensions with or without LD, or approvals of Variations, Contract Closure, Terminations, Arbitrator appointment, Accepting and sanctioning Court and Arbitration award					
Waiver of Liquidated Damages					
Allowing release of Time-barred claims					
Enlistment and Debarment of consultants/ service providers					
Initiation and Approval of Enlistment of service providers					
Initiation and Approval of Removal from Enlistment of service providers due to misdemeanours					
Initiation and Approval of Holiday Listing/ Suspension of service providers due to misdemeanours					
Initiation and Approval of Banning of service providers within the Ministry or recommendation to Ministry of Commerce for Country-wide					

Annexure 2C: Model Clause/ Certificate to be inserted in tenders etc. w.r.t Order (Public Procurement No.1)

[Refer para 1.6 and Appendix-1 (Para 1.3(iii)(e))]

(While adhering to the substance of the Order, procuring entities and GeM are free to appropriately modify the wording of the clause/ certificate based on their past experience, local needs etc.)

Model Clauses for Tenders

I. Any bidder from a country which shares a land border with India will be eligible to bid in this tender only if the bidder is registered with the Competent Authority.

II. "Bidder" (including the term 'tenderer', 'consultant' or 'service provider' in certain contexts) means any person or firm or company, including any member of a consortium or joint venture (that is an association of several persons, or firms or

companies), every artificial juridical person not falling in any of the descriptions of bidders stated hereinbefore, including any agency branch or office controlled by such person, participating in a procurement process.

III. "Bidder from a country which shares a land border with India" for the purpose of this Order means: -

- a. An entity incorporated, established or registered in such a country; or
- b. A subsidiary of an entity incorporated, established or registered in such a country; or
- c. An entity substantially controlled through entities incorporated, established or registered in such a country; or
- d. An entity whose beneficial owner is situated in such a country; or
- e. An Indian (or other) agent of such an entity; or

f. A natural person who is a citizen of such a country; or

g. A consortium or joint venture where any member of the consortium or joint venture falls under any of the above

IV. The beneficial owner for the purpose of (iii) above will be as under:

1. In case of a company or Limited Liability Partnership, the beneficial owner is the natural person(s), who, whether acting alone or together, or through one or more juridical person, has a controlling ownership interest or who exercises control through other means.

Explanation—

a. “Controlling ownership interest” means ownership of or entitlement to more than twenty-five per cent, of shares or capital or profits of the company;

b. “Control” shall include the right to appoint majority of the directors or to control the management or policy decisions including by virtue of their shareholding or management rights or shareholders agreements or voting agreements;

2. In case of a partnership firm, the beneficial owner is the natural person(s) who, whether acting alone or together, or through one or more juridical person, has ownership of entitlement to more than fifteen percent of capital or profits of the partnership;

3. In case of an unincorporated association or body of individuals, the beneficial owner is the natural person(s), who, whether acting alone or together, or through one or more juridical person, has ownership of or entitlement to more than fifteen percent of the property or capital or profits of such association or body of individuals;

4. Where no natural person is identified under (1) or (2) or (3) above, the beneficial owner is the relevant natural person who holds the position of senior managing official;

5. In case of a trust, the identification of beneficial owner(s) shall include identification of the author of the trust, the trustee, the beneficiaries with fifteen percent or more interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership.

V. An Agent is a person employed to do any act for another, or to represent another in dealings with third person.

VI. [To be inserted in tenders for Works contracts, including Turnkey contracts]
The successful bidder shall not be allowed to sub-contract works to any contractor from a country which shares a land border with India unless such contractor is registered with the Competent Authority. Model Certificate for Tenders (for transitional cases as stated in para 3 of this Order)

"I have read the clause regarding restrictions on procurement from a bidder of a country which shares a land border with India; I hereby certify that this bidder is not from such a country and is eligible to be considered."

Model Certificate for Tenders

"I have read the clause regarding restrictions on procurement from a bidder of a country which shares a land border with India; I certify that this bidder is not from such a country or, if from such a country, has been registered with the Competent Authority. I hereby certify that this bidder fulfills all requirements in this regard and is eligible to be considered. [Where applicable, evidence of valid registration by the Competent Authority shall be attached.]"

Model Certificate for Tenders for Works involving possibility of sub-contracting

"I have read the clause regarding restrictions on procurement from a bidder of a country which shares a land border with India and on sub-contracting to contractors from such countries; I certify that this bidder is not from such a country or, if from such a country, has been registered with the Competent Authority and will not sub-contract any work to a contractor from such countries unless such contractor is registered with the Competent Authority. I hereby certify that this bidder fulfills all

requirements in this regard and is eligible to be considered. [Where applicable, evidence of valid registration by the Competent Authority shall be attached.]"

Model Certificate for GeM:

"I have read the clause regarding restrictions on procurement from a bidder of a country which shares a land border with India; I certify that this vendor/ bidder is not from such a country or, is not from such a country, has been registered with the Competent Authority. I hereby certify that this vendor/ bidder fulfills all requirements in this regard and is eligible to be considered for procurement on GeM. [Where applicable, evidence of valid registration by the Competent Authority shall be attached.]"

Annexure 2D: Format for seeking the approval of the Competent Authority for inviting Global Tender Enquiry for procurements less than Rs. 200 crores

(Refer Para 5.1.4)

- (i) Every page should be attested by Administrative Ministry
- (ii) Proposals are to be simultaneously sent to the following:
 - a) Cabinet Secretariat, email: ca4-cabsec@gov.in
 - b) Department of Promotion of Industry & Internal Trade (DPIIT) email: manmeet.nanda@ias.nic.in&rajesh.gupta66@gov.in
 - c) Department of Expenditure, email: kanwal.irss@gov.in and sudesh.kumar85@gov.in

Table-1

S.No	Particulars	Remarks
1	Name of the Ministry:	
2	Name of the Department:	
3	Name of the sub-ordinate office (if applicable):	
4	Detailed Description of the Item	
5	Use of the Item	
6	Life time of the item proposed (in years)	
7	Whether item is procured regularly? [If so, details of procurement of the said item over the past three years (three completed financial years or last three tenders and the current financial year] inclusive of supply details as per format given under table-2.	
8	Quantity required to be procured with justification for the quantity (States/UT/Region wise projection)	
9	Estimated procurement price along with basic of such estimation (International Price comparison chart)	
10	Justification to be submitted as under	
	a. Detailed justification for Global Tender and essentially of import (item wise)	

S.No	Particulars	Remarks
	b. Who are the (possible) vendors of the item under procurement, in the global (including India) market?	
	c. Whether the Department has tried and floated the tender to identify the domestic suppliers in the past financial year (If not, the reason thereof)	
	d. Capacity of all domestic local suppliers as per the domestic tender floated, if any	
11	What are technical alternatives available within country and whether they can be used (<i>substituted</i>) for the proposed item under GTE?	
12	Whether the Department had in the past attempted at development of local suppliers/ phased indigenization/ promotion of alternative technology having sufficient local suppliers. (If so, details thereof)	
13	Consequences of non-procurement of the item through GTE.	
14	Whether BIS standards are available for the items proposed under procurement. If not, the efforts made to operationalize such standards.	
15	Whether the department had published procurement plan for next 5 years, for the item under discussion?	

The above proposal is submitted, with the approval of the Secretary of the Administrative Department/ Ministry, for the consideration of the Competent Authority, as mandated by D/o Expenditure order dated 15th May, 2020 regarding Amendment in GFRs-2017, regarding Global Tender Enquiry.

Also, it is informed that the above proposal had been sent to Cabinet Secretariat (via Email ID: ca4-cabsec@gov.in), D/o Expenditure (via Email ID: GTEnquiry-200@gov.in) and to DPIIT, for their consideration.

Stamp and Signature of the
Authorized officer of the proposing Department

Name
Designation
Contact Number
Email ID

Table-2

Details of procurement of the said item over the past three years (Three completed financial years and the current financial year) inclusive of supply details.

Annexures

Year of contract	Item	Contract No. & date	Supplier	Quantity of supply with unit	Rate per unit	Completion date of contract	Country of Origin of goods	Local content in %

Annexure 2E: List of Medical Devices and IVDs, where local manufacturers are not available, as on 17.12.2021 (as verified with the Medical Devices Manufacturing Associations)

[Refer para 5.1..6 (e)]

S.No	Name of Medical Device/ Equipment
1	Intra-aortic balloon Pump (IABP)
2	Video Assisted Thoracic Surgery (VATS) and Minimally Invasive Cardiac Surgery instrument set
3	Flow Track Cardiac Output Monitoring (EV1000)
4	Sander's Jet Ventilator for Emergency Airway
5	ENT Coblator system with standard set of wands
6	Automated Identification and antibiotic susceptibility system
7	Automated Semen Analyzer
8	Histopathology fully automated H& E slide Stainer
9	Fully Automated IHC Stainer
10	Auto PAP cervical cancer screening system with HPV
11	Automatic components preparation machine
12	Visual Field Analyzer
13	Cystoscope paediatric cystoscope
14	Flow Cytometer
15	Flexible cysto-nephoscopy
16	T Piece Resuscitator
17	CO2 Fraction Laser
18	Diode Laser
19	Q-Switched ND YAD Laser
20	Video Bronchoscope set Adult, Paediatric, and Neonatal
21	Surgical Opera
22	Cavitational /Cavitron - Ultrasonic Surgical Aspirator (CUSA)
23	Endobronchial Ultrasound System
24	Rotary Microtome
25	Magnifying surgical loupes
26	Endoscopic Saphenous Vein Harvesting (EVH) System
27	Intra operative Imaging and TTFM for CT Surgery
28	DEXA Scan
29	Radio surgery equipment
30	Near Infrared Spectroscopy
31	Fluid therapy
32	Near Infrared Spectrometer (NIRS)
33	Electro Physiology (EP) System
34	TOF Monitor/Watch for Neuro Muscular block
35	Transcranial Doppler
36	Low Temperature Hydrogen Peroxide Gas Steriliser

Annexures

S.No	Name of Medical Device/ Equipment
37	Mannequins (Laerdal) for training of CPR for COVID Preparedness
	a) Intubation
	b) Cardio Pulmonary Resuscitation (CPR)
	c) Peripheral, Central and Arterial Cannulation
	d) Front of neck Access (Cricothyroidotomy and tracheostomy)
38	Image Analysis Tools/Trinocular Compound Phase Contrast Microscope for Andrology Lab
39	Gas Analysis Apparatus Halden's Student Type
40	Gas Analyzer Automatic for CO ₂ , O ₂ and N ₂
41	High end Operating Microscope
42	Plasma Coblaction System
43	Stroboscope
44	ENT Skull Base Navigation System
45	Automated Microbial Identification and Sensitivity System
46	NAT Analyzer
47	Cryostat
48	Vitek2-Automated Microbiology Susceptibility Testing Analyser
49	FFR Machine (Fractional Flow Reserve)
50	VIDAS
51	Kingfisher Flex
52	ACL Elite
53	Cytoprep Centrifuge with Vortex Mixer
54	Antigen Retrieval System
55	Trans Oesophageal Echo Cardiograph
56	IVUS -Volcano
57	STERRAD-100 NX All Clear
58	Minimally Invasive Cardiac Instruments
59	Impella
60	Endourology set
61	Cystoscope Karl Storz
62	Video Endoscopy Systems
63	Floppy wire with extra support 0 Coronary Angioplasty
64	Fully Automated Non-Contact Tonometer
65	Optical Biometer
66	Phaco Machine with Posterior and Anterior Vitrectomy
67	Portable Ultrasound Machine for Anaesthesia and Vascular Access
68	Activated Clotting Time Machine
69	Thromboelastogram (TEG)/ Thromboelastometer/ ROTEM
70	Bone Anchored Hearing Aid (BAHA) Sound Processor with Soft Band.
71	CI Speech Processor for Cochlear Implant
72	Bi-Ventricular Pacemaker with Quadripolar LV Lead
73	DDDR with Matching Electrodes Pacemaker
74	MRI Conditional Automatic Implantable Cardioverter Defibrillator (AICD)
75	MR1 Conditional Cardiac Resynchronisation Therapy - Pacing (CRT- P)
76	Single Chamber (SSI) MRI Compatible Pacemaker
77	Single Chamber Temporary Pacemaker
78	Non-complain /semi complain /CTO coronary balloon.
79	Vacuum Heart Stabilizer System for off Pump CABG
80	Expandable Corpectomy device
81	Biomimetic Synthetic Absorbable Dural substitute of sizes

S.No	Name of Medical Device/ Equipment
82	AO TRS Modular Drive for Drill/Reamer
83	AO TRS Modular Sagittal saw system
84	Battery Oscillator
85	Arthroscopy Systems
86	Navigation System for Neurosurgery & Orthopaedic Surgery
87	Time Lapse Embryo Imaging System
88	Portable Mobile Endoscopy Unit
89	Cryoprobe
90	Isothermal Calorimeter (ITC)
91	Electrical Impedance Tomography
92	FNIRS (Functional Near Infra-Red Spectroscopy) System
93	Automated Hand-Held Analyzer
94	Automated High Throughput Liquid Based Cytology (LBC) System
95	Automated IHC (Immuno Histochemistry Stainer)
96	Automated Slide Stainer for Histopathology
97	3T Digital PET/MR
98	Dual Particle Cyclotron on buyback basis
99	Sweat Collection and Chloride Estimation
100	Automated Bronchoscope Cleaning Equipment
101	Electronics and console for the existing 700 MHz NMR Spectrometer
102	Video bronchoscope with mobility of tip in four directions
103	Freeze Fracture System
104	Cryo Plunge Freezing Unit
105	Biological High- Resolution Atomic Force Microscopy
106	Carbon Coater (Evaporator) for grids
107	Hemostasis Analyzer System
108	Auricular Reconstruction Set
109	Thin Layer Chromatography Liner Analyser for lipid analysis
110	Digital Slide Scanner System
111	Full Endoscopic lumbar IT & ED set
112	Rapid Blood/Fluid Flow warmer
113	Fully Automated Computerized Archival System for Histopathology & Cytology Slides
114	Vacuum Assist Drainage Controller Device
115	VAP Care System
116	Cryoablation Unit
117	3D Printer Hardware with SLA (LFSJ TM Technology and Machine interface software
118	Transcutaneous Oxygen Monitor
119	Non-Invasive Jugular Oximetry Monitor
120	Dedicated Solid-state cardiac SPECT Camera
121	Hemodynamic Recorded for Cardio Vascular Lab
122	Gel Documentation System
123	Automatic Colony Counter
124	Droplet Digital Polymerase Chain Reaction System (PCR)
125	Multi-block PCR Machine
126	Integrated Automated Charting System upgradable for ICU Monitoring System
127	Viscoelastic Global coagulation Testing Device
128	Robotic Surgery System with accessories

Annexure 2F: Example of Formula for Price Variation Clause

[Refer Para 6.2.6 (ii) and Para 9.15.10]

(The formula for price variation should ordinarily include a fixed element, a material element and a labour element. The figures representing the material element and the labour element should reflect the corresponding proportion of input costs, while the fixed element may range from 10 to 25% (ten to twenty-five percent). That portion of the price represented by the fixed element and profits and is not subject to variation. The portions of the price represented by the material element and labour element along will attract price variation.)

The formula for price variation will thus be:-

$$Pa = Po \left[\frac{\left(F + a \left(\frac{M1}{Mo} \right) + b \left(\frac{L1}{Lo} \right) \right)}{100} \right] - Po$$

Where: -

P_a is then adjustment amount payable to the supplier (a minus figure will indicate a reduction in the contract price) on the date of supply.

P_o is the contract price on the base date (which is taken as the date on which tender is due to open).

F is the fixed element (as the percentage of the total price) not subject to price variation.

a is the assigned percentage to the material element in the contract price.

b is the assigned percentage to the labour element in the contract price.

(F, a and b being percentages should total 100)

L_o and L_1 are the average wage indices for the quarter before the quarter in which base month falls and for the quarter before the quarter in which date of supply falls; respectively. For example for a tender opening on March 17, 2016 (base date), L_o would be average wage index for the quarter of Oct-Dec 2015.

M_o and M_1 are the material prices/indices as average of the month, two month prior to the month in which base month falls and average of the month, two month prior to the month in which date of supply falls, respectively. For example, for a tender opening on March 17, 2016 (base date), M_o would be prices/index as average of the month of January 2016. All material prices/indices will be basic prices without excise duty and without any other central, state, local taxes and duties and Octroi.

If more than one major item of material is involved, the material element can be broken up into two or three components such as M_x , M_y , M_z .

The following conditions would be applicable to price adjustment:

- Base dates shall be due dates of opening of bids (technical bid in two or three envelop/cover system).
- Date of supply shall be the date of calculation/determination of the price variation.
- No price increase is allowed beyond original delivery period.
- No price adjustment shall be payable on the portion of contract price paid to the seller as an advance/interim payment after the date of such payment.
- Total adjustment will be subject to maximum ceiling of ____%.
- No price adjustment shall be payable if this is less than or equal to 2% (two percent) of P_o .
- Payments for each supply would initially be made as per the base price mentioned in the contract. Price adjustment bill should be submitted only quarterly for the supplies made during the quarter.
- In GTE tenders extra care should be taken in selecting the price indices. Preferably the price indices should be from the same country and of same currency as the country and currency of the bidder. In case price is in a currency of a country where inflation is low and the indices are from country with much higher inflation rates, $\left(\frac{M1}{M0}\right)$ and $\left(\frac{L1}{L0}\right)$ should be multiplied by a correction factor of exchange rates $\left(\frac{E0}{E1}\right)$, where E_0 is the exchange rate of country of M and L indices with reference to currency of price P. For example, if M&L are from India and P is in \$, then E_0 is Number of Rs. in a \$ on base date and E_1 is the exchange rate on determination date.
- Even if there is no price adjustment claim, supplier must submit all relevant data to prove that there is no downward variation. In any case he must submit a declaration as follows;

“It is certified that there has been no decrease in the price of price variation indices and in the event of any decrease of such indices during the currency of this contract we shall promptly notify the same to the purchaser and offer requisite reduction in the contract rate.”

Annexure 3: Format of Procurement Proposal

Procurement Proposal (Concept Paper) for Procurement of Consultancy/ other services

(Refer Para 1.15 and 9.8)

NO.	Date
Category of Assignment	Consultancy Services/ other services
Name of Officer/ Office proposing the Assignment	
Brief Description of Consultancy/ other services Proposed:	
Proposed Period of Engagement:	
Place and Nodal Officer for execution	
Total Estimated Cost:	
Estimate Name/ number:	
Allocation No	Allocation Code No

Purpose/ Objective Statement of Services

- i) Description of service:
- ii) Background of the Organisation and the Project:
- iii) Purpose/ Objectives of the Assignment: (Highlight how the proposed procurement of services would fit in with short-term and strategic goals of Procuring Entity)

Service Outcome Statement

- i) Outcomes expected from the Procurement of Services:
 - a) Broad List of Activities/ Steps involved in achieving objectives:
 - b) Expected Time-frame of assignment/ Duration of Engagement:
 - c) Rough estimate of cost of Procurement of services: (including related costs to be incurred by the organization)

Justification for the procurement of Services

- i) Capabilities required for carrying out the assignments:

- a) Rough assessment of available in-house capabilities as compared to required capabilities:
- b) The eligibility and pre-qualification criteria to be met by the consultants/ service providers:
- c) Precedences and similar assignments carried out earlier in our organisation/ similar organisations
- d) Justification: Based on assessment of required and in-house capabilities;

In case of Consultancy Services

It is certified that, the hiring of consultants is justified for following reasons (Tick points applicable). Please also add a narrative justification:

- i) Inadequacy of Capability or Capacity of required expertise in-house; or
- ii) There is internal capacity/ capability to do the job but there are consideration of economy, Speed and efficiency in relation to additional requirement/ commitment/ usage of;
 - a) Staff/ Management/ Organization;
 - b) Technological and Material Resources;
 - c) Money, and
 - d) Time/ Speed of execution; and
- iii) Also tick one or more of following:
 - a) The need to have qualified consultant for providing a specialized high quality service; or/ and
 - b) Need for impartial advice from a consultant (acting independently from any affiliation, economic or otherwise) to avoid conflicts of interest;
 - c) The need for Transfer of Knowledge/ Training/ Capacity and capability building as a by-product of such engagement
 - d) Need to acquire information about/ Identifying and implementing new methods and systems
 - e) Need for planning and implementing organizational change

In case of Other (Non-consultancy) Services

It is certified that, the procurement (outsourcing) of these services is justified for following reasons (Tick one main point below). Please also add a narrative justification:

- i) An administrative policy decided by the Ministry/ Department to outsource specific (class of) services; or
- ii) Economy, Speed and efficiency and more effective delivery of public services relating to additional requirement/ commitment/ usage of (tick one or more below):
 - a) Staff/ Management/ Organization;
 - b) Technological and Material Resources;
 - c) Money, and
 - d) Time/ Speed of execution.

In principle approval

In principle approval may kindly be accorded, for further processing. Final administrative and budgetary approvals would be taken after development of Terms of Reference/ Activity Schedule and detailed estimates.

Proposing Officer

Signatures/ Name/ Designation/ Department

Comments and Instructions:

Approving Officer

Signatures/ Name/ Designation/ Department

Annexure 4: Terms of Reference (ToR) Format

(Refer Para 4.1)

1. Description of Assignment
2. Procuring Entity's Organisation Background
3. Assignment Background
4. Statement of Purpose/ Objectives
5. Statement of Assignments Outcomes
6. Detailed Scope of Work and Time-lines
 - a. Tasks, Activities, dependencies, bar chart and Gantt Chart, Milestones
 - b. Place of Assignment and Touring Requirements if any
 - c. Length and Duration of assignments
7. Team Composition and Qualification Requirements for the Key Experts (and any other requirements which will be used for evaluating the key experts under the Bid data sheet)
8. Capacity Building, Training and Transfer of Knowledge, if any
9. Deliverables, Reporting Requirements and Time Schedule for Deliverables [If no reports are to be submitted, state here "Not applicable."]
 - a. Format, frequency, and contents of reports; dates of submission
 - b. Number of copies, and requirements for electronic submission (or on computer media)
 - c. Persons (indicate names, titles, submission address) to receive them;
10. Background material, Data, reports, records of previous surveys, and so on, to be provided to the consultant (Mention a caveat about reliability of material provided and need for the consultant to verify and crosscheck vital aspects)
11. Facilities such as local conveyance, office space, office machines, secretarial assistance, utilities, local services, etc., which would be provided to the consultant by the Procuring Entity (Specifically mention, what facility/ utilities would not be provided and also, charges if any for facilities offered)
12. Institutional and organisational arrangement
 - a. Counterpart Project Manager and Team
 - b. Consultancy Management Committee
 - c. Chain of Command for reporting

Annexures

13. Procedure for review of the work of consultant after award of contract

Annexure 5: Bid Opening Attendance Sheet cum Report

(Refer Para 6.4, 6.8 and 9.17)

[Name of Procuring Entity]

Bid Opening Attendance Sheet cum Report

Type of Opening	Eo/ Technical/ Financial	No		Date and Time of Opening		
Title of Tender						
Attendance Record						
Sr No	Bidder's Name	Bidder's Address	Bidder's Authorisation and Date	Represented by	Contact No.	Signature of Representative

Bid Opening Report							
Offer No.	Bidder's Name	Bidder's Ref and Date	Submission of Requisite EMD (Y/N)	Submission of other Mandatory Documents (Y/N)	No of Cuttings/Overwritings	Rate Quoted and Taxes/Duties (Financial Bid)	Other Special Features Announced
--/--							
--/--							
--/--							

Total no. of regular tenders taken out from the tender box to be opened as mentioned above..... (In figures and in words)

Signature, Date and Time Name and Designation of Tender Opening Officer	Signature, Signature, Date and Time Name and Designation of Tender Opening Officer
--	---

Received total regular tenders..... (In figures/words) as above

Signature, Date and Time Name and Designation of Procuring Entity Officer	Signature, Signature, Date and Time Name and Designation of Procuring Entity Officer
--	---

Annexure 6: CEC Committee Minutes Format for Consultancy Services

(For EoI/ Techno-Commercial/Financial Bids)

(Refer Para 5.1, 5.2 and 6.7)

Organisation: _____					
Minutes of Tender Committee Meeting (EoI/ Techno-commercial/Financial Bids)					
Stage of Evaluation: EoI/ Technical/ Financial					
Section I: Top Sheet					
File No:		Date:			
Procuring Entity/ Client		Method of Selection		LCS/ QCBS/ SSS	
Type of Contract	Lump-sum/ Time Based/ Percentage/ Retainer cum Success Fee/ Indefinite Delivery				
Name of Assignment		Estimated Cost:-			
Tender Stage Published In		Date of Publication			
Bid Validity and Extensions taken		Bid Opening Date			
Past Precedents/ Procurements					
Sr. No.	service provide r	Order Reference & Date	Description of Service	Cost Details	Remarks
Members of the Tender Committee					
Sr. No.	Name	Designatio n	Sr. No.	Name	Designation
1			2		
3			4		
Section II: Background of the Assignment					
Include a brief description, context, scope, and objectives of the services. Mention technical and financial approvals; estimated cost; budgetary provisions; urgency of requirement; special technical requirements and other connected procurements					

which are part of same package/project.
Review special conditions, restriction if any, on participation of bidders; purchase preferences, requirements prescribed in bid documents (EMD, document submission, etc.)
Describe briefly the selection process that has been completed before this stage: mode of bidding; bidding document contents; bid publication; Pre-proposal Conferences, Amendment/ Clarifications sought and given, withdrawals of firms before proposal submissions, level of competition obtained; issues if any noticed during bid-opening (bids not opened due to lack/ unsatisfactory EMD, etc.), the establishment of the shortlist, EoI, and. Describe major events that may have affected the timing (delays, complaints from consultants, reference of RfP document (attach with the Evaluation Report or make it available for review/approving authority), extension of proposal submission date, and so on).
Names/nationality of firms/associations (mark domestic firms and firms that had expressed interest)of Firms who participated and Shortlisted Bidders prior to this stage – EoI/ Technical Evaluation: <ul style="list-style-type: none"> i) Participated/ Expressed Interest: ii) Shortlisted in EoI/ Technical Evaluation prior to this
Section III: Preliminary Evaluation of Responsiveness (Refer to Annexure 6A)
Review handling of any complaints received
Discuss preliminary evaluation for determining substantially responsive bids and for minor corrections and clarifications
Section IV: Evaluation of Responsive Bids: Technical Evaluation
<ul style="list-style-type: none"> i) Describe briefly the meetings and actions taken by the evaluation committee: formation of a technical evaluation team, outside assistance, evaluation guidelines, justification of sub-criteria and associated weightings as indicated in the standard RfP and compliance of evaluation with RfP. ii) Summary of Evaluation Criteria and Weights assigned iii) Grading and Rating Scheme in the Bid documents or decided before the Evaluation iv) Present results of the technical evaluation: scores and the award recommendation (based on Rating System agreed among evaluators prior to receipt of proposals). v) Highlight strengths and weaknesses of each proposal (most important part of the report). <ul style="list-style-type: none"> a) <u>Strengths</u>: Experience in very similar projects in the country; quality of the methodology, proving a clear understanding of the scope of the assignment; strengths of the local partner; and experience of proposed staff in similar assignments. b) <u>Weaknesses</u>: Of a particular component of the proposal; of a lack of experience in the country; of a low level of participation by the local partner; of a lack of practical experience (experience in studies rather than in

implementation); of staff experience compared to the firm's experience; of a key staffer (e.g., the team leader); of a lack of responsiveness; and of disqualifications (conflict of interest).

vi) Comment on individual evaluators' scores (discrepancies). Items requiring further negotiations.

Technical Evaluation Report should also contain (Formats given in Annexure 6B to 6F)

- a) Technical Evaluation Summary (simplified in case of LCS or EoI, otherwise detailed, if so chosen in RfP)
- b) Evaluation of Consultancy Firm's Experience (In case of Detailed Technical Evaluation specified)
- c) Evaluation of Methodology & Work Schedule (In case of Detailed Technical Evaluation specified)
- d) Evaluation of the Key Professionals (In case of Detailed Technical Evaluation specified)

Section V: Evaluation of Technically Successful Bids: Financial Evaluation

- i) Start with review of techno-commercial evaluation and shortlisted Firms and approval and directions by CA
- ii) Describe briefly the meetings and actions taken by the evaluation committee: formation of a financial evaluation team, outside assistance, evaluation guidelines, justification of associated weightings as indicated in the standard RfP and compliance of evaluation with RfP.
- iii) Insert a summary table of evaluated financial scores/ combined weighted scores
- iv) Deliberations should be in the sequence of financial/ combined scores etc. Indicate: any issues faced during the evaluation, such as difficulty in obtaining the exchange rates to convert the prices into the common currency used for evaluation purposes; adjustments made to the prices of the proposal(s) (mainly to ensure consistency with the technical proposal) and determination of the evaluated price (does not apply to Quality-based (Quality-based), Selection- based on Qualifications (Qualifications), and Single-source Selection (Single-Source)); arithmetical correction in case of Time-based Contract, tax-related problems; award recommendation; and any other important information.
- v) Attach Minutes of Public Opening of Financial Proposals

Section VI: Summary of Recommendations

Bid-wise recommendation should be recorded

In case of evaluation of financial bids,

- i) Give a summary of recommended bids, award value, bid expiry date and special conditions, if any;
- ii) Also mention that the rates recommended are considered reasonable (and basis for such determination);
- iii) Total value of the recommendations for determining level of acceptance

authority; iv) Mention that none of the TC members have any conflict of interest with the parties recommended for award; v) Request acceptance of recommendations by competent authority and that it's within his powers of acceptance as per SoPP/ DFPR.			
Signature Name and Designation of the Members			
1		2	
	Date:		Date:
	(Name & Designation)		(Name & Designation)
3		4	
	Date:		Date:
	(Name & Designation)		(Name & Designation)
Remarks by the Accepting Authority:			

Signature:_____ Date:_____			
Name & Designation of Accepting Authority _____			

Annexure 6A: Format for evaluation of Responsiveness

Name of the consultancy firm:

Sr. No.	Item	Required response
1	Has the consultant paid the RfP document fees?	Yes
2	Has the consultant submitted the requisite bid processing fee and bid security?	Yes
3	Have all the pages required to be signed by the authorized representative of the consultant been signed?	Yes
4	Has the power of attorney been submitted in the name of authorized representative?	Yes
5	In the case of JV/consortium, whether the MoU has been submitted?	Yes
6	Has the consultant submitted all the required forms of the technical proposal?	Yes
7	Technical proposal does not contain any financial information?	Yes
8	Is financial proposal submitted separately in a sealed cover?	Yes

Annexure 6B: Format for Simplified evaluation of quality (LCS/ EoI)

(If so specified in Bid Documents)

Sr. No.	Item	Required response
1	Does the consultancy firm have the required experience?	Yes
2	Does the proposed methodology of work fulfil the objectives of the assignment/ job till the last detail of the ToR?	Yes
3	Do the methodology, work plan and staffing schedule provide coverage of the entire scope of work as described in ToR?	Yes
4	Does the team leader fulfil the minimum educational qualification and experience criteria?	Yes
5	Has the consultant provided for all the professionals for requisite expertise?	Yes
6	Does the key professional (indicate the position) fulfil the minimum educational qualification and experience criteria? [Evaluate for all the proposed key personnel]	Yes
7	Does the staffing schedule including the key professionals proposed, the responsibility assigned to them and the support staff together is adequate for performing the entire scope of work indicated in the ToR?	Yes

Note: If the answer is yes, in all the cases, the consultancy firm is considered technically qualified for the assignment.

(If so specified in RfP)

Annexure 6C: Format for Detailed Technical evaluation - Summary Sheet

(To be compiled from Annexures 6D; 6E; and 6F)

S.No.	Name of the consultant	Firm's Experience Marks Awarded	Methodology & Work schedule Marks Awarded	Qualifications of Key Professionals Marks Awarded	Total Marks. Awarded	Ranking of Technical Marks
		Max. Marks =	Max. Marks =	Max. Marks =	Max. Marks 100	

Annexure 6D Evaluation of Consultancy Firm's Experience

(Averaged from individual worksheets of CEC members)

Sr.No.	Name of the Consultancy	Firm Number of Projects of similar nature	Marks Awarded
			Max. Marks =

Annexure 6E Evaluation of Methodology & Work Schedule

(Averaged from individual worksheets of CEC members)

S.No.	Name of the Consultancy	Firm's Understanding of ToR – Marks Awarded	Work Plan & Methodology – Marks Awarded	Organization and Staffing for the proposed assignment – Marks Awarded	Total – Marks Awarded
		Max. Marks =	Max. Marks =	Max. Marks =	Max Marks =

Annexure 6F Evaluation of the Key Professionals

(Averaged from individual worksheets of CEC members)

Name of the Consultancy Firm:								
Sr. No.	Name of the Key Professionals	Educational Qualification	Marks Awarded	No. of Projects of similar nature	Marks Awarded	Experience of the region (No. of Projects in the region)	Marks Awarded	Total Marks (4+6+8)
			Max. Marks =		Max. Marks =		Max. Marks =	Max. Marks =
1	2	3	4	5	6	7	8	9
Grand Total for the consultant:								
Name of the Consultancy Firm:								
Grand Total for the consultant:								
Name of the Consultancy Firm:								
Grand Total for the consultant:								
Name of the Consultancy Firm:								
Grand Total for the consultant:								

Annexure 7: Activity and Other Schedule for Other (Non-consultancy) Services

(Refer Para 9.9.1)

- i) Description of Assignment
- ii) Procuring Entity's Organisation and Assignment Background
- iii) Statement of Purpose/ Objectives
- iv) Statement of Assignments Outcomes
- v) Itemized Activity Schedule and Time-lines
 - a. Tasks, Activities, dependencies, categorised into classes, location and features affecting prices.
 - b. Frequency of Activities, Quantum, Length and Duration of Activities
 - c. Performance standards for such activities
- vi) Labour/ Personnel Deployment Schedule:
 - a. Type of Personnel, Number of each type, Place, Shifts, Frequency of deployment
 - b. Project Managers, Supervisors, Their qualifications/ experience, numbers
 - c. Leave reserve and reliving staff needed are not included in the numbers of personnel, these must be included in the rate of each personnel
- vii) Material Schedule, if any: Materials, Consumables, Tools of Trade, to be consumed/ deployed, tabulate, quantum, specifications, per unit of activity/ Manpower/ day/ location etc
- viii) Essential Equipment Schedule: Deployment of essential machinery (equipment, Trucks, Cranes, Washing Machines, vessels/ crafts, plant & machinery) – mention quantity/ activity, specifications, capacity, age. Possession/ access to such machinery may also be included in the qualification requirements.
- ix) Outcomes, deliverables, reports and Time Schedule for Deliverables
- x) Statutory and contractual obligations to be complied with by the contractor: Various statutory provisions relating to labour, taxation, Workmen Safety, Child and Women Labour, Private Security Agencies, Environmental Protection, Mining, Forest clearance, Employment reservations and Procuring Entity's own regulation about

- safety, security, confidentiality etc. must be listed, so that price implications and compliance is taken care of by the bidder.
- xi) Facilities and Utilities to be provided by the Procuring Entity to service provider at Site: It should be mentioned, if any facility/ utility (Operation Manuals, Emergency Medical, Room, Furniture, Electricity connection, Water connection) etc would be made available to the successful bidder to carry out the service. In case it is proposed to charge the Electricity/ Water supplied to the service provider, the same may be mentioned, including the rate of charges. Specially mention facilities and utilities which will not be provided, or the facilities which would be provided on chargeable basis.
 - xii) Institutional and organisational arrangement
 - a. Counterpart Project Manager and Team
 - b. Chain of Command for reporting
 - xiii) Procedure for review of the work of consultant after award of contract

Annexure 8: Certificate for Procurement of other services without Quotation

(Refer Para 9.11)

Ref _____

No:

Place: _____ Date: _____

“I, _____, am personally satisfied that the other services executed as described below are of the requisite scope and performance standards and have been got executed from a reliable service provider at a reasonable price.”

Description of Service:	
Justification:	
Place and Nodal Officer for availing the Services	
Contract Basis	Lump-Sum/ Unit (Item) Rate/ Time-based
Scope/ Quantum/ Performance Standards	
Rate:	
Taxes/Duties:	
Other Charges:	
Total Contract Price:	
service provider	M/S
Vide Bill No.:	
Cheque may be drawn in favour of	
Name of Procuring Officer:	
Designation:	
Signature:	

Annexure 9: Purchase Committee Certificate for Procurement of other services

(Refer Para 9.11)

Ref _____
No: _____

Place: _____ Date: _____

Description of Service:						
Justification:						
Place and Nodal Officer for availing the Services						
Contract Basis					Lump-Sum/ Unit (Item) Rate/ Time-based	
Scope/ Quantum/ Performance Standards						
Details of Prices Ascertained						
service provider	Rate:	Taxes/Duties:	Other Charges:	Total Unit Price:	Total Price:	Recommendations & Comments
Selected service provider						
Unit Rate, Taxes/ Duties/ Other Charges						
Total Unit Rate						
Total Value of Purchase						
Cheque may be drawn in favour of						
Signature:		Signature:		Signature:		
Name 1:		Name 2:		Name 3:		
Designation:		Designation:		Designation:		

“Certified that we the undersigned, members of the purchase committee are jointly and individually satisfied that the above described Services are executed at a reasonable price and are of the requisite scope and performance standards and have been got executed from a reliable service provider, and it is not debarred by Department of Commerce or Ministry/Department concerned.” The details of recommended purchase are:

(For Techno-Commercial/Financial Bids)

Annexure 10: Tender Committee Minutes Format for Other (Non-consultancy) Services

(Refer Para 9.17)

Organisation: _____ _____					
Minutes of Tender Committee Meeting (Techno-commercial/Financial Bids)					
Procuring Entity/ Client:			Stage of Evaluation: Technical/ Financial Bids		
Section I: Top Sheet					
File No:				Date:	
Name of Assignment					
Type of Contract	Lump-sum/ Time Based/ Indefinite Delivery/ Unit (Item) Rate		Estimated Cost:-		
Tender Published In			Date of Publication		
Bid Validity and extensions taken			Bid Opening Date		
Past Precedents/ Procurements					
Sr. No.	Supplier	Order Reference & Date	Quantity	Basic Rate (Rs.)	Remarks
Members of the Tender Committee					
Sr. No.	Name	Designation	Sr. No.	Name	Designation
1			2		
3			4		
Section II: Background of the Assignment					
Include a brief description, context, scope, and objectives of the services. Mention technical and financial approvals; estimated cost; budgetary provisions; urgency of requirement; special technical requirements and other connected procurements which are part of same package/project.					

Review special conditions, restriction if any, on participation of bidders; purchase preferences, requirements prescribed in bid documents (EMD, document submission, etc.)
Describe briefly the selection process that has been completed before this stage: mode of bidding; bidding document contents; bid publication; Pre-proposal Conferences, Amendment/ Clarifications sought and given, withdrawals of firms before proposal submissions, level of competition obtained; issues if any noticed during bid-opening (bids not opened due to lack/ unsatisfactory EMD, etc.), the establishment of the shortlist. Describe major events that may have affected the timing (delays, complaints from consultants, reference of RfP document (attach with the Evaluation Report or make it available for review/approving authority), extension of proposal submission date, and so on).
Names/nationality of firms/associations (mark domestic firms and firms that had expressed interest) of Firms who participated and Shortlisted Bidders prior to this stage: <ul style="list-style-type: none"> a) Participated: b) Shortlisted in Technical Evaluation prior to this
Section III: Preliminary Evaluation of Responsiveness
Review handling of any complaints received
Discuss preliminary evaluation for determining substantially responsive bids and for minor corrections and clarifications
Section IV: Evaluation of Responsive Bids – Technical/ Quality Evaluation
<ul style="list-style-type: none"> i) Describe briefly the meetings and actions taken by the evaluation committee: formation of a technical evaluation team, outside assistance, evaluation guidelines, justification of evaluation criteria in the standard RfP and compliance of evaluation with RfP. ii) Present results of the technical evaluation iii) Highlight strengths and weaknesses of each proposal: <ul style="list-style-type: none"> (a) <u>Strengths</u>: Experience in very similar projects in the country; proving a clear understanding of the scope of the assignment; (b) <u>Weaknesses</u>: Of a particular component of the proposal; of a lack of experience in the region or type of service; of a lack of responsiveness;
Section V: Evaluation of Technically Successful Bids: Financial Evaluation
<ul style="list-style-type: none"> a) Start with review of techno-commercial evaluation and shortlisted Firms and approval and directions by CA b) Describe briefly the meetings and actions taken by the evaluation committee: formation of a financial evaluation team, outside assistance, evaluation guidelines, and compliance of evaluation with RfP. c) Insert a summary table of evaluated bid prices from L-1 to highest d) Attach Minutes of Public Opening of Financial Proposals
Section VI: Summary of Recommendations
Bid-wise recommendation should be recorded

In case of evaluation of financial bids,			
i) Give a summary of recommended bids, award value, bid expiry date and special conditions, if any.			
Also mention that the rates recommended are considered reasonable (and basis for such determination).			
Total value of the recommendations for determining level of acceptance authority.			
Mention that none of the TC members have any conflict of interest with the parties recommended for award.			
Request acceptance of recommendations by competent authority and that it's within his powers of acceptance as per SoPP/ DFPR.			
Signature Name and Designation of the Members			
1		2	
	Date:		Date:
	(Name & Designation)		(Name & Designation)
3		4	
	Date:		Date:
	(Name & Designation)		(Name & Designation)
Remarks by the Accepting Authority:			

Signature: _____ Date: _____			
Name & Designation of Accepting Authority _____			

Manual for Procurement of Consultancy & Other Services

Appendix

Appendix 1: Basic Aims and Fundamental Principles of Public Procurement

(Refer Para 1.5, 1.6)

1.1 Basic Aims of Procurement – the Five Rs of Procurement

In every procurement, public or private, the basic aim is to achieve just the right balance between costs and requirements concerning the following five parameters called the Five R's of procurement. The entire process of procurement (from the time the need for an item, facility or services is identified till the need is satisfied) is designed to achieve such a right balance. The word 'right' is used in the sense of 'optimal balance'.

i). Right Quality

Procurement aims to buy just the right quality that will suit the needs – no more and no less – with clear specification of the Procuring Entity's requirements, proper understanding of functional value and cost, understanding of the bidder's quality system and quality awareness. The concept of the right balance of quality can be further refined to the concept of utility/value. For the Right Quality, Technical Specification (Terms of Reference (ToR) in case of Procurement of Services) should be the most vital ingredient. In public procurement, it is essential to give due consideration to Value for Money while benchmarking the specification.

ii). Right Quantity

There are extra costs and systemic overheads involved with both procuring a requirement too frequently in small quantities or with buying large quantities. Hence, the right quantity is procured (in appropriate size of contract) which balances extra costs associated with larger and smaller quantities. In case of Procurement of Services, scope of Work determines the quantum of services.

iii). Right Price

It is not correct to aim at the cheapest materials/ facilities/ Services available. The price should be just right for the quality, quantity and other factors involved (or

should not be abnormally low for a facilities/works/ services which could lead to a situation of non-performance or failure of contract). The concept of price can be refined further to take into account not only the initial price paid for the requirement but also other costs such as maintenance costs, operational costs and disposal costs (Also termed as life cycle costing - please also refer to para 1.2 below)

iv). **Right Time and Place**

If the material (or facility or services) is needed by an organisation in three months' time, it will be costly to procure it too late or too early. Similarly, if the vendor delivers the materials/ facilities/ services in another city, extra time and money would be involved in logistics. An unrealistic time schedule for completion of a facility may lead to delays, claims and disputes.

v). **Right Source**

Similarly, the source of delivery of Goods, Works and Services of the requirement must have just right financial capacity and technical capability for our needs (demonstrated through satisfactory past performance of contracts of same or similar nature). Buying a few packets of printer paper directly from a large manufacturer may not be the right strategy. On the other hand, if our requirements are very large, buying such requirements through dealers or middlemen may also not be right.

1.2 Refined Concepts of Cost and Value – Value for Money

The concept of price or cost has been further refined into Total Cost Of Ownership (TCO) or Life Cycle Cost (LCC) or Whole-of-Life (WOL) to take into account not only the initial acquisition cost but also cost of operation, maintenance and disposal during the lifetime of the external resource procured. Similarly, the concept of quality is linked to the need and is refined into the concept of utility/ value. These two, taken together, are used to develop the concept of Value for Money (VfM, also called Best Value for Money in certain contexts). VfM means the effective, efficient, and economic use of resources, which may involve the evaluation of relevant costs and benefits, along with an assessment of risks, non-price attributes (e.g. in goods and/or services that contain recyclable content, are recyclable, minimise waste and greenhouse gas emissions, conserve energy and water and minimize habitat destruction and environmental degradation, are non-toxic etc.) and/or life cycle

costs, as appropriate. Price alone may not necessarily represent VfM. *In public procurement, VfM is achieved by attracting the widest competition by way of optimal description of need; development of value-engineered specifications/ Terms of Reference (ToR); appropriate packaging/ slicing of requirement; selection of an appropriate mode of procurement and bidding system.* These advanced concepts are explained below.

1.2.1 The Concept of Value

Value is a management and economics concept. It represents the extent of satiation of a hierarchy of needs of a person by a product bought for this purpose. This is subjective and difficult to quantify. This is because different persons (or the same persons under different circumstances) would have different hierarchy of needs and would perceive different extents of satiation or value from the same product. There are three sources of the value of a product. The first source of value is from the functional usage of the product (known as use value) and the second source comes from the social status associated with the ownership of the product (esteem value). This can be shown as the difference between a luxury branded gold-plated, diamond encrusted pen and a disposable non-descript functional pen, though both fulfil the broadly same function and have the same use value. The luxury branded pen, in addition to the use value, also has additional esteem value. The third source of value comes from the price that one can get by exchanging or scrapping the product at the end of the useful life of the product. This is called the disposal value. Normally, when people buy a car, they do consider the estimated disposal value of different choices of models. Value is the sum total of all the three values.

1.2.2 Total Cost of Ownership

While the value of a product covers all components of value over the “Whole-Of-Life” (WOL), the costs incurred on the product should also take into consideration the total of various elements of costs incurred over WOL of the product. For this purpose, future costs are discounted to present value (not to be confused with the value we are discussing – this is a financial discounting concept). For example, it would not be prudent to buy a cheap car, which has a very high cost of operating. This is called variously as WOL or “Life-Time-Cost” (LCC) or “Total Cost of Ownership” (TCO). The last is a preferred nomenclature in procurement and is defined as the total of all

costs associated with a product, service, or capital equipment that are incurred over its expected life. Typically, these costs can be broken into four broad categories:

- a) **Procurement price.** The amount paid to the vendor/ contractor for the product, service, or capital equipment;
- b) **Acquisition costs.** All costs associated with bringing the product, service, or capital equipment into operation at the customer's location. Examples of acquisition costs are sourcing, administration, freight, taxes, and so on;
- c) **Usage costs.** In the case of a product, all costs associated with converting the procured part/material into the finished product and supporting it through its usable life. In the case of a service, all costs associated with the performance of the service that is not included in the procurement price. In the case of capital equipment, all costs associated with operating the equipment through its life. Examples of usage costs are inventory, conversion, wastage, lost productivity, lost sales, warranty, installation, training, downtime, and so on; and
- d) **End-of-life costs.** All costs incurred when a product, service, or capital equipment reaches the end of its usable life, net of amounts received from the sale of the remaining product or the equipment (disposal value) as the case may be. Examples of end-of-life costs are obsolescence, disposal, clean-up, and project termination costs

1.2.3 Value for Money

Besides value of a product or service, the customer also has his own notion of “value” of a particular sum of money. This is different for different people or even for the same person in different circumstances. When the perceived value of a product matches the perceived value of the amount of money (cost of the product), the customer feels he got the full value for his money. This is called the VfM. In procurement, Total Cost of Ownership is taken to evaluate value for money. Given the limited resources available to the government, ensuring VfM in procurement is the key to ensuring the optimum utilisation of scarce budgetary resources. It usually means buying the product or service with the lowest WOL costs that is ‘fit for purpose’ and just meets the specification. VfM also incorporates affordability; clearly,

goods or services that are unaffordable cannot be bought. This should be addressed as soon as possible within the process, ideally at the need assessment stage before procurement commences. In order to address this issue, a change in the procurement approach, specification or business strategy may be required.

Where an alternative is chosen that does not have the lowest WOL costs, then the additional 'value added' benefit must be proportional and objectively justifiable. Assessment of bids should be conducted only in relation to a published set of evaluation criteria (which should be relevant to the subject of the contract), and any 'added value' that justifies a higher price must flow from these defined criteria. In public procurement VfM is often primarily established through the competitive process. A strong competition from a vibrant market will generally deliver a VfM outcome. However, where competition is limited, or even absent, other routes may have to be used to establish VfM. These can include benchmarking, construction of theoretical cost models or 'shadow' bids by the procurement agency. For major contracts, this can require considerable financial expertise and external support. A VfM assessment, based on the published conditions for participation and evaluation, may include consideration of some factors such as:

- i) Fitness for purpose;
- ii) Potential vendor/contractor's experience and performance history;
- iii) Flexibility (including innovation and adaptability over the lifecycle of the procurement);
- iv) Environmental sustainability (such as energy efficiency and environmental impact); and
- v) Total cost of ownership

But due to uncertainties in estimates of various components of TCO (and actual costs over the life-cycle) and intangibles of Value, some element of subjectivity may become unavoidable, and hence is not normally useable in routine Public Procurement cases. Therefore, preference is given to alternative means for ensuring VfM by way of optimal description of needs; development of value-engineered specifications/ Terms of Reference and appropriate packaging/ slicing of requirements and selection of appropriate mode/ bidding systems of procurement etc.

1.3 Fundamental Principles of Public Procurement

General Financial Rules, 2017 lay down the Fundamental Principles of Public Procurement. These principles and other additional obligations of procuring authorities in public procurement can be organised into five fundamental principles of public procurement, which all procuring authorities must abide by and be accountable for:

i). Transparency Principle

All procuring authorities are responsible and accountable to ensure transparency, fairness, equality, competition and appeal rights. This involves simultaneous, symmetric and unrestricted dissemination of information to all likely bidders, sufficient for them to know and understand the availability of bidding opportunities and actual means, processes and time-limits prescribed for completion of registration of bidders, bidding, evaluation, grievance redressal, award and management of contracts. It implies that such officers must ensure that there is consistency (absence of subjectivity), predictability (absence of arbitrariness), clarity, openness (absence of secretiveness), equal opportunities (absence of discrimination) in processes. In essence Transparency Principle also enjoins upon the Procuring Authorities *to do only that which it had professed to do as pre-declared in the relevant published documents and not to do anything that had not been so declared*. As part of this principle, all procuring entities should ensure that offers should be invited following a fair and transparent procedure and also ensure publication of all relevant information on the Central Public Procurement Portal (CPPP).

ii). Professionalism Principle

As per these synergic attributes, the procuring authorities have a responsibility and accountability to ensure professionalism, economy, efficiency, effectiveness and integrity in the procurement process. They must avoid wasteful, dilatory and improper practices violating the Code of integrity for Public Procurement (CIPP) mentioned in Chapter 3 of this manual. They should, at the same time, ensure that the methodology adopted for procurement should not only be reasonable and appropriate for the cost and complexity but should also effectively achieve the planned objective of the procurement. As part of this principle, the government may

prescribe professional standards and specify suitable training and certification requirements for officials dealing with procurement matters.

In reference to the above two principles - Transparency and Professionalism Principle, It may be useful to refer to the following provisions in the General Financial Rules, 2017:

“Rule 144 of GFR 2017: Fundamental principles of public buying. (for all procurements including procurement of works).— Every authority delegated with the financial powers of procuring goods in public interest shall have the responsibility and accountability to bring efficiency, economy, and transparency in matters relating to public procurement and for fair and equitable treatment of suppliers and promotion of competition in public procurement.

The procedure to be followed in making public procurement must conform to the following yardsticks:-

- a) *The description of the subject matter of procurement to the extent practicable should --*
 1. *be objective, functional, generic and measurable and specify technical, qualitative and performance characteristics;*
 2. *not indicate a requirement for a particular trade mark, trade name or brand.*
- b) *the specifications in terms of quality, type etc., as also quantity of goods to be procured, should be clearly spelt out keeping in view the specific needs of the procuring organisations. The specifications so worked out should meet the basic needs of the organisation without including superfluous and non-essential features, which may result in unwarranted expenditure.*
- c) *Where applicable, the technical specifications shall, to the extent practicable, be based on the national technical regulations or recognized national standards or building codes, wherever such standards exist, and in their absence, be based on the relevant international standards. In case of Government of India funded projects abroad, the technical specifications may be framed based on requirements and standards of the host beneficiary Government, where such standards exist. Provided that a Procuring Entity*

may, for reasons to be recorded in writing, adopt any other technical specification.

- d) Care should also be taken to avoid purchasing quantities in excess of requirement to avoid inventory carrying costs;*
- e) offers should be invited following a fair, transparent and reasonable procedure;*
- f) the procuring authority should be satisfied that the selected offer adequately meets the requirement in all respects;*
- g) the procuring authority should satisfy itself that the price of the selected offer is reasonable and consistent with the quality required;*
- h) at each stage of procurement the concerned procuring authority must place on record, in precise terms, the considerations which weighed with it while taking the procurement decision.*
- i) a complete schedule of procurement cycle from date of issuing the tender to date of issuing the contract should be published when the tender is issued.*
- j) All Ministries/Departments shall prepare Annual Procurement Plan before the commencement of the year and the same should also be placed on the their website”*
- k) [Notwithstanding anything contained in these Rules, Department of Expenditure may, by order in writing, impose restrictions, including prior registration and/or screening, on procurement from bidders from a country or countries, or a class of countries, on grounds of defence of India, or matters directly or indirectly related thereto including national security; no procurement shall be made in violation of such restrictions.]⁵⁷*

iii). Broader Obligations Principle

Over and above transparency and professionalism, the procuring authorities have also the responsibility and accountability to conduct public procurement in a manner to facilitate achievement of the broader objectives of the government - to the extent these are specifically included in the ‘Procurement Guidelines’:

⁵⁷ Inserted vide Department of Expenditure (DoE), Ministry of Finance (MoF) OM No. F.6/18/2019-PPD dated 23.07.2020.

- a) Preferential procurement from backward regions, weaker sections and MSEs, locally manufactured goods or services, to the extent specifically included in the 'Procurement Guidelines'; and
- b) Reservation of procurement of specified class of goods from or through certain nominated CPSEs or Government Organisations, to the extent specifically included in the 'Procurement Guidelines'.
- c) Support to broader social policy and programme objectives of the government (for example, economic growth, strengthening of local industry - make-in-India, Ease of Doing Business, job and employment creation, and so on, to the extent specifically included in the 'Procurement Guidelines');
- d) Facilitating administrative goals of other departments of government (for example, ensuring tax or environmental compliance by participants, Energy Conservation, accessibility for People With Disabilities etc. to the extent specifically included in the 'Procurement Guidelines').
- e) Procurement policies and procedures must comply with accessibility criteria which may be mandated by the Government from time to time. Keeping this in view, Department of Expenditure amended Rule 144 of GFR, 2017 and introduced a sub-point (xi) imposing restrictions under the rule [as mentioned under (ii) above]. The detailed provisions were notified through Order (Public Procurement No.1)⁵⁸ which are as follows:

1. Requirement of registration

- a) Any bidder from a country which shares a land border with India will be eligible to bid in any procurement whether of goods, services (including consultancy services and non-consultancy services) or works (including turnkey projects) only if the bidder is registered with the Competent Authority, specified in Para 12(c) below.
- b) The Order shall not apply to (i) cases where orders have been placed or contract has been concluded or letter/notice of award/ acceptance (LoA) has

⁵⁸ Inserted vide Department of Expenditure (DoE), Ministry of Finance (MoF) OM No. F.6/18/2019-PPD dated 23.07.2020.

been issued on or before the date of the order (23rd July 2020); and (ii) cases falling under para 13 below.

2. **Transitional cases**

Tenders where no contract has been concluded or no LoA has been issued so far shall be handled in the following manner: -

- a) In tenders which are yet to be opened, or where evaluation of technical bid or the first exclusionary qualificatory stage (i.e. the first stage at which the qualifications of tenderers are evaluated and unqualified bidders are excluded) has not been completed: No contracts shall be placed on bidders from such countries. Tenders received from bidders from such countries shall be dealt with as if they are non-compliant with the tender conditions and the tender shall be processed accordingly.
- b) If the tendering process has crossed the first exclusionary qualificatory stage, if the qualified bidders include bidders from such countries, the entire process shall be scrapped and initiated *de novo*. The *de novo* process shall adhere to the conditions prescribed in the Order.
- c) As far as practicable, and in cases of doubt about whether a bidder falls under paragraph (1) above, a certificate shall be obtained from the bidder whose bid is proposed to be considered or accepted, in terms of paras 5(c), 5(d) and 6 read with para (1).

3. **Incorporation in tender conditions**

In tenders to be issued after the date (23rd July 2020) of the order, the provisions of paragraph (1) above and of other relevant provisions of the Order shall be incorporated in the tender conditions.

4. **Applicability**

- a) Apart from Ministries/Departments, attached and subordinate bodies, notwithstanding anything contained in Rule 1 of the GFRs 2017, the Order shall also be applicable:to all Autonomous Bodies;
- b) to public sector banks and public sector financial institutions; and
- c) subject to any orders of the Department of Public Enterprises, to all Central Public Sector Enterprises; and
- d) to procurement in Public Private Partnership projects receiving financial support from the Government or public sector enterprises/ undertakings.

- e) Union Territories, National Capital Territory of Delhi and all agencies/undertakings thereof

5. Definitions

- a) "Bidder" for the purpose of the Order (including the term 'tenderer', 'consultant' 'vendor' or 'service provider' in certain contexts) means any person or firm or company, including any member of a consortium or joint venture (that is an association of several persons, or firms or companies), every artificial juridical person not falling in any of the descriptions of bidders stated hereinbefore, including any agency, branch or office controlled by such person, participating in a procurement process.
- b) "Tender" for the purpose of the Order will include other forms of procurement, except where the context requires otherwise.
- c) "Bidder from a country which shares a land border with India" for the purpose of the Order means
 - i. An entity incorporated, established or registered in such a country; or
 - ii. A subsidiary of an entity incorporated, established or registered in such a country; or
 - iii. An entity substantially controlled through entities incorporated, established or registered in such a country; or
 - iv. An entity whose beneficial owner is situated in such a country; or
 - v. An Indian (or other) agent of such an entity; or
 - vi. A natural person who is a citizen of such a country; or
 - vii. A consortium or joint venture where any member of the consortium or joint venture falls under any of the above
- d) "Agent" for the purpose of the Order is a person employed to do any act for another, or to represent another in dealings with third persons.

6. Beneficial owner for the purposes of point (c) (iv) will be as under:

- a) In case of a company or Limited Liability Partnership, the beneficial owner is the natural person(s), who, whether acting alone or together, or through one or more juridical person(s), has a controlling ownership interest or who exercises control through other means. Explanation:-
- b) In case of a partnership firm, the beneficial owner is the natural person(s) who, whether acting alone or together, or through one or more juridical

person, has ownership of entitlement to more than fifteen percent of capital or profits of the partnership;

- c) In case of an unincorporated association or body of individuals, the beneficial owner is the natural person(s), who, whether acting alone or together, or through one or more juridical person, has ownership of or entitlement to more than fifteen percent of the property or capital or profits of such association or body of individuals;
- d) Where no natural person is identified under (6) (a) or (6) (b) or (6) (c) above, the beneficial owner is the relevant natural person who holds the position of senior managing official;
- e) In case of a trust, the identification of beneficial owner(s) shall include identification of the author of the trust, the trustee, the beneficiaries with fifteen percent or more interest in the trust and any other natural person exercising ultimate effective control over the trust through a chain of control or ownership.

7. Sub-contracting in works contracts

In works contracts, including turnkey contracts, contractors shall not be allowed to sub-contract works to any contractor from a country which shares a land border with India unless such contractor is registered with the Competent Authority. The definition of “contractor from a country which shares a land border with India” shall be as in paragraph (5) (c) above. This shall not apply to sub-contracts already awarded on or before the date of the Order (i.e. 23rd July, 2020).

8. Certificate regarding compliance

A certificate shall be taken from bidders in the tender documents regarding their compliance with the Order. If such certificate given by a bidder whose bid is accepted is found to be false, this would be a ground for immediate termination and further legal action in accordance with law.

9. Validity of registration

In respect of tenders, registration should be valid at the time of submission of bids and at the time of acceptance of bids. In respect of supply otherwise than by tender, registration should be valid at the time of placement of order. If the bidder was validly registered at the time of acceptance / placement of order, registration shall not be a relevant consideration during contract execution.

10. Government e-Marketplace

The Government E-Marketplace shall, as soon as possible, require all vendors/ bidders registered with GeM to give a certificate regarding compliance with the Order, and after the date fixed by it, shall remove non-compliant entities from GeM unless/ until they are registered in accordance with this Order.

11. Model Clauses/ Certificates

Model Clauses and Model Certificates which may be inserted in tenders / obtained from Bidders are given at Annexure-2C. While adhering to the substance of the Order, procuring entities are free to appropriately modify the wording of these clauses based on their past experience, local needs etc. without making any reference to Department of Expenditure.

12. Competent Authority and Procedure for Registration

- a) The Competent Authority for the purpose of registration under this Order shall be the Registration Committee constituted by the Department for Promotion of Industry and Internal Trade (DPIIT)⁵⁹.
- b) The Registration Committee shall have the following members¹⁰
 - i. An officer, not below the rank of Joint Secretary, designated for this purpose by DPIIT, who shall be the Chairman;
 - ii. Officers (ordinarily not below the rank of Joint Secretary) representing the Ministry of Home Affairs, Ministry of External Affairs, and of those Departments whose sectors are covered by applications under consideration;
 - iii. Any other officer whose presence is deemed necessary by the Chairman of the Committee.
- c) DPIIT has laid down the method of application, format etc. for such bidders as stated in para (1) (a) above⁶⁰. On receipt of an application seeking registration

⁵⁹ (i) In respect of application of the Order to procurement by/ under State Governments, all functions assigned to DPIIT shall be carried out by the State Government concerned through a specific department or authority designated by it. The composition of the Registration Committee shall be as decided by the State Government and paragraph G above shall not apply. However, the requirement of political and security clearance as per para D shall remain and no registration shall be granted without such clearance.

(ii) Registration granted by State Governments shall be valid only for procurement by the State Government and its agencies/ public enterprises etc. and shall not be valid for procurement in other states or by the Government of India and their agencies/ public enterprises etc.

from a bidder from a country covered by para (1) (a) above the Competent Authority shall first seek political and security clearances from the Ministry of External Affairs and Ministry of Home Affairs, as per guidelines issued from time to time. Registration shall not be given unless political and security clearance have both been received.

d) The Ministry of External Affairs and Ministry of Home Affairs may issue guidelines for internal use regarding the procedure for scrutiny of such applications by them.

e) The decision of the Competent Authority, to register such bidder may be for all kinds of tenders or for a specified type(s) of goods or services, and may be for a specified or unspecified duration of time, as deemed fit. The decision of the Competent Authority shall be final.

f) Registration shall not be granted unless the representatives of the Ministries of Home Affairs and External Affairs on the Committee concur⁶¹.

g) Registration granted by the Competent Authority of the Government of India shall be valid not only for procurement by Central Government and its agencies/ public enterprises etc. but also for procurement by State Governments and their agencies/ public enterprises etc. No fresh registration at the State level shall be required.

h) The Competent Authority is empowered to cancel the registration already granted if it determines that there is sufficient cause. Such cancellation by itself, however, will not affect the execution of contracts already awarded. Pending cancellation, it may also suspend the registration of a bidder, and the bidder shall not be eligible to bid in any further tenders during the period of suspension.

⁶⁰ Notified vide OM No.P-45021/112/2020-PP (BE-II) (E-43780) issued by DPIIT dated 30.03.2021

⁶¹ (i) In respect of application of the Order to procurement by/ under State Governments, all functions assigned to DPIIT shall be carried out by the State Government concerned through a specific department or authority designated by it. The composition of the Registration Committee shall be as decided by the State Government and paragraph G above shall not apply. However, the requirement of political and security clearance as per para D shall remain and no registration shall be granted without such clearance.

(ii) Registration granted by State Governments shall be valid only for procurement by the State Government and its agencies/ public enterprises etc. and shall not be valid for procurement in other states or by the Government of India and their agencies/ public enterprises etc.

- i) For national security reasons, the Competent Authority shall not be required to give reasons for rejection/cancellation of registration of a bidder.
- j) In transitional cases falling under para (2) above, where it is felt that it will not be practicable to exclude bidders from a country which shares a land border with India, a reference seeking permission to consider such bidders shall be made by the procuring entity to the Competent Authority, giving full information and detailed reasons. The Competent Authority shall decide whether such bidders may be considered, and if so shall follow the procedure laid down in the above paras.
- k) Periodic reports on the acceptance/ refusal of registration during the preceding period may be required to be sent to the Cabinet Secretariat. Details will be issued separately in due course by DPIIT.

13. Special Cases [In reference to para (1) (b) above]

- a) Bona fide procurements made through GeM without knowing the country of the bidder till the date fixed by GeM for this purpose, shall not be invalidated by the Order.
- b) Bona fide small procurements, made without knowing the country of the bidder, shall not be invalidated by the Order.
- c) In projects which receive international funding with the approval of the Department of Economic Affairs (DEA), Ministry of Finance, the procurement guidelines applicable to the project shall normally be followed, notwithstanding anything contained in the Order and without reference to the Competent Authority. Exceptions to this shall be decided in consultation with DEA.
- d) The Order shall not apply to procurement by Indian missions and by offices of government agencies/ undertakings located outside India.
- e) The Order will not apply to bidders from those countries (even if sharing a land border with India) to which the Government of India has extended lines of credit or in which the Government of India is engaged in development projects. Updated lists of countries to which lines of credit have been

extended or in which development projects are undertaken are given in the website of the Ministry of External Affairs⁶².

- f) A bidder is permitted to procure raw material, components, sub-assemblies etc. from the vendors from countries which shares a land border with India. Such vendors will not be required to be registered with the Competent Authority, as it is not regarded as “sub-contracting”. However, in case a bidder has proposed to supply finished goods procured directly/ indirectly from the vendors from the countries sharing land border with India, such vendor will be required to be registered with the Competent Authority⁶³.
 - g) Procurement of spare parts and other essential service support like Annual Maintenance Contract (AMC)/ Comprehensive Maintenance Contract (CMC), including consumables for closed systems, from Original Equipment Manufacturers (OEMs) or their authorized agents, shall be exempted from the requirement of registration as mandated under Rule 144(xi) of GFR, 2017 and Public Procurement orders issued in this regard⁶⁴.
14. Clarification to Order (Public Procurement No.1) dated 23rd July 2020⁶⁵
- a) For the purpose of (2)(b) above, “qualified bidders” means only those bidders would otherwise have been qualified for award of the tender after considering all factors including price, if the Order (Public Procurement No.1) dated 23rd July 2020 had not been issued.
 - b) If bidders from such countries would not have qualified for award for reasons unconnected with the said Orders (for example, because they do not meet tender criteria or their price bid is higher or because of the provisions of purchase preference under any other order or rule or any other reason) then there is no need to scrap the tender/ start the process *de novo*.
 - c) The following examples are given to assist in implementation of the Order

⁶² Notified through Order (Public Procurement No. 2) vide F.No.6/18/2019-PPD issued by Department of Expenditure dated 23.07.2020

⁶³ Notified vide OM No. F.18/37/2020-PPD issued by Department of Expenditure dated 08.02.2021

⁶⁴ Notified vide OM No. F.12/1/2021-PPD(Pt.) issued by Department of Expenditure dated 02.03.2021

⁶⁵ Notified through Order (Public Procurement No. 3) vide F.No.6/18/2019-PPD issued by Department of Expenditure dated 24.07.2020

- i. Example 1: Four bids are received in a tender. One of them is from a country which shares a land border with India. The bidder from such country is found to be qualified technically by meeting all prescribed criteria and is also the lowest bidder. In this case, the bidder is qualified for award of the tender, except for the provisions of the Order (Public Procurement No. 1) dated 23rd July. In this case, the tender should be scrapped and fresh tender initiated.
- ii. Example 2: The facts are as in Example 1, but the bidder from such country, though technically qualified is not the lowest because there are other technically qualified bidders whose price is lower. Hence the bidder from such country would not be qualified for award of the tender irrespective of the Order (Public Procurement No. 1) dated 23rd July 2020. In such a case, there is no need to scrap the tender.
- iii. Example 3: The facts are as in Example 1, but the bidder from a country which shares a land border with India, though technically qualified, is not eligible for award due to the application of price preference as per other orders/ rules. In such a case, there is no need to scrap the tender.
- iv. Example 4: Three bids are received in a tender. One of them is a bidder from a country sharing a land border with India. The bidder from such a country does not meet the technical requirements and hence is not qualified. There is no need to scrap the tender.

iv). **Extended Legal Responsibilities Principle**

Procuring authorities must fulfil additional legal obligations in public procurement, over and above mere conformity to the mercantile laws (which even private sector procurements have to comply with). The Constitution of India has certain provisions regarding fundamental rights and public procurement. Courts have, over a time, taking a broader view of Public Procurement as a function of 'State', interpreted these to extend the responsibility and accountability of public procurement Authorities. Courts in India thus exercise additional judicial review (beyond contractual issues) over public procurement in relation to the manner of decision making in respect of fundamental rights, fair play and legality. Similarly, procuring

authorities have also the responsibility and accountability to comply with the laws relating to Governance Issues like Right to Information (RTI) Act and Prevention of Corruption Act, and so on. Details of such extended legal obligations are given in Appendix 2.

v). **Public Accountability Principle**

Procuring authorities are accountable for all the above principles to several statutory and official bodies in the Country – the Legislature and its Committees, Central Vigilance Commission, Comptroller and Auditor General of India, Central Bureau of Investigations and so on– in addition to administrative accountability. As a result, each individual public procurement transaction is liable to be scrutinised independently, in isolation, besides judging the overall outcomes of procurement process over a period of time. Procuring authorities thus have responsibility and accountability for compliance of rules and procedures in each individual procurement transaction besides the achievement of overall procurement outcomes. The procuring authority, at each stage of procurement, must therefore, place on record, in precise terms, the considerations which weighed with it while making the procurement decision from need assessment to fulfilment of need. Such records must be preserved, retained in easily retrievable form and made available to such oversight agencies. The Procuring Entity shall Therefore, maintain and retain audit trails, records and documents generated or received during its procurement proceedings, in chronological order, the files will be stored in an identified place and retrievable for scrutiny whenever needed without wastage of time. The documents and record will include:

- a) documents pertaining to determination of need for procurement;
- b) description of the subject matter of the procurement;
- c) statement of the justification for choice of a procurement method other than open competitive bidding;
- d) documents relating to pre-qualification and registration of bidders, if applicable;
- e) particulars of issue, receipt, opening of the bids and the participating bidders at each stage;

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- f) requests for clarifications and any reply thereof including the clarifications given during pre-bid conferences;
- g) bids evaluated, and documents relating to their evaluation;
- h) contracts and Contract Amendment; and
- i) complaint handling, correspondences with clients, consultants, banks.

Appendix– 2: Legal Aspects of Public Procurement

(Refer Para 1.3 and 1.12)

1.0 Relevant Provisions of the Constitution of India

1.1 Equality for Bidders

Article 19 (1) (g) of the Constitution of India (under Part III – ‘Fundamental Rights’) grants all its citizens the right “to practise any profession or to carry out any occupation, trade or business”. This has been interpreted by courts in a way so as to ensure that every citizen of India has a right to get equal opportunity to bid for and be considered for a public procurement contract. However, this provision does permit stipulation of reasonable eligibility or pre-qualification criteria for the selection of successful bidders in a public procurement contract. Thus a public procurement organisation should be ready to prove in court that no eligible bidder has been denied reasonable and equal opportunity under this article to bid and be considered for the concerned contract.

1.2 Persons Authorised to Make and Execute Contracts on Behalf of Governments

“Part III - FUNDAMENTAL RIGHTS - Right to Freedom
§19 Protection of certain rights regarding freedom of speech, etc.
(1) All citizens shall have the right-
(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India; [and]
(g) to practise any profession, or to carry on any occupation, trade or business.”

“Part XII. - Finance, Property, Contracts and Suits
§299 Contracts:
All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.
Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.”

As per Article 299 (Part XII – Finance, Property, Contracts and Suits) of the Constitution of India, all contracts on behalf of the Union Government or state governments are to be entered into and executed by authorised persons on behalf of the President of India or Governor of the state, respectively. The President of India, Governor of the state and the authorised persons who enter into or execute such contracts are granted immunity from personal liability under this article. That is why, above the signatures of such persons, on the contract documents, a legal phrase “For and on Behalf of the President of India/the Governor of State” is written to signify this fact. In a state government, the persons who are authorised to do so are listed in the DFPR. Provisions of DFPR are expanded upon by various departments by issuing SoPP. Rule 224 (1) & (2), Chapter 8: Contract Management of the GFR, 2017 covers this aspect also

1.3 Other Mercantile Laws

A procurement contract besides being a commercial transaction is also a legal transaction. There are a number of commercial/mercantile laws that are applicable equally to the private sector and public procurement, such as the Indian Contract Act, Sales of Goods Act, Arbitration and Conciliation Act, and so on. Although a public procurement professional is expected to have a working knowledge of the following basic laws relating to procurement, yet he is not expected to be a legal expert. If standard contract forms are used, the procurement official can discharge his normal functions without frequent legal help. In case any complex legal issue arises, or a complex contract beyond the standard contract form is to be drafted, an appropriate legal professional may be associated with the procurement from an early stage.

Salient features of these mercantile laws relating to Procurement are summarised below.

2.0 Salient Features of the Indian Contract Act

2.1 Legal Aspects Governing Public Procurement of Goods - Introduction

A public procurement contract, besides being a commercial transaction, is also a legal transaction. There are a number of laws that may affect various commercial aspects of public procurement contracts. A public procurement professional is

expected to be generally aware of the implications of following basic laws affecting procurement of goods; however, he or she is not expected to be a legal expert. Where appropriate in complex cases, legal advice may be obtained. In other categories of procurement, additional set of laws may be relevant:

- i) The Constitution of India;
- ii) Indian Contracts Act, 1872;
- iii) Sale of Goods Act, 1930;
- iv) Arbitration and Conciliation Act, 1996 read with the Arbitration and Conciliation (Amendment) Act, 2015;
- v) Competition Act, 2002 as amended with Competition (Amendment) Act, 2007;
- vi) Micro, Small and Medium Enterprises Development (MSMED) Act, 2006;
- vii) Information Technology Act, 2000 (IT Act, regarding e-procurement and e-auction, popularly called the Cyber Law);
- viii) Right to Information (RTI) Act 2005;
- ix) Central Vigilance Commission Act, 2003;
- x) Delhi Special Police Establishment Act, 1946 (basis of the Central Bureau of Investigation);
- xi) Prevention of Corruption Act, 1988;
- xii) The Foreign Trade (Development and Regulation) Act, 1992 and the Foreign Trade Policy (EXIM Policy), 2015; Foreign Exchange Management Act (FEMA), 1999 and FEMA (Current Account Transactions) Rules, 2000.

The elements and principles of contract law and the meaning and import of various legal terms used in connection with the contracts are available in the Indian Contract Act, 1872 read with the Sale of Goods Act, 1930. Some of the salient principles relating to contracts are set out briefly in this chapter.

2.2 Elementary Legal Practices

2.2.1 What is a Contract? The proposal or offer when accepted is a promise, a promise and every set of promises forming the consideration for each other is an agreement, and an agreement if made with free consent of parties competent to contract, for a lawful consideration and with a lawful object is a contract.

2.2.2 Proposal or Offer: When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of the other to such act or abstinence, he is said to make a proposal or offer. In a sale or purchase by tender, the tender signed by the tenderer is the proposal. The invitation to tender and instructions to tenderers do not constitute a proposal.

2.2.3 Acceptance of the Proposal: When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise.

2.2.4 What agreements are contracts: An agreement is a contract enforceable by law when the following are satisfied. A defect affecting any of these renders a contract un-enforceable

- i) Competency of the parties;
- ii) Freedom of consent of both parties
- iii) Lawfulness of consideration
- iv) Lawfulness of object

2.3 Competency of Parties

Under law any person who has attained majority and is of sound mind or not debarred by law to which he is subject, may enter into contracts. It, therefore, follows that minors and persons of unsound mind cannot enter into contracts nor can insolvent person do so.

2.3.1 Categories of persons and bodies who are parties to the contract may be broadly sub-divided under the following heads: -

- i) Individuals;
 - ii) Partnerships;
 - iii) Limited Companies;
 - iv) Corporations other than limited companies
- a) **Contracts with Individuals:** Individuals tender either in their own name or in the name and style of their business. If the tender is signed by any person other than the concerned individual, the authority of the person signing the

tender on behalf of another must be verified and a proper power of attorney authorizing such person should be insisted on. In case, a tender is submitted in a business name and if it is a concern of an individual, the constitution of the business and the capacity of the individual must appear on the face of the contract and the tender signed by the individual himself as proprietor or by his duly authorized attorney.

- b) **Contracts with Partnerships:** A partnership is an association of two or more individuals formed for the purpose of doing business jointly under a business name. It is also called a firm. It should be noted that a partnership is not a legal entity by itself, apart from the individuals constituting it. A partner is the implied authority to bind the firm in a contract coming in the purview of the usual business of the firm. The implied authority of a partner, however, does not extend to enter into arbitration agreement on behalf of the firm. While entering into a contract with partnership firm care should be taken to verify the existence of consent of all the partners to the arbitration agreement.
- c) **Contracts with Limited Companies:** Companies are associations of individuals registered under Companies Act in which the liability of the members comprising the association is limited to the extent of the shares held by them in such companies. The company, after its incorporation or registration, is an artificial legal person which has an existence quite distinct and separate from the members of shareholders comprising the same. A company is not empowered to enter into a contract for purposes not covered by its memorandum of association; any such agreement in excess of power entered into the company is void and cannot be enforced. Therefore, in cases of doubt, the company must be asked to produce its memorandum for verification or the position may be verified by an inspection of the memorandum from the office of the Registrar of Companies before entering into a contract. Normally, any one of the Directors of the company is empowered to present the company. Where tenders are signed by persons other than Directors or authorized Managing Agents, it may be necessary to

examine if the person signing the tender is authorized by the company to enter into contracts on its behalf.

- d) **Corporation other than Limited Companies:** Associations of individuals incorporated under statutes such as Trade Union Act, Co- operative Societies Act and Societies Registration Act are also artificial persons in the eye of law and are entitled to enter into such contracts as are authorized by their memorandum of association. If any contract has to be entered into with any one or such corporations or associations, the capacity of such associations to enter into contract should be verified and also the authority of the person coming forward to represent the said Association.

2.4 Consent of both Parties

Two or more persons are said to consent when they agree upon the same thing in the same sense. When two persons dealing with each other have their minds directed to different objects or attach different meanings to the language which they use, there is no agreement. The misunderstanding which is incompatible with agreement, may occur in the following cases: -

- i) When the misunderstanding relates to the identity of the other party to the agreement;
- ii) When it relates to the nature or terms of the transactions;
- iii) When it related to the subject matter of the agreement.

2.5 Free consent of both Parties

2.5.1 The consent is said to be free when it is not caused by coercion, undue influence, fraud, mis-representation or mistake. Consent is said to be so caused when it would not have been given but for the existence of coercion, undue influence, fraud, mis-representation or mistake. When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was caused. A party to a contract, whose consent was caused by fraud or misrepresentation may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in

the position in which he would have been if the representations made had been true.

2.5.2 In case consent to an agreement has been given under a mistake, the position is slightly different. When both the parties to an agreement are under a mistake as to a matter essential to the agreement, the agreement is not voidable but void. When the mistake is unilateral on the part of one party only, the agreement is not void.

2.5.3 Distinction has also to be drawn between a mistake of fact and a mistake of law. A contract is not void because it was caused by a mistake as to any law in force in India but a mistake as to law not in force in India has the same effect as a mistake of fact.

2.6 Consideration

Consideration is something which is advantageous to the promisor or which is onerous or disadvantageous to the promisee. Inadequacy of consideration is, however, not a ground avoiding the contract. But an act, forbearance or promise which is contemplation of law has no value is no consideration and likewise an act or a promise which is illegal or impossible has no value.

2.7 Lawfulness of object

The consideration or object of an agreement is lawful, unless it is forbidden by law or is of such a nature that if permitted, it would defeat the provisions of any law, or is fraudulent or involves or implies injury to the fraudulent property of another or the court regards it as immoral or opposed to public policy. In each of these cases the consideration or object of an agreement is said to be unlawful.

2.8 Communication of an Offer or Proposal

The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. A time is generally provided in the tender forms for submission of the tender. Purchaser is not bound to consider a tender, which is received beyond that time.

2.9 Communication of Acceptance

A date is invariably fixed in tender forms upto which tenders are open for acceptance. A proposal or offer stands revoked by the lapse of time prescribed in such offer for its acceptance. If, therefore, in case it is not possible to decide a tender within the period of validity of the offer as originally made, the consent of the tenderer firm should be obtained to keep the offer open for further period or periods.

2.9.1 The communication of an acceptance is complete as against the proposer or offerer, where it is put in the course of transmission to him, so as to be out of the power of the acceptor, and it is complete as against the acceptor when it comes to the knowledge of the proposer or offerer. The medium of communication in government contracts is generally by post and the acceptance is, therefore, complete as soon as it is posted. So that there might be no possibility of a dispute regarding the date of communication of acceptance, it should be sent to the correct address by some authentic fool proof mode like registered post acknowledgement due, etc.

2.10 Acceptance to be identical with Proposal

If the terms of the tender or the tender, as revised, and modified, are not accepted or if the terms of the offer and the acceptance are not the same, the acceptance remains a mere counter offer and there is no concluded contract. It should, therefore, be ensured that the terms incorporated in the acceptance are not at variance with the offer or the tender and that none of the terms of the tender are left out. In case, uncertain terms are used by the tenderers, clarifications should be obtained before such tenders are considered for acceptance. If it is considered that a counter offer should be made, such counter offer should be carefully drafted, as a contract is to take effect on acceptance thereof.

If the subject matter of the contract is impossible of fulfilment or is in itself in violation of law such contract is void.

2.11 Withdrawal of an Offer or Proposal

A tenderer firm, who is the proposer may withdraw its offer at any time before its acceptance, even though the firm might have offered to keep the offer open for a specified period. It is equally open to the tenderer to revise or modify his offer

before its acceptance. Such withdrawal, revision or modification must reach the accepting authority before the *date and time of opening of tender*.

No legal obligations arise out of such withdrawal or revision or modification of the offer as a simple offer is without a consideration. Where, however, a tenderer agrees to keep his offer open for a specified period for a consideration, such offers cannot be withdrawn before the expiry of the specified date. This would be so where earnest money is deposited by the tenderer in consideration of his being supplied the subsidiary contract and withdrawal of offer by the tenderer before the specified period would entitle the purchaser to forfeit the earnest money.

2.12 Withdrawal of Acceptance

An acceptance can be withdrawn before such acceptance comes to the knowledge of the tenderer. A telegraphic revocation of acceptance, which reaches the tenderer before the letter of acceptance, will be a valid revocation.

2.13 Changes in terms of a concluded Contract

No variation in the terms of a concluded contract can be made without the consent of the parties. While granting extensions or making any other variation, the consent of the contractor must be taken. While extensions are to be granted on an application of the contractor, the letter and spirit of the application should be kept in view in fixing a time for delivery.

2.14 Discharge of Contracts

A contract is discharged or the parties are normally freed from the obligation of a contract by due performance of the terms of the contract. A contract may also be discharged: -

- i) **By mutual agreement:** If neither party has performed the contract, no consideration is required for the release. If a party has performed a part of the contract and has undergone expenses in arranging to fulfil the contract it is necessary for the parties to agree to a reasonable value of the work done as consideration for the value.
- ii) **By breach:** In case a party to a contract breaks some stipulation in the contract which goes to the root of transaction, or destroys the foundation of

the contract or prevents substantial performance of the contract, it discharges the innocent party to proceed further with the performance and entitles him to a right of action for damages and to enforce the remedies for such breach as provided in the contract itself. A breach of contract may, however, be waived.

- iii) **By refusal of a party to perform:** On a promisor's refusal to perform the contract or repudiation thereof even before the arrival of the time for performance, the promisee may at his option treat the repudiation as an immediate breach putting an end to the contract for the future. In such a case the promisee has a right of immediate action for damages.
- iv) **In a contract where there are reciprocal promises:** If one party to the contract prevents the other party from performing the contract, the contract may be put to an end at the instance of the party so prevented and the contract is thereby discharged.

2.15 Stamping of Contracts

Under entry 5 of Schedule I of the Indian Stamp Act, an agreement or memorandum of agreement for or relating to the sale of goods or merchandise exclusively is exempt from payment of stamp duty. (A note or memorandum sent by a Broker or Agent to his principal intimating the purchase or sale on account of such principal is not so exempt from stamp duty.)

The Stamp Act provides that no Stamp Duty shall be chargeable in respect of any instrument executed by or on behalf of or in favour of the Government in cases where but for such exemption Government would be liable to pay the duty chargeable in respect of such instrument. (Cases in which Government would be liable are set out in Section 29 of the Act).

2.16 Authority for Execution of Contracts

As per Clause 1 of Article 299 of the Constitution, the contracts and assurances of property made in the exercise of the executive power of the Union shall be executed on behalf of the President. The words "for and on behalf of the President of India" should Therefore, follow the designation appended below the signature of the officer authorized in this behalf.

Note 1: The various classes of contracts and assurances of property, which may be executed by different authorities, are specified in the Notifications issued by the Ministry of Law from time to time.

Note 2: The powers of various authorities, the conditions under which such powers should be exercised and the general procedure prescribed with regard to various classes of contracts and assurances of property are laid down in Rule 21 of the Delegation of Financial Powers Rules.

2.17 Contract Effective Date

The date of commencement of the obligations under the contract on the parties to a contract is referred as the contract effective date. This date should be invariably indicated in each contract, as per agreed terms and conditions. The Ministries/Departments are advised to set the effective date to be a date after the following:

- i) Date of signing of the contract;
- ii) Furnishing of performance bond in terms of performance security;
- iii) Receipt of Bank Guarantee for advance payment;
- iv) Obtaining Export Licence for supply of stores by seller and confirmation by the buyer;
- v) Receipt of End User's Certificate. The supplier shall provide the End User's Certificate within 30 (thirty) days of the signing of the contract.

3.0 Salient Features of the Indian Arbitration & Conciliation Act 1996

3.1 Indian Arbitration & Conciliation Act 1996 provides for dispute settlement either by a process of conciliation and/or by arbitration. This act is based on a 'United Nation's Commission on International Trade Law Model Arbitration Law' with an object to minimise the supervisory role of courts in the arbitral process and to provide that every final arbitral award is enforced in the same manner, as if it was a decree of the court. It covers both international and domestic arbitration and conciliation.

3.1 Arbitration

Arbitration is one of the oldest methods of settling civil disputes arising out of and in the course of performance of the contract between two or more persons by reference of the dispute to an independent and impartial third person called the arbitrator, instead of litigating the matter in the usual way through the courts. It saves time and expense, avoids unnecessary technicalities and, at the same time, ensures “substantial justice within limits of the law”.

3.2 Arbitrator, Arbitration and Arbitral Award

The person or persons appointed to determine differences and disputes are called the arbitrator or arbitral tribunal. The proceeding before him is called arbitration proceedings. The decision is called an Award. For the purpose of Law of Limitations, The Arbitration for a particular dispute is deemed to have commenced on the date, on which a request for arbitration is received by the respondent.

3.3 Arbitration Agreement

It is an agreement by the parties to submit to arbitration all or certain disputes, which have arisen or which may arise between them, in respect of a defined legal relationship, whether contractual or non-contractual. The dispute resolution method of arbitration, as per the Arbitration and Conciliation Act, can be invoked only if there is an arbitration agreement (in the form of an arbitration clause or a separate arbitration agreement) in the contract. If there is such an agreement, courts are barred from directly entertaining any litigation in respect of such contracts, and are bound instead to refer the parties to arbitration.

3.4 Appointment and Composition of Arbitral Tribunal

Both parties can mutually agree on the number of arbitrators (which cannot be an even number) to be appointed. In case there is no agreement, a single (sole) arbitrator may be appointed. The parties can mutually agree on a procedure for appointing the arbitrator or arbitrators, or else in case of arbitration with three arbitrators, each party will appoint one arbitrator and the two appointed arbitrators will appoint the third arbitrator, who will act as a presiding arbitrator. If one party fails to appoint an arbitrator within 30 (thirty) days, or if the two appointed arbitrators fail to agree on the third arbitrator, then the court may appoint any person or institution as arbitrator. In case of an international commercial dispute, the application for

appointment of arbitrator has to be made to the Chief Justice of India. In case of other domestic disputes, the application has to be made to the Chief Justice of the High Court within whose jurisdiction the parties are situated.

3.5 Challenge to Appointment of Arbitrator

An arbitrator is expected to be independent and impartial. If there are some circumstances due to which his independence or impartiality can be challenged, he must disclose the circumstances before his appointment. The appointment of an arbitrator cannot be challenged on any ground, except when there is justifiable doubt as to the arbitrator's independence or impartiality or when he does not possess the qualifications for the arbitrator agreed to by the parties. The challenge to appointment has to be decided by the arbitrator himself. If he does not accept the challenge, the arbitration can continue and the arbitrator can make the arbitral award. However, in such a case, application for setting aside the arbitral award can be made to the court, after the award is made by the arbitrator. Thus the other party cannot stall further arbitration proceedings by rushing to court.

3.6 Conduct of Arbitral Proceedings

The parties are free to agree on the procedure to be followed for conducting proceedings, location, language of hearings and written proceedings. Failing any agreement, the arbitral tribunal may decide themselves on these aspects. The parties shall be treated with equality and each party shall be given a full opportunity to present its case. The arbitral tribunal shall observe the rules of natural justice but is bound neither by Civil Procedure Code 1908 nor by Indian Evidence Act 1872. Limitation Act, 1963 is applicable from the date of commencement of arbitral proceedings. Arbitral tribunals have powers to do the following:

- i) Determine admissibility, relevance, materiality and weight of any evidence;
- ii) Decide on their own jurisdiction;
- iii) Decide on interim measures;
- iv) Termination of proceedings; and
- v) Seek court assistance in taking evidence.

3.7 Arbitral Award

The decision of the arbitral tribunal is termed as 'arbitral award'. The decision of arbitral tribunal shall be by majority. The arbitral award shall be in writing, mentioning the place and date, and signed by the members of the tribunal. It must state the reasons for the award. A copy of the award should be given to each party. The tribunal can make interim award also. An arbitral award is enforceable in the same manner as if it were a decree of the court.

3.8 Recourse against Arbitral Award

Recourse to a court against an arbitration award can be made by an application (within three months from the date of the arbitral award), only on the grounds specified in the act, that is, the party was under some incapacity; arbitration agreement was not valid; proper opportunity was not given to present the case; award deal with disputes not falling within the terms of reference of arbitrator; composition of the arbitral tribunal is not as per agreement of parties; subject matter of dispute is not capable of settlement through arbitration under the law or the arbitral award is in conflict with the public policy.

3.9 Conciliation

This is a new concept added in the Act for settlement of disputes. The party initiating conciliation shall send a written invitation to the other party to conciliate and proceedings shall commence when the other party accepts the initiations to conciliation. The parties may agree on the name of a sole conciliator or each party may appoint one conciliator. The conciliation shall assist the parties to reach an amicable settlement of their dispute. When the parties sign the settlement agreement, it shall be final and binding on the parties. The conciliator shall authenticate the settlement agreement and furnish a copy thereof to each party. This process has not yet come into a common use.

3.10 Changes introduced by the Arbitration and Conciliation (Amendment) Act, 2015

- i) Independence, Disqualification and Obligations of arbitrators at the time of appointment
 - a) **Independence, Impartiality and Accountability of Arbitrators:** A fixed fee structure ensures the independence of the arbitral tribunal and also provides a

reasonable cost estimate to the parties entering into arbitration. The Amendment Act in the Fourth Schedule prescribes the model fees for arbitrators and the High Courts have been assigned the responsibility of framing the rules for determination of the fees and the manner of its payment. The model fee varies from Rs 45,000 (Rupees forty-five thousands) to Rs 30 (Rupees thirty) Lakhs for various slabs of disputed value from Rupees five Lakh to above Rs 20 (Rupees Twenty) Crore (with a sole arbitrator entitled to 25% (twenty five percent) extra above the model fee) it is clarified that such fees shall not be applicable in International Commercial Arbitration and in cases where parties have agreed for determination of fees as per the rules of an arbitral institution.

- b) **Disqualification from appointment:** A long and exhaustive list of specific circumstances which shall act as a bar against any person from being appointed as an arbitrator in a dispute, have been enumerated in the seventh schedule. However, the parties to the dispute have been given the opportunity, after the dispute has arisen, to waive the applicability of the seventh schedule, by mutual written agreement, if they so deem fit. Especially of interest in Public Procurement is disqualification of past or present employees, consultant, advisors or other related business relationship not only with the Procuring Entity but also with any affiliated entity thereof. Thus the earlier practice of appointing serving officers of Procuring Entity as arbitrator is no more legal.
- c) **Disclosures:** An arbitrator who is approached for appointment is obligated to disclose as per Sixth Schedule of the Act. The declaration as per a set format removes any ambiguity and ensures uniformity:
1. **conflict of Interest** the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality as per fifth schedule to the Act for arbitrator.
 2. **Time constraints:** An arbitrator shall disclose all circumstances which may affect his ability to deliver an award within 12 (twelve) months.

ii) Fast-tracking Arbitration in India

a) **Award within 12 (twelve) months:** The arbitral tribunal is statutorily obligated to deliver an award within 12 (twelve) months from the date when arbitral tribunal enters into reference. The arbitral tribunal is said to have entered upon the reference on the date on which the arbitrator(s) have received notice of their appointment. The award can be delayed by a maximum period of six months only under the special circumstances where all parties give their consent to such extension of time. Where the award is not made out within the statutory period the mandate of arbitrators shall automatically terminate. It is open for the courts to extend the time period for making an award upon receipt of an application by any of the parties. Such extension is to be granted only for sufficient cause and the court in its discretion may impose the following penalties depending on the facts and circumstances of the case:

1. Reduce the fees of arbitrators by up to 5% for each month of delay.
2. Substitute one or all the arbitrators.
3. Impose actual or exemplary costs on any of the parties.

b) **Oral arguments to be held on a day-to-day basis:** Oral arguments as far as possible shall be heard by the arbitral tribunal on a day to day basis and no adjournments shall be granted without sufficient cause. Provision for imposition of exemplary cost on the party seeking adjournment without sufficient cause has also been made.

c) **Fast Track Procedure:** The parties to arbitration may choose to opt for a new fast track procedure either before or after the commencement of the arbitration. The award in fast track arbitration is to be made out within six months. Where the Arbitral Tribunal delivers the award within a period of six months the arbitral tribunal shall be entitled to additional fees. The quantum of such additional fees shall be determined by the parties. The salient features of the fast track arbitration are:

1. Dispute is to be decided based on written pleadings only.
2. Arbitral Tribunal shall have the power to call for clarifications in addition to the written pleadings where it deems necessary.

3. Oral hearing maybe held only if all the parties make a request or if the arbitral tribunal considers it necessary.
 4. The parties are free to decide the fees of the arbitrator(s).
- d) **Appointment within 60 (sixty) days:** Whenever an application for appointment of Arbitrator(s) is moved before a court such application shall be disposed of as expeditiously as possible and an endeavour shall be made to dispose of the matter within a period of sixty days from the date of service of notice on the opposite party. The court while appointing arbitrators shall confine itself to the examination of the existence of an arbitration agreement.

3.10.1 Procedural and Jurisprudence simplified

- a) **Arbitration to commence within 90 (ninety) days of interim relief:** Where the court grants interim relief before the commencement of arbitration, the arbitration must commence within 90 (ninety) days from such order of interim relief. The court however has been given the authority to extend the period within which the arbitration must commence, if it deems such extension necessary. The Act prohibits courts from entertaining any application for interim relief once the arbitration has entered into reference, unless the court finds that circumstances exist which may not render the remedy provided under section 17 efficacious.
- b) **Powers of Interim Relief in Section 9 also to Arbitral Tribunal:** The parties to arbitration can now directly approach the arbitral tribunal for seeking interim relief on the same grounds as were available to the parties under section 9 of the previous act. Further, the tribunal has now been granted the powers of a court while making interim awards in the proceedings before it.
- c) **Arbitral tribunal not bound to rule in accordance with terms of the contract:** The arbitral tribunal was previously bound to deliver an award in accordance with the terms of the agreement and was required to take into consideration the 'usages of the trade applicable to the transaction'. Vide the Amendment the arbitral tribunal has been freed of the obligation to only rule in accordance with the terms of the agreement. The arbitral

tribunal is only required to take the agreement into account while delivering its award and is free to deviate from the terms of the agreement if the circumstances so warrant.

d) Act made applicable on International Commercial Arbitration with even seat outside India: Part I of the act has been made applicable for limited purpose (listed below) on International Commercial Arbitrations even in instances where the seat of the arbitration is outside India, however giving freedom to exclude the applicability the Act by entering into an agreement to this effect:

1. Seeking interim relief from courts [section 9]
2. Seeking the assistance of the court in taking evidence [section 27]
3. Appealing against the order of a court where the court refuses to refer the parties to arbitration. [section 37(1) (a)]
4. Restricting the right to second appeal and preserving the right of parties to approach the Supreme Court in appeal. [section 37 (3)]

4.0 Salient Features of Competition Act, 2002 relating to Anti-competitive Practices

- i) The **Preamble of the Competition Act, 2002**, provides for the establishment of a Commission keeping in view of the economic development of the country to promote and sustain competition in markets; prevent practices having adverse effect on competition; protect consumer interest; and ensure freedom of trade carried on by participants in Indian markets.
- ii) The Act was amended by **Competition (Amendment) Act, 2007** and again by Competition (Amendment Act), 2009.
- iii) In India, **Competition Commission of India (“CCI”)**, formulated under the Competition Act is a quasi-judicial and regulatory body entrusted with the task enforcement of the Competition Act, 2002. Apart from specific functions under the Competition Act, 2002 the CCI also has extra-territorial jurisdiction, inquiry into anticompetitive conduct, sector-specific regulatory work, competition advocacy,

power of appointment of professional and experts, and procedure for investigation (in terms of regulating its own procedure).

- iv) Section 8 dealing with **composition of Commission** provides for a chairperson and not less than two and not more than six members which are to be appointed by Central Government. The CCI is vested with inquisitorial, investigative, regulatory, adjudicatory and also advisory jurisdiction. Vast powers have been given to the Commission and under Section 64, the Commission can frame regulations.
- v) The **Competition Appellate Tribunal (COMPAT)** is another body entrusted with the responsibility of hearing and disposing of appeals against any direction or decision or order of the CCI. It also adjudicates on compensation claims arising from the findings of the CCI or its own findings on appeals against the CCI orders and passes orders on the recovery of compensation.
- vi) Any person aggrieved by the order or decision of the CCI may prefer an **appeal** to the Competition Appellate Tribunal ('COMPAT') within 60 (sixty) days from the date of communication of such order or decision. The second and final appeal under Section 53T lies before the Supreme Court of India from the orders of the COMPAT within a period of 60 (sixty) days from the date of communication of the order by the COMPAT.
- vii) CCI may **initiate an inquiry**:
 - a) On its own motion on the basis of information and knowledge in its possession, or
 - b) On receipt of any information, in such manner and accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association, or
 - c) On receipt of a reference from the Central Government or a State Government or a statutory authority
- viii) The Act provides for Director General office as a separate investigative wing to assist the CCI. The DG looks into the complaints received from the CCI and submits all findings to it. DG is solely responsible for making enquiries, for examining documents and for making investigations into complaints. The DG is vested under the Act with powers of summoning of witnesses, examining them on

- oath, requiring the discovery and production of documents, receiving evidence on affidavits, issuing commissions for the examination of witnesses etc.
- ix) The Act in Section 49 (3) lays down the advocacy function of CCI and lays down that the CCI shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues. Section 32 of the Act grants the CCI extra-territorial jurisdiction over anticompetitive conduct which has an appreciable adverse effect on competition within India. Any anticompetitive activity taking place outside India but having an appreciable adverse effect on competition within India shall be subject to the application of the Competition Act.
- x) Under s. 21 of the Act, any statutory authority can suo motto or on request of a party in the course of a proceeding before it can make a reference to CCI. CCI shall give its opinion within sixty days of receipt of such reference by such statutory authority. Under the provisions of the Act, the authority which made reference shall consider the opinion of the Commission and thereafter, give its findings recording reasons on the issues referred to in the said opinion by CCI. Section 21A in the same language provides for such reference by CCI to any statutory authority.
- xi) The key provisions of the Competition Act include:
- a) Section 3 of the Competition Act, 2002 dealing with anti-competitive agreements;
 - b) Section 4 of the Competition Act, 2002 which discusses abuse of dominance;
 - c) Section 5 and 6 of the Competition Act, 2002 dealing with the regulation of combinations.
- xii) The term 'agreement', has been defined broadly in the Competition Act. It extends to a mere 'arrangement', 'understanding' or 'action in concert', none of which need be in writing or enforceable by law.
- xiii) Section 3(1) of the Competition Act lays down that no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India. The Act prohibits an anti-competitive agreement and declares that such an agreement shall be void.

- xiv) Section 3(3) of the Competition Act deals with the horizontal agreements as it covers the agreements between entities engaged in identical or similar trade of goods or provision of services. It also includes cartels. The section covers:
 - a) Agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise
 - b) Practice carried on by any association of enterprises or association of persons
 - c) Decision taken by any association of enterprises or association of persons
- xv) Section 3(3) of the Competition Act enlists four broad classifications of horizontal agreements which are presumed to cause an appreciable adverse effect on competition (AAEC) in India.
 - a) Agreements regarding Prices
 - b) Agreements regarding Quantity/ Quality
 - c) Market Allocation
 - d) Bid Rigging
- xvi) These four horizontal agreements are not presumed to have appreciable adverse effect on competition and excluded from the provisions of Section 3(3) of the Competition Act, 2002 provided they are entered into by way of joint ventures and increase efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.
- xvii) Cartels, by their very nature are secretive and thus it is difficult to find the direct evidence of their presence. The orders of the CCI clearly point that CCI relies on circumstantial evidence, both economic and conduct-based, to reach its decision on the existence of a cartel agreement.
- xviii) The Act provides a definition for bid rigging and it covers agreements having effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding:
 - a) Collusive bidding: Agreement between firms to divide the market, set prices or limit production – involves, kickbacks and misrepresentation of independence
 - b) Bid Rotation
 - c) Bid Suppression
 - d) Complementary Bidding
 - e) Subcontracting arrangements
 - f) Market Allocation

- xix) The Act gives wide discretion to CCI to frame the remedies to overcome the anticompetitive situation:
- a) Declare Anticompetitive Agreements Void
 - b) Impose Heavy Penalties
 - 1. Penalty can be up to 10% (ten percent) of the average turnover for the last three preceding financial years upon each of such persons or enterprises which are parties to bid-rigging
 - 2. Cartel, a penalty of up to three times of its profit for each year of the continuance of such agreement or 10% (ten percent) of its turnover for each year of the continuance of such agreement, whichever is higher
 - c) Order the parties to Cease & Desist
 - d) Modification of agreements
 - e) Remedy Damage to reputation
 - f) Fix Individual Liability
 - g) Grant Interim orders
 - h) Any other order as CCI deems fit
- xx) Who can file the information: Raising issues regarding anti-competitive behaviour for action by CCI under the act is called filing the information:
- a) Any person, consumer or their association or trade association can file information before the Commission.
 - b) Central Govt. or a State Govt. or a statutory authority can also make a reference to the Commission for making an inquiry.
 - c) "Person" includes an individual, HUF, firm, company, local authority, cooperative or any artificial juridical person.
- xxi) What are the issues on which information can be filed?
- a) The information can be filed on the issues like anti-competitive agreements and abuse of dominant position or a combination.
 - b) Class of consumers.
- xxii) The fee -
- a) Rupees 5000/- (Five thousand only) in case of individual, or Hindu undivided family (HUF), or Non Government Organisation (NGO), or Consumer Association, or Co-operative Society, or Trust, duly registered under the respective Acts,

- b) Rupees 20,000/-(twenty thousand only) in case of firms, companies having turnover in the preceding year upto Rupees one Crores, and
- c) Rupees 50,000/- (fifty thousand only) in case not covered under clause (a) or (b) above.

5.0 Salient Features of the Whistle Blowers Protection Act, 2011 and the Whistle Blowers Protection (Amendment) Act, 2015

- i) The Act seeks to protect whistleblowers, i.e. persons making a public interest disclosure related to an act of corruption, misuse of power, or criminal offence by a public servant.
- ii) Any public servant or any other person including a non-governmental organization may make such a disclosure to the designated agencies i.e. Central or State Vigilance Commission. The Time Limit for making any complaint or disclosure to the Competent Authority is seven years from the date on which the action complained against is alleged to have taken place.
- iii) The Designated Agency cannot entertain any disclosure relating to any inquiry ordered under the Public Servants (Inquiries) Act, 1850 and Commissions of Inquiry Act, 1952.
- iv) Similarly, the Amendment Act, 2015, The Bill prohibits the reporting of a corruption related disclosure if it falls under any 10 (ten) categories including information related to:
 - a) The sovereignty, strategic, scientific or economic interests of India, or the incitement of an offence
 - b) Records of deliberations of the Council of Ministers
 - c) That which is forbidden to be published by a court or if it may result in contempt of court;
 - d) A breach of privilege of legislatures;
 - e) Commercial confidence, trade secrets, intellectual property (if it harms a third party);
 - f) That relayed in a fiduciary capacity;
 - g) That received from a foreign government;
 - h) That which could endanger a person's safety etc.;
 - i) That which would impede an investigation etc.;

- j) Personal matters or invasion of privacy.
However, if information related to (ii), (v), (vi), and (x) is available under the Right to Information Act, 2005, then it can be disclosed under the Act.
- v) Any public interest disclosure received by a Competent Authority will be referred to a government authorised authority if it falls under any of the above prohibited categories. This authority will take a decision on the matter, which will be binding.
- vi) The Identity of the Complainant must be included in the Complaint or the Disclosure. However the Designated Agency shall conceal the identity of the complainant unless the complainant himself has revealed his identity to any other office or authority while making public interest disclosure or in his complaint or otherwise. However, the Designated Agency can reveal the identity of the complainant in circumstances where it becomes inevitable or extremely necessary for the purposes of the enquiry.
- vii) The Designated Agency may, with the prior written consent of the complainant, reveal the identity of the complainant to such office or organization where it becomes necessary to do so. If the complainant does not agree to his name being revealed, in that case, the complainant shall provide all documentary evidence in support of his complaint to the Designated Agency.
- viii) Any person who negligently or with mala fide reveals the identity of the complainant shall be punished with imprisonment up to three years and fine not exceeding fifty thousand rupees.
- ix) Similarly any disclosure made with mala fide and knowingly that it was false or misleading shall be punished with imprisonment up to two years and fine not exceeding thirty thousand rupees.
- x) After receipt of the report or comments relating to the complaint, if the Designated Agency is of the opinion that such comments or report reveals either wilful misuse of power or wilful misuse of discretion or substantiates allegations of corruption, it shall recommend to the public authority to take appropriate corrective measures such as initiating proceedings against the concerned public servant or other administrative and corrective steps. However, in case the public authority does not agree with the recommendation of the Designated Agency, it shall record the reasons for such disagreement.

- xi) While dealing with any such inquiry, the Designated Agency shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908 in respect of matters like receiving evidence, issuing commissions, discovery and production of any document etc. Also, every proceeding before the Designated Agency shall be deemed to be a judicial proceeding under the Code of Criminal Procedure, 1973 and Indian Penal Code.
- xii) No obligation to maintain secrecy or other restrictions upon the disclosure of information shall be claimed by any Public Servant in the proceedings before the Designated Agency.
- xiii) But, no person is required to furnish any information in the inquiry under this act if such information falls under the 10 (ten) categories mentioned before.
- xiv) It shall be the responsibility of the Central Government to ensure that no person who has made a disclosure is victimised on the ground that such person had made a disclosure under this act.
- xv) If any person is victimised or likely to be victimised on the above-mentioned ground, he may contact the Designated Agency and the Designated Agency may pass appropriate directions in this respect. The Designated Agency can even restore status quo ante with respect to the Public Servant who has made a disclosure. Also, the Designated Agency can pass directions to protect such complainant.
- xvi) If an offence under this act has been committed by any Head of the Department unless he proves that the offence was committed without his knowledge or that he exercised all due diligence in this respect.
- xvii) This Act extends to all the Companies as well. When any offence under this act has been committed by a company, every person who at the time of the offence was responsible for the conduct of the business of the company shall be deemed to be guilty of the offence unless he proves that the offence was committed without his knowledge or that he exercised all due diligence in this respect.
- xviii) No court can take cognizance of any offence under this act save on a complaint made by the Designated Agency. No court inferior to that of a Chief Metropolitan Magistrate or a Chief Judicial Magistrate shall try any offence under this act. The High Court shall be the appellate authority in this respect.

Appendix 3: Electronic Procurement (e-Procurement)

(Refer Para 4.5)

1.0 Electronic procurement (e-procurement)

E-procurement is the use of information and communication technology (specially the internet) by the buyer in conducting procurement processes with the vendors/contractors for the acquisition of goods (supplies), works and services aimed at open, non-discriminatory and efficient procurement through transparent procedures. The Procurement Policy Division, Department of Expenditure, MoF, has vide Office Memorandum no: 10/3/2012-PPC dated January 9, 2014⁶⁶ prescribed mandatory procurement of tenders through the e-procurement mode for tenders valued above Rupees two lakh. (as per GFR, 2017, now this is mandatory for all tenders)

2.0 Service Provider

A service provider is engaged to provide an e-procurement system covering the following:

- i) All steps involved, starting from hosting of tenders to determination of techno-commercially acceptable lowest bidder, are covered;
- ii) The system archives the information and generates reports required for the management information system/decision support system;
- iii) A helpdesk is available for online and offline support to different stakeholders;
- iv) The system arranges and updates the Digital Signature Certificate (DSC) for departmental users; and
- v) Different documents, formats, and so on, for the e-procurement systems are available.

3.0 The e-Procurement Process: In e-procurement, all processes of tendering have the same content as in normal tendering and are executed, once the necessary changes have been made, online by using the DSC as follows:

⁶⁶ http://eprocure.gov.in/cppp/sites/default/files/instruction_contents/INST_DOC_NO_1/eProcurement0901208.4.pdf

- i) **Communications:** Wherever traditional procedures refer to written communication and documents, the corresponding process in e-procurement would be handled either fully online by way of uploading/downloading/emails or automatically generated SMSs or else partly online and partly offline submission. It is advisable to move to full submissions online. More details would be available from e-procurement service provider's portal. In e-procurement, the tender fee, EMD and documents supporting exemption from such payments are submitted in paper form to the authority nominated in the NIT, but scanned copies are to be uploaded – without which the bid may not get opened. In future, such payments may be allowed online also;
- ii) **Publishing of tenders:** Tenders are published on the e-procurement portal by authorised executives of Procuring Entity with DSC. After the creation of the tender, a unique "tender id" is automatically generated by the system. While creating/publishing the tender, the "bid openers" are identified – four officers (two from the Procuring Entity and two from the associated/integrated Finance) with a provision that tenders may be opened by any two of the four officers. As in case of normal tenders, NITs are also posted on the Procuring Entity website. The downloading of the tender may start immediately after e-publication of NIT and can continue till the last date and time of bid submission. The bid submission will start from the next day of e-publication of NIT. In case of limited and PAC/ single tenders, information should also be sent to target vendors/contractors through SMS/email by the portal;
- iii) **Registration of bidders on portal:** In order to submit the bid, bidders have to register themselves online, as a one-time activity, on the e-procurement portal with a valid DSC. The registration should be in the name of the bidder, whereas DSC holder may be either the bidder himself or a duly authorised person. The bidders will have to accept, unconditionally, the online user portal agreement which contains all the terms and conditions of NIT including commercial and general terms and conditions and other conditions, if any, along with an online undertaking in support of the authenticity of the declarations regarding facts, figures, information and documents furnished by the bidder online;

- iv) **Bid submission:** The bidders will submit their techno-commercial bids and price bids online. No conditional bid shall be allowed/ accepted. Bidders will have to upload scanned copies of various documents required for eligibility and all other documents as specified in NIT, techno-commercial bid in cover-I, and price bid in cover-II. To enable system generated techno-commercial and price comparative statements, such statements should be asked to be submitted in Excel formats. The bidder will have to give an undertaking online that if the information/declaration/scanned documents furnished in respect of eligibility criteria are found to be wrong or misleading at any stage, they will be liable to punitive action. EMD and tender fee (demand draft/banker's cheque/pay order) shall be submitted in the electronic format online (by scanning) while uploading the bid. This submission shall mean that EMD and tender fee are received electronically. However, for the purpose of realisation, the bidder shall send the demand draft/banker's cheque/pay order in original to the designated officer through post or by hand so as to reach by the time of tender opening. In case of exemption of EMD, the scanned copy of the document in support of exemption will have to be uploaded by the bidder during bid submission;
- v) **Corrigendum, clarifications, modifications and withdrawal of bids:** All these steps are also carried out online mutatis mutandis the normal tendering process;
- vi) **Bid opening:** Both the techno-commercial and price bids are opened online by the bid openers mentioned at the time of creation of the tender online. Relevant bidders can simultaneously take part in bid opening online and can see the resultant bids of all bidders. The system automatically generates a technical scrutiny report and commercial scrutiny report in case of the techno-commercial bid opening and a price comparative statement in case of price bid opening which can also be seen by participating bidders online. Bid openers download the bids and the reports/statements and sign them for further processing. In case of opening of the price bid, the date and time of opening is uploaded on the portal and shortlisted firms are also informed

through system generated emails and SMS alerts – after shortlisting of the techno-commercially acceptable bidders;

- vii) **Shortfall document:** Any document not enclosed by the bidder can be asked for, as in case of the traditional tender, by the purchaser and submitted by the bidder online, provided it does not vitiate the tendering process;
- viii) **Evaluation of techno-commercial and price bids:** This is done offline in the same manner as in the normal tendering process, based on system generated reports and comparative statements;
- ix) **Award of contract:** Award of the contract is done offline and a scanned copy is uploaded on the portal. More needs to be done in this regard. The information and the manner of disclosure in this regard must conform to Section 4(1) (b), 4(2) and 4(3) of the RTI Act to enhance transparency and also to reduce the need for filing individual RTI applications. Therefore, the award must be published in a searchable format and be linked to its NIT. Please see Para 8.5 for further details; and
- x) **Return of EMD:** EMD furnished by all unsuccessful bidders should be returned through an e-payment system without interest, at the earliest, after the expiry of the final tender validity period but not later than 30 (thirty) days after conclusion of the contract. EMD of the successful bidder should be returned after receipt of performance security as called for in the contract.

