

practices, either directly or indirectly, at any stage during the procurement process or during execution of resultant contracts:

- i) **“Corrupt practice”**: making offers, solicitation or acceptance of bribe, rewards or gifts or any material benefit, in exchange for an unfair advantage in the procurement process or to otherwise influence the procurement process or contract execution;
- ii) **“Fraudulent practice”**: any omission or misrepresentation that may mislead or attempt to mislead so that financial or other benefits may be obtained or an obligation avoided. This includes making false declaration or providing false information for participation in a tender process or to secure a contract or in execution of the contract;
- iii) **“Anti-competitive practice”**: any collusion, bid rigging or anti-competitive arrangement, or any other practice coming under the purview of The Competition Act, 2002, between two or more bidders, with or without the knowledge of the procuring entity, that may impair the transparency, fairness and the progress of the procurement process or to establish bid prices at artificial, non-competitive levels;
- iv) **“Coercive practice”**: harming or threatening to harm, persons or their property to influence their participation in the procurement process or affect the execution of a contract;
- v) **“Conflict of interest”**: participation by a bidding firm or any of its affiliates that are either involved in the consultancy contract to which this procurement is linked; or if they are part of more than one bid in the procurement; or if the bidding firm or their personnel have relationships or financial or business transactions with any official of procuring entity who are directly or indirectly related to tender or execution process of contract; or improper use of information obtained by the (prospective) bidder from the procuring entity with an intent to gain unfair advantage in the procurement process or for personal gain; and
- vi) **“Obstructive practice”**: materially impede the procuring entity’s investigation into allegations of one or more of the above mentioned prohibited practices either by deliberately destroying, falsifying, altering; or by concealing of

evidence material to the investigation; or by making false statements to investigators and/ or by threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation; or by impeding the procuring entity's rights of audit or access to information;

7.2.3 Obligations for Proactive Disclosures⁴⁹

- i) Procuring authorities as well as bidders, contractors and consultants, are obliged under Code of Integrity for Public Procurement to suo-moto proactively declares any conflicts of interest (coming under the definition mentioned above – pre-existing or as and as soon as these arise at any stage) in any procurement process or execution of contract. Failure to do so would amount to violation of this code of integrity; and
- ii) Any bidder must declare, whether asked or not in a bid document, any previous transgressions of such a code of integrity with any entity in any country during the last three years or of being debarred by any other procuring entity. Failure to do so would amount to violation of this code of integrity.
- iii) To encourage voluntary disclosures, such declarations would not mean automatic disqualification for the bidder making such declarations. The declared conflict of interest may be evaluated and mitigation steps, if possible, may be taken by the procuring entity. Similarly voluntary reporting of previous transgressions of Code of Integrity elsewhere may be evaluated and barring cases of various grades of debarment, an alert watch may be kept on the bidder's actions in the tender and subsequent contract.

7.2.4 Punitive Provisions⁵⁰

Without prejudice to and in addition to the rights of the procuring entity to other penal provisions as per the bid documents or contract, if the procuring entity comes to a conclusion that a (prospective) bidder/ contractor directly or through an agent, has violated this code of integrity in competing for the contract or in executing a contract,

⁴⁹ Rule 175(1) (ii & ii), GFR, 2017

⁵⁰ Rule 175(2), GFR, 2017

the procuring entity may take appropriate measures including one or more of the following:

- i) If his bids are under consideration in any procurement
 - a) Forfeiture or encashment of bid security;
 - b) calling off of any pre-contract negotiations; and
 - c) rejection and exclusion of the bidder from the procurement process
- ii) If a contract has already been awarded
 - a) Cancellation of the relevant contract and recovery of compensation for loss incurred by the procuring entity;
 - b) Forfeiture or encashment of any other security or bond relating to the procurement;
 - c) Recovery of payments including advance payments, if any, made by the procuring entity along with interest thereon at the prevailing rate;
- iii) Provisions in addition to above:
 - a) Removal from the list of enlisted contractors and banning/ debarment of the bidder from participation in future procurements of the procuring entity for a period not less than one year;
 - b) In case of anti-competitive practices, information for further processing may be filed under a signature of the Joint Secretary level officer, with the Competition Commission of India;
 - c) Initiation of suitable disciplinary or criminal proceedings against any individual or staff found responsible.

7.2.5 Conduct of Public Servants in Public Procurement - Risks and Mitigations	
<i>Risk</i>	<i>Mitigation</i>
Hospitality: Hospitality (including facilitation of travel, lodging, boarding and entertainment during official or unofficial programs) from suppliers may tend to cross the limits of ethical/ occasional/ routine/ modest/ normal business practice. Officials sent to firm's premises for inspections/ meetings may mistakenly presume entitlement to hospitality from the firm,	Hospitality must never be solicited, directly or indirectly. The frequency, scale and number of officials availing hospitality should not be allowed to identify the recipient in a public way with any particular contractor, supplier or service provider or raise doubts about its neutrality. It should not involve significant travel, overnight accommodation or trips abroad. Particular care should be taken in relation to offers of hospitality from firms (say participating in current or imminent tenders or its

7.2.5 Conduct of Public Servants in Public Procurement - Risks and Mitigations	
<i>Risk</i>	<i>Mitigation</i>
<p>even if other arrangements are available at the location.</p> <p>In the contracts signed with suppliers by some of the Ministries/ Departments have clauses of pre-inspection at the firm's premises, where there is a provision that the suppliers or the vendors will pay for the travel, stay, hospitality and other expenses of the Inspecting officials.</p>	<p>execution) who stand to derive a personal or commercial benefit from their relationship with the recipient.</p> <p>This is not in keeping with need to safeguard the independence of the inspecting teams. Such provisions in contracts need to be discouraged, so that Inspections are not compromised. Necessary steps maybe taken to strictly avoid such provisions in the contracts with suppliers/ vendors⁵¹.</p>
<p>Gifts: Gifts from suppliers may tend to cross the limits of ethical/ occasional/ routine/ modest/ normal business practice, especially on festive season. Since the value of the gift may not be known to the recipient, it may cause inadvertent violation of Conduct rules.</p>	<p>Gifts must never be solicited, directly or indirectly. An official should not accept and retain gifts more valuable than the limit as laid down in the conduct rules. Cash, gift cheques or any vouchers that may be exchanged for cash may not be accepted regardless of the amount. Particular care should be taken in relation to gifts from firms (say participating in current or imminent tenders or its execution) who stand to derive a personal or commercial benefit from their relationship with the recipient. Any gift received inadvertently in violation of above, must immediately either be returned or else reported and deposited in Toshakhana/ Treasury.</p>
<p>Private Purchases from Official Suppliers: Procuring Officials may mistakenly consider it innocuous to seek discounts in private procurements from suppliers having official dealings or its associates (especially from Rate Contract holders).</p>	<p>Officials involved in Public Procurement must never indulge in any non-official pecuniary transaction with the contractors, suppliers or service providers with whom they have official dealings; including seeking or accepting special facilities or discounts on private purchases (particularly same items which are being ordered officially on rate contracts).</p>
<p>Sponsorship of Events: Procuring Officials may mistakenly consider it innocuous to seek financial favours</p>	<p>Officials involved in Public Procurement must never indulge in any non-official pecuniary transaction with the contractors,</p>

⁵¹ Notified vide OM No.F.11/13/2017-PPD issued by Department of Expenditure dated 24.10.2017

7.2.5 Conduct of Public Servants in Public Procurement - Risks and Mitigations	
<i>Risk</i>	<i>Mitigation</i>
(donations, advertisements for souvenirs, and contributions in cash or kind) in relation to sponsoring of cultural, social, charitable, religious, or sporting events, in the false belief that since he/ she is personally not benefitted, it would not be a violation of CIPP.	suppliers or service providers with whom they have official dealings; including soliciting of sponsorship for unofficial and private cultural, social, sporting, religious, charitable or similar organisations or events.

7.3 Integrity Pact (IP)

The Pre-bid and Post-Contract Integrity Pact is a tool to help governments, businesses and civil society to fight corruption in public contracting. It binds both procuring entities and sellers to ethical conduct and transparency in all activities from pre-selection of bidders, bidding and contracting, implementation, completion and operation related to the contract. This removes insecurity of Bidders, that while they themselves may abjure Bribery, but their competitors may resort to it and win contract by unfair means.

Ministry of Finance, Department of Expenditure have mandated Ministries/ Departments and their attached/ subordinate offices (including autonomous bodies) to incorporate Integrity Pact by, depending on the nature of procurements/ contracts above a threshold value. The nature of procurement and threshold of value is to be decided by the Ministries/ Departments with approval of the Minister in charge. As guidance, the threshold should be such as to cover bulk (80-90%) of its procurement expenditure.

The pact essentially envisages an agreement between the prospective contractors/ bidders and the Procuring Entity, committing the persons/ officials of both sides, not to resort to any corrupt practices in any aspect/ stage of the contract. Only those contractors/ bidders, who commit themselves to such a Pact with the Procuring Entity, would be considered competent to participate in the bidding process. In other words, entering into this Pact would be a preliminary qualification. The essential ingredients of the Pact include:

- i) Promise on the part of the Procuring Entity to treat all bidders with equity and reason and not to seek or accept any benefit, which is not legally available;

- ii) Promise on the part of bidders not to offer any benefit to the employees of the Procuring Entity not available legally and also not to commit any offence under Prevention of Corruption Act, 1988 or Indian Penal Code 1860;
- iii) Promise on the part of Bidders not to enter into any undisclosed agreement or understanding with other bidders with respect to prices, specifications, certifications, subsidiary contracts, etc.
- iv) Undertaking (as part of Fall Clause) by the Bidders that they have not and will not sell the same material/ equipment at prices lower than the bid price.
- v) Foreign bidders to disclose the name and address of agents and representatives in India and Indian Bidders to disclose their foreign principals or associates;
- vi) Bidders to disclose the payments to be made by them to agents/ brokers or any other intermediary.
- vii) Bidders to disclose any past transgressions committed over the specified period with any other company in India or Abroad that may impinge on the anti corruption principle.
- viii) Integrity Pact lays down the punitive actions for any violation.
- ix) IP would be implemented through a panel of Independent External Monitors (IEMs), appointed by the organization in consultation with Central Vigilance Commission. The IEM would review independently and objectively, whether and to what extent parties have complied with their obligations under the Pact. Government of India organizations and Public Sectors of implementing Integrity Pact are required to select at most three persons (below the age of 70 (seventy) years) of high integrity and reputation as Independent External Monitors (IEM) after due diligence and forward to the CVC for its approval. Only those officers of Government of India departments or Public Sector Undertakings, who have retired from top management positions, would be considered for appointment as IEM, provided they are neither serving or retired from the same organization. Eminent persons, retired judges of High/ Supreme Courts, executives of private sector of considerable eminence could also be considered for functioning as Independent External Monitors. The appointment of Independent External Monitors would be for an initial period of three years and could be extended for another term of two

years (maximum tenure of five years). Names and contact details of the Independent External Monitor(s) should be listed in Notice Inviting Tender (NIT).

- x) In tenders meeting the criteria of threshold value/ nature of procurement - Integrity Pact clause and format should be included in the Bid Documents. Each page of such Integrity pact proforma would be duly signed by Procuring Entity's competent signatory. All pages of the Integrity Pact are to be returned by the bidder (along with the technical bid) duly signed by the same signatory who signed the bid, i.e. who is duly authorized to sign the bid and to make binding commitments on behalf of his company. Any bid not accompanied by Integrity Pact duly signed by the bidder shall be considered to be a non-responsive bid and shall be rejected straightway. Names and contact details of the Independent External Monitor(s) should be listed in Notice Inviting Tender (NIT).
- xi) Role/ Functions of IEMs: The Monitors would not be subject to instructions by the representatives of the parties and should perform their functions neutrally and independently. They would review independently and objectively, whether and to what extent parties have complied with their obligations under the Integrity Pact. For this purpose, they would have access to all contract documents/ books of accounts of the bidders in case of any allegation of violation of any provisions of the Integrity Pact or payment of commission, whenever required. The IEMs will have the option to participate in such meetings among the parties related to the project provided such meetings could have an impact on the contractual relations between the parties. Ideally all IEMs of an organization should meet once every two months to take stock of ongoing tendering process. The IEMs would examine all complaints received by them and give their recommendations/ views to the designated officer of the Procuring Entity, at the earliest. The Monitors would also inform the Procuring Entity, if they notice or have reason to believe, a violation of the Integrity Pact. They may also send their report directly to the Central Vigilance Commission, in case of suspicion of serious irregularities requiring legal/ administrative action. At least one IEM would be invariably cited in the NIT. However for ensuring the desired transparency and objectivity in dealing with the complaints arising out of any tendering process, the matter should be examined by the full panel of IEMs, who would look into the records, conduct an investigation, and submit their joint recommendations. The recommendations of IEMs would be

in the nature of advice and would not be legally binding. IEMs may not be equated with consultants in the Procuring Entity. Their role is independent in nature and the advice once tendered would not be subject to review. The role of the Chief Vigilance Officer (CVO) of Procuring Entity shall remain unaffected by the presence of IEMs. A matter being examined by the IEMs can be separately investigated by the CVO, if a complaint is received by him or directed to him by the CVC. As per para 5.13 of CVC OM No. 05/01/22 issued vide letter No. 015/VGL/091 dated 25.01.2022, in the event of any dispute between the management and the contractor relating to those contracts where Integrity Pact is applicable, in case, both the parties are agreeable, they may try to settle dispute through mediation before the panel of IEMs in a time bound manner. If required, the organizations may adopt any mediation rules for this purpose. In case, the dispute remains unresolved even after mediation by the panel of IEMs, the organization may take further action as per the terms & conditions of the contract.

7.4 Development of New Sources and Registration/ Enlistment of Contractors

7.4.1 The terms 'enlistment' and 'registration' may be differentiated as follows: --

- i) **Registration:** Simply registering the contractor, without any verification.
- ii) **Enlistment:** Including the name of the contractor in the list of after verification of credentials.

7.4.2 **Registration:** All the Ministries/Departments shall register the prospective contractors on their e-procurement portal or in the CPPP (in case they do not have their own e-procurement portal) before submitting their bids. The contractor may be an Individual, Sole proprietorship firm, partnership firm, limited liability partnership, private or public limited company. For registration, the Ministries/Department/CPSUs shall capture *at least*– (i) Name of contractor, (ii) Address and Contact details, (iii) Permanent Account Number (PAN), (iv) Details of digital signature certificate (DSC) and (v) GSTIN. Depending on the requirement of respective procurement portal, the Ministries/Departments can capture any other information, as may be considered necessary.

7.4.3 **Enlistment:** Some Departments such as Central Public Works Department (CPWD) and Military Engineering Services (MES) are enlisting the contractors after

verification of their credentials. Such enlistment is used by CPWD for obtaining bids for small value tenders i.e. up to Rs. 20 crores. For the tenders above Rs. 20 crores any contractor even if not enlisted can participate in the tenders issued by the CPWD. It is expected that Ministries/Departments will also develop their own enlistment process, as has been done by CPWD, Ministry of Railways (MoR) and Ministry of Road Transport & Highways (MoRTH) to reduce the time required for verification of credentials of the contractors after opening of the bids. The lists of such enlisted contractors can be used by any Ministry/Department/CPSU.

7.4.4 The Ministries/Departments will also share the information of registered and enlisted contractors with each other through the Central Public Procurement (CPPP). The Ministries/Departments will also ensure that whenever a contractor is debarred, the information regarding the same is made available immediately to all the Ministries/Departments through the CPPP. The reasons for the debarment and order of such debarment may also be displayed on the CPPP. The National Informatics Centre (NIC)/ Ministry of Electronics and Information Technology (MeitY) shall make appropriate changes in the CPPP so that each contractor can be uniquely identified by PAN. All the Ministries/ Departments may take cognizance of the information regarding debarment of contractors and use it as an input for the decision making process as per their own procurement policies.

7.4.5 Ministries/ Departments with a significant volume of procurements may follow their own policies and procedures for enlistment of contractors, if already existing. The policies and procedures for enlistment described below is for guidance of Ministries/ Departments, who do not have their own, laid down policies/ procedures for enlistment. The Ministry/ Department shall notify the authorities competent to deal with the applications and grant enlistments, along with their jurisdictions. The appellate authority shall be at least one level above the registering authority or as designated by the Ministry/ Department.

7.4.6 Categories for Enlistment

In case of procurement of works, the Administrative Department shall enlist firms as contractors of goods in different types/ categories of works (Civil, Electrical, Horticulture, Furniture, Nursery etc). The contractor may be a Private, Partnership, Pvt Ltd, Corporate, PSU or a Joint Venture company.

7.4.7 Class of Enlistment (Tendering Limits)

Enlistment should be done by Class of the firms (Grade A, B, and so on) on their capability for executing contract orders of different monetary limits in the relevant category of requirements. The monetary limits should be carefully fixed keeping in view the banker's reports, capacity and capability of the firm and other financial information indicated in the balance sheets, profit and loss statements:

(A sample classification - Source CPWD website)

Class	Tendering Limit	Class	Tendering Limit
Class-I (Super)	Rs 500 crore	Class-II	Rs 5 crore
Class-I (AAA)	Rs 200 crore	Class-III	Rs 1.5 crore
Class-I (AA)	Rs 100 crore	Class-IV	Rs 60 lakh
Class-I (A)	Rs 50 crore	Class-V	Rs 15 lakh
Class-I	Rs 20 crore		

7.4.8 Procedure for Enlistment: Enlistment of contractors should be done by any Ministry/ Department in case it desires to enlist contractors for works which are exclusively needed by it by keeping fundamental principles of public procurement in view (especially the transparency principle - transparency, fairness, equality, competition and appeal rights) with the approval of CA after carefully assessing and verifying credentials, capability, quality control systems, past performance, after-sales service facilities, financial background, and so on, of the contractor/ service provider(s):

- i) Details of the procedure for enlistment of new firms may be uploaded on the website and also published in the form of a booklet for information of the contractors. Timeframes and criteria for enlistment of new contractors may be clearly indicated;
- ii) Possible sources for any category/ group of requirements can be identified based on internal and external references. Data of new contractors can be obtained from the response received from contractors, open tender advertisements, pre-qualification bids, Expression of Interest (EoI), against various enquiries on the website, dedicated websites, exhibitions, buyer-seller

meets, various publications of BIS, trade journals, and so on. The e-procurement portal does pre-registration of contractors online. Such data can be a source of information on prospective contractors;

- iii) New contractor(s) may be considered for enlistment at any time, provided they fulfil all the required conditions. For any larger scale or critical enlistment of contractors, Procuring Entity should call for EOI by publicising its need for development of sources. The stages to be followed together with the applicable guidelines for EOI have been detailed in Chapter 3;
- iv) While registering the firms, an undertaking may be obtained from them that they will abide by the CIPP enclosed with the application with a clear warning that, in case of transgression of the code of integrity, their names are likely to be deleted from the list of enlisted contractors, besides any other penalty or more severe action as deemed fit; and
- v) Along with the new/ renewal application for enlistment, the contractors should also be asked to declare that, if awarded a contract in any LTE in which they participate, they bind themselves to abide by the Procuring Entity's General Conditions of Contract (GCC). Such GCC should be part of the application.
- vi) **Eligibility**
 - i) Any firm, situated in India or abroad, which is in the business of providing goods/ works/ services of specified categories of interest, shall be eligible for enlistment;
 - ii) Contractors should possess valid Digital Signature Certificate (DSCs) Class III b with the company name at the time of enlistment/ renewal, so as to enable them to participate in e-procurements
 - iii) Firm, against whom punitive action has been taken, shall not be eligible for re-enlistment during the currency of punitive action. Enlistment requests may not be entertained from such firms, stakeholders of whom have any interest in de-Enlisted/ banned firms;
- vii) The application form, complete in all respects and accompanied with the requisite processing fee and prescribed documents shall be submitted by the firms to the registering authority. The enlistment application form, duly filled-in,

when received from the firms shall be scrutinised carefully for assessing the capacity and capability of the firms including credentials, capability, quality control system, past performance, financial background, and so on, of the applicant. References shall be made to other firms of standing of whom the applicant firm claims to be a contractor. Likewise, the applicant firm's bankers may also be requested to advice about the financial standing of the firm. Enlistment of contractors should be done with the approval of CA.

- viii) In cases where the firm is not considered capable and enlistment cannot be granted, the concerned authority shall communicate the deficiencies and shortcomings direct to the firms under intimation to the appellate authority. Where a request for re- verification and review is made by the firm, along with any fee as prescribed and within the period prescribed by the department, review shall be undertaken. Requests for re-verification after expiry of the said period would be treated as a fresh application and processing fee, if any prescribed, charged accordingly;
- ix) Enlistment should be for specific category of works;
- x) It should be mentioned in the letter of enlistment that the enlistment is valid for a period of three years and would be considered for extension based (on application by the contractor/ service provider) on satisfactory performance of the firm. However, the enlistment would be initially treated as provisional and it would be treated as confirmed only after the firm has satisfactorily executed one contract of the relevant category and value from Procuring Entity. The extension of validity of enlistment is not a matter of right and Procuring Entity reserves the right not to extend such enlistment without assigning any reason;
- xi) All Enlisted contractors should be allocated a unique enlistment number. Once the firms are enlisted, a circular shall be issued by the enlistment authority indicating the names and addresses of the enlisted contractors with details of the requirements and monetary value they will execute as well as the validity period, and so on, for which they are enlisted;
- xii) Performance and conduct of every enlisted contractor is to be watched by the concerned department. Procuring Entity should also reserve the right to remove firms who do not perform satisfactorily, even during the validity of enlistment

(after giving due opportunity to the contractor to make a representation) if they fail to abide by the terms and conditions of the enlistment or fail to execute contracts on time or do substandard work or make any false declaration to any government agency or for any ground which, in the opinion of the government, is not in public interest;

- xiii) Procuring Entity shall retain its option to reassess firms already enlisted, at any later date, to satisfy itself about the current financial soundness/ credit worthiness, facilities available, and so on. Thereafter, Procuring Entity may decide to retain them as enlisted contractors for the requirements and monetary limit earlier considered or with necessary changes as deemed fit. In case of adverse reports from the team of Procuring Entity officers who reassess the firm, Procuring Entity shall delete such firm from the enlisted contractors list;

7.5 Debarment

7.5.1 Rule 151 of GFR, 2017 deals with debarment which is as under:

- i) A bidder shall be debarred if he has been convicted of an offence
 - a) under the Prevention of Corruption Act, 1988; or
 - b) the Indian Penal Code or any other law for the time being in force, for causing any loss of life or property or causing a threat to public health as part of execution of a public procurement contract.
- ii) A bidder debarred under sub-section (i) or any successor of the bidder shall not be eligible to participate in a procurement process of any procuring entity for a period not exceeding three years commencing from the date of debarment. Department of Commerce (DGS&D) will maintain such list which will also be displayed on the website of DGS&D as well as Central Public Procurement Portal.
- iii) A procuring entity may debar a bidder or any of its successors, from participating in any procurement process undertaken by it, for a period not exceeding two years, if it determines that the bidder has breached the code of integrity. The Ministry/ Department will maintain such list which will also be displayed on their website.

- iv) The bidder shall not be debarred unless such bidder has been given a reasonable opportunity to represent against such debarment.

7.5.2 Guidelines on Debarment of firms from Bidding⁵²

1. The guidelines are classified under following two types:-
 - i. In cases where debarment is proposed to be limited to a single Ministry, the appropriate Orders can be issued by that Ministry itself, thereby banning all its business dealing with the debarred firm.
 - ii. Where it is proposed to extend the debarment beyond the jurisdiction of the particular Ministry i.e. covering to all central Ministries/ Departments, the requisite Orders shall be issued by Department of Expenditure (DoE), Ministry of Finance (MoF).

Definitions

- i. Firm: The term 'firm' or 'bidder' has the same meaning for the purpose of these Guidelines, which includes an individual or person, a company, a cooperative society, a Hindu undivided family and an association or body of persons, whether incorporated or not, engaged in trade or business.
- ii. Allied firm: All concerns which come within the sphere of effective influence of the debarred firms shall be treated as allied firms. In determining this, the following factors may be taken into consideration:
 - a) Whether the management is common;
 - b) Majority interest in the management is held by the partners or directors of banned/ suspended firm;
 - c) Substantial or majority shares are owned by the banned/ suspended firm and by virtue of this it has a controlling voice.
 - d) Directly or indirectly controls, or is controlled by or is under common control with another bidder.
 - e) All successor firms will also be considered as allied firms.

The terms "banning of firm", 'suspension', 'Black-Listing' etc. convey the same meaning as of "Debarment".

2. Debarment by a Single Ministry/ Department

⁵²Notified vide OM No. F.1/20/2018-PPD issued by Department of Expenditure dated 02.11.2021

Orders for Debarment of a firm(s) shall be passed by a Ministry/ Department/organizations, keeping in view of the following:

- i. A bidder or any of its successors may be debarred from participating in any procurement process for a period not exceeding two years.
 - ii. Firms will be debarred if it is determined that the bidder has breached the code of integrity as per Rule 175 of GFRs 2017. (Refer to para 7.2 of this Manual for further reading on Code of Integrity).
 - iii. A bidder can also be debarred for any actions or omissions by the bidder other than violation of code of integrity, which in the opinion of the Ministry/Department, warrants debarment, for the reasons like supply of sub-standard material, non-supply of material, abandonment of works, sub-standard quality of works, failure to abide "Bid Securing Declaration" etc.
 - iv. It shall not be circulated to other Ministries/ Departments. It will only be applicable to all the attached/ subordinate offices, Autonomous bodies, Central Public Sector Undertakings (CPSUs) etc. of the Ministry/ Department issuing the debarment Order.
 - v. The concerned Ministry/ Department before issuing the debarment order against a firm must ensure that reasonable opportunity has been given to the concerned firm to represent against such debarment (including personal hearing, if requested by firm).
 - vi. Secretary of Ministry/Department may nominate an officer at the rank of Joint Secretary/Additional Secretary as competent authority to debar the firms.
 - vii. Ministry/ Department that issued the order of debarment can also issue an Order for revocation of debarment before the period of debarment is over, if there is adequate justification for the same. Ordinarily, the revocation of the Order before expiry of debarred period should be done with the approval of Secretary concerned of Ministry/Department.
 - viii. The Ministry/Department will maintain list of debarred firms, which will also be displayed on its website.
 - ix. Debarment is an executive function and should not be allocated to Vigilance Department.
3. It is possible that the firm may be debarred concurrently by more than one Ministry/ Department. Ministries/ Departments at their option may also delegate

powers to debar bidders to their CPSUs, Attached Offices/ Autonomous Bodies etc. In such cases, broad principles for debarment in para 2 as above are to be kept in mind. Debarment by such bodies like CPSUs etc. shall be applicable only for the procurements made by such bodies. Similarly, Government e-Marketplace (GeM) can also debar bidders up to two years on its portal. In case of debarments done by CPSUs, revocation of the debarment orders before expiry of debarred period should be done only with the approval of Chief Executive Officer of concerned CPSUs etc.

4. Debarment across All Ministries/ Departments

- i. Where a Ministry/ Department is of the view that business dealings with a particular firm should be banned across all the Ministries/ Departments by debarring the firm from taking part in any bidding procedure floated by the Central Government Ministries/ Departments, the Ministry/ Department concerned, should after obtaining the approval of the Secretary concerned, forward to DoE a self-contained note setting out all the facts of the case and the justification for the proposed debarment, along with all the relevant papers and documents. DoE will issue the necessary orders after satisfying itself that proposed debarment across all the Ministries/ Departments is in accordance with Rule 151 of GFRs, 2017. This scrutiny is intended to ensure uniformity of treatment in all cases.
- ii. The firm will remain in suspension mode (i.e. debarred) during the interim period till the final decision taken by DoE, only in the Ministry/ Department forwarding such proposal.
- iii. Ministry/ Department before forwarding the proposal to DoE must ensure that reasonable opportunity has been given to the concerned firm to represent against such debarment (including personal hearing, if requested by firm). If DoE realizes that sufficient opportunity has not be given to the firm to represent against the debarment, such debarment requests received from Ministries/ Departments shall be rejected.
- iv. DoE can also give additional opportunity, at their option, to firm to represent against proposed debarment. DoE can also take suo-moto action to debar the firms in certain circumstances.
- v. No contract of any kind whatsoever shall be placed on the debarred firm, including its allied firms by any Ministries/ Departments/ Attached/Subordinate

offices of the Government of India including autonomous body, CPSUs etc. after the issue of a debarment order.

- vi. DoE will maintain list of such debarred firms, which will be displayed on Central Public Procurement Portal.

5. Revocation of Orders

- i. An order for debarment passed shall be deemed to have been automatically revoked on the expiry of that specified period and it will not be necessary to issue a specific formal order of revocation.
- ii. A debarment order may be revoked before the expiry of the Order, by the competent authority, if it is of the opinion that the disability already suffered is adequate in the circumstances of the case or for any other reason.

6. Other Provisions (common to both types of debarment)

- i. No contract of any kind whatsoever shall be placed to debarred firm including its allied firms after the issue of a debarment order by the Ministry/ Department. Bids from only such firms shall be considered for placement of contract, which are neither debarred on the date of opening of tender (first bid, normally called as technical bid, in case of two packet/two stage bidding) nor debarred on the date of contract. Even in the cases of risk purchase, no contract should be placed on such debarred firms.
- ii. If case, any debar firms has submitted the bid, the same will be ignored. In case such firm is lowest (L-1), next lowest firm shall be considered as L-1. Bid security submitted by such debarred firms shall be returned to them.
- iii. Contracts concluded before the issue of the debarment order shall, not be affected by the debarment Orders.
- iv. The Debarment shall be automatically extended to all its allied firms. In case of joint venture/ consortium is debarred all partners will also stand debarred for the period specified in Debarment Order. The names of partners should be clearly specified in the "Debarment Order".
- v. Debarment in any manner does not impact any other contractual or other legal rights of the procuring entities.
- vi. The period of debarment shall start from the date of issue of debarment order.
- vii. The Order of debarment will indicate the reason(s) in brief that lead to debarment of the firm.

- viii. Ordinarily, the period of debarment should not be less than six months.
- ix. In case of shortage of suppliers in a particular group, such debarments may also hurt the interest of procuring entities. In such cases, endeavour should be to pragmatically analyze the circumstances, try to reform the supplier and may get a written commitment from the supplier that its performance will improve.
- x. All Ministries/ Departments must align their existing Debarment Guidelines in conformity with these Guidelines. Further, bidding documents must also be suitably amended, if required.

7.6 Project Management

7.6.A Poor management of public funded projects costs the nation in terms of the following, be it in the owner organization or in construction firms contracted to build a project:

- i) Additional expenditure burden due to increased costs, crowding out more deserving schemes and projects
- ii) Affect viability of projects due to increase in construction, causing losses to CPSE or agency concerned
- iii) Economic burden, due to delayed return in investments
- iv) Imposes unnecessary economic burden on affected stakeholders
- v) Creates a culture of acceptance of delay and avoidable costs – breeding more cases
- vi) Increased costs of procurement due to monetization of higher risks, perceived by contractors, of delays and scope creep associated with public funded projects.

7.6.B Given the importance of project management in the final outcomes of projects, owner organizations which plan, fund and implement projects as well as construction firms contracted to build and/or manage projects need to adopt and institutionalize project management standards in their processes. A number of International Project Management Standards have been evolved by Governments as well as International bodies to assist organizations minimize cost and time overruns. While there are a variety of frameworks such as ISO-21500, PMBOK, PRINCE2, LOGFRAME, etc., most of them have a lot in common and have the following elements that need to be

taken into account for effective management of projects. Some of these standards may be adopted by Government to improve processes and train project staff.

7.6.C The quality of project works significantly depends on supervision and monitoring. For completion of the projects within the stipulated time and cost and with specified quality standards, periodical review should be done by various levels of the officers.

7.6.D Information Technology (IT) enabled project management systems can help in improving efficiency, transparency and aid faster decision making in execution of projects. These systems may be used for maintenance of records for the progress of work (including hindrance register), variations, etc., wherein reasons for delays are also to be captured on real time basis. Such systems may be used for capturing progress and quality of work, site records/ photographs/ videos etc. including geo tagging.

7.6.E Wherever applicable, the role of the Project Management Consultant (PMC) should be clearly defined in the contracts. Deployment of the PMC does not absolve the project executing authority of the responsibility to supervise the quality and timelines of the project.

7.6.F The credentials and deployment schedule of key and other technical personnel to be engaged by PMC on the work should be taken along with the bid. During execution, adherence to deployment of key and other technical personnel as per the schedule of deployment should be ensured.

7.6.G Execution of the work shall primarily be the responsibility of the officials designed with such responsibility. However, for large contracts senior officers shall also review the progress and quality of the work at various stages of construction. To this effect, presentations on the project performance may be made periodically before the senior officers depending upon the value of the project and progress of the project vis-à-vis schedule. Project executing authorities should put in place detailed instructions in this regard.

Note: In para 7.6.G instructions containing “shall” are mandatory; any deviation from these instructions shall require relaxation from Ministry of Finance (for Ministries/ Departments etc.) or from the Board of Directors (for Central Public Sector Enterprises).

7.6.H Project executing authorities should put in place a system for capturing the photographs and videos of important and critical activities of construction. This may be implemented in projects above a threshold value or, if possible, in all projects. Such photos/ videos may be uploaded in IT based project monitoring system to facilitate monitoring the progress and quality of work as well as assessment of delay in execution of work by stakeholders and senior management. Apart from this photographs and videos may serve as permanent record of the project for posterity in case needed for any eventuality including litigation or enquiry/ investigation.

7.6.I It may also be useful to stipulate organizational standards and/or certifications for project managers/staff, in complex projects, as tender conditions to minimize risk of cost and time overruns:

7.6.1 Organisational Standards: ISOs 21500:2012⁵³

Guidance on Project Management is an international standard developed by the International Organization for Standardization, or ISO starting in 2007 and released in 2012. It was intended to provide generic guidance, explain core principles and what constitutes good practice in project management. ISO 21500 was developed to offer guidance on the concepts and processes of project management with the goal of implementing processes and best practices to improve project management performance. While, the standard describes important concepts and processes of project management it does not provide detailed guidance and general management topics are limited to relevant aspects of project management. The standard as developed by the ISO was modelled on the PMIs PMBOK, although there are some key differences. The ISO project management standard is only 47 pages long and is limited to the introduction of the processes, their inputs, and their outputs. Another major change is the introduction of a new subject by ISO, namely, “stakeholder management”. The ISO 21500 can be used as a basis for the development of national standards. It is not intended for certification or regulatory purposes.

7.6.2 Organisational Standards: IS 15188:2009

⁵³ <https://www.iso.org/standard/50003.html>

The Indian Standard, on *Construction Project Management*, covers general guidelines for construction project management. The scope of this standard covers the stages subsequent to the stage of approval (when a decision to implement the project including its financing is taken) till commissioning and handing over of the project. The standard explains that the distinct features of a construction project include the temporary nature of the organizations involved, the evolutionary process of project deliverables during project development stages and the unique output of the built facility. This standard is intended to provide a general overview of construction project management and information regarding the applicable tools and techniques. It covers general provisions about project, stakeholder, construction project life cycle, construction project delivery models, construction methodologies/techniques and organizational structures. It covers the construction project management stages such as pre construction, construction and commissioning and handing over and gives guidelines under these stages and their sub-stages for management of construction projects. It gives brief guidelines on the following construction project management functions:

- i) Scope management,
- ii) Procurement management,
- iii) Time management,
- iv) Cost management,
- v) Quality management,
- vi) Risk management,
- vii) Communication management,
- viii) Human resources management,
- ix) Health, safety and environment management,
- x) Integration management, and
- xi) Sustainability management.

9 out of 12 parts (except the ones in italics) of the above standard have been issued.

7.6.3 Project Staff certification

Project Management Institute (PMI-USA) has developed certification standards for project managers and executives in a variety of areas such as general project management, risk management, scheduling, etc. The PMI Project Management Book of Knowledge (PMBOK) describes processes, inputs, outputs and associated tools

and techniques. Both organizations use the concept of process as an integral part of project management. A large number of project firms have adopted this standard for improving competence of their manpower. ISO and PMI segregate project processes into five process groups with some minor variances in labelling. The differences between the two standards are minimal with respect to process groups and subjects/knowledge areas. The substantive difference in the two standards is with the detail and description of tools and techniques, because ISO 21500:2012 do not provide it. The 47 project management processes identified in the *PMBOK® Guide* are further grouped into ten separate Knowledge Areas. Knowledge Area represents a complete set of concepts, terms, and activities that make up a professional field, project management field, or area of specialization. These ten Knowledge Areas are used on most projects most of the time. Project teams should utilize these ten Knowledge Areas and other Knowledge Areas, as appropriate, for their specific project. The Knowledge Areas are:

- i) Project Integration Management
- ii) Project Scope Management
- iii) Project Time Management
- iv) Project Cost Management
- v) Project Quality Management
- vi) Project Human Resource Management
- vii) Project Communications Management
- viii) Project Risk Management
- ix) Project Procurement Management
- x) Project Stakeholder Management

PMBOK – 10 Knowledge Areas

Knowledge Areas	Project Management Process Groups				
	Initiating Process Group	Planning Process Group	Executing Process Group	Monitoring and Controlling Process Group	Closing Process Group
4. Project Integration Management	4.1 Develop Project Charter	4.2 Develop Project Management Plan	4.3 Direct and Manage Project Work	4.4 Monitor and Control Project Work 4.5 Perform Integrated Change Control	4.6 Close Project or Phase
5. Project Scope Management		5.1 Plan Scope Management 5.2 Collect Requirements 5.3 Define Scope 5.4 Create WBS		5.5 Validate Scope 5.6 Control Scope	
6. Project Time Management		6.1 Plan Schedule Management 6.2 Define Activities 6.3 Sequence Activities 6.4 Estimate Activity Resources 6.5 Estimate Activity Durations 6.6 Develop Schedule		6.7 Control Schedule	
7. Project Cost Management		7.1 Plan Cost Management 7.2 Estimate Costs 7.3 Determine Budget		7.4 Control Costs	
8. Project Quality Management		8.1 Plan Quality Management	8.2 Perform Quality Assurance	8.3 Control Quality	
9. Project Human Resource Management		9.1 Plan Human Resource Management	9.2 Acquire Project Team 9.3 Develop Project Team 9.4 Manage Project Team		
10. Project Communications Management		10.1 Plan Communications Management	10.2 Manage Communications	10.3 Control Communications	
11. Project Risk Management		11.1 Plan Risk Management 11.2 Identify Risks 11.3 Perform Qualitative Risk Analysis 11.4 Perform Quantitative Risk Analysis 11.5 Plan Risk Responses		11.6 Control Risks	
12. Project Procurement Management		12.1 Plan Procurement Management	12.2 Conduct Procurements	12.3 Control Procurements	12.4 Close Procurements
13. Project Stakeholder Management	13.1 Identify Stakeholders	13.2 Plan Stakeholder Management	13.3 Manage Stakeholder Engagement	13.4 Control Stakeholder Engagement	

7.6.4 Capacity of Contractors

Contractors involved in construction or development of large projects for the Government needs to have tremendous capacity to deliver projects on time and cost. Firms are often unable to deliver contracts on time in cases where conditions precedent is met by the Government agency. There are several other reasons for project delays or escalation of costs:

- i) Poor Governance within the firm

- ii) Financial mismanagement
- iii) Incompetent project leadership
- iv) Lack of competence in the project team
- v) Inability to use technology for project management.
- vi) Poor process management and standardisation

Financial management by the contractor is an equally critical factor. Mobilising finances and resources for several large projects on which the firm is working on poses significant managerial challenge. Hence, ensuring that the eligibility criteria in fixing the minimum turnover, net worth, profits and bidding capacity in relation the project size (simultaneous exposure in other large projects) becomes a sine qua non for successful execution of projects. There is need to ensure that contracting firms adopt appropriate management standards. Adoption of ISO 21500:2012 could be specified in the RFQ conditions when inviting tenders. Third party assessment of the capabilities listed in this standard could be called for.

Contracting firms involved project construction need qualified, trained personnel and managers to plan and construct projects in time, cost and quality. It is important to ensure that contractor organisations have qualified/ certified project management professionals at the time of commencement of works on awarded contracts. Certifications such as PMI-PMP/PRINCE2-practitioner/CPMP etc., besides experience, may be specified in the contract conditions for the key staff of the field project organisation of the contractor.

7.6.5 Capacity of Government Organisations

- i) Selecting and appointing a full-time competent and experienced *Project Director/Mission Director* to head the project, especially large projects, on part of the public organisation is a crucial decision. Public agencies need to appoint a Project Director in time to prevent drift and cost/time overruns. This must be the first decision in commencement of projects.
- ii) *Recruiting and staffing the public sector organisation* with experienced and reliable heads of finance, technical, legal, HR & PR wings will ensure effective decision making on project options, resolving project hurdles, supervision of the Project Consultants, completing procurement processes and awarding contracts on time, launching construction/implementation, monitoring construction, contract and claims management, monitoring quality, cost control,

managing stakeholders, etc., are crucial activities that only the owner organisation would care about.

- iii) The *quality, experience and competence of the Project Design and Management Consultant selected to prepare the Detailed Project Report (DPR)* is a key decision. Experience and performance of the PMC in past projects are vital in determining optimal decision making in project design. Time spent in site and market investigation, exploring and evaluating technology options, finance and implementation options, evaluating procurement options, etc., would save a lot of costs and time later. Involvement of the project organisation in the DPR preparation is a key factor in project success. Dilution of eligibility criteria in selection of consultants could save money in the short run, but end up very expensive in the long run, especially in large projects.
- iv) Delay in land acquisition and securing all statutory clearances for the projects are critical conditions precedent for start of any project. *As a principle, no project contracts may be awarded without possession of at least 90% of the entire land and the obtaining statutory clearances/NOCs for project construction and operation.*
- v) *Weekly Project Management meetings* of owner organisation with the PMC/IE and contractors are key factors in ensuring effective communications, timely detection of critical issues and their resolution. This will also enable detection and removal of hurdles, prevention of disputes or at least satisfactory resolution of disputes within the ambit of the contract.
- vi) The Project Management team in the Government agency has to regularly and independently track the status of the projects; identify bottlenecks and risks that may impact project delivery. Developing a *risk management strategy* enables identification of risks associated with the projects enabling timely decision making by the relevant authorities. A risk management group may need to be setup to periodically assess risks and review mitigation measures undertaken.
- vii) **Delay in taking timely decisions** : Delay in decision making by the officials of the project executing authority on various changes in the project scheme arising out of emerging situations during execution of the work is also one of the contributors to the delay in completion of projects. Sometimes timely decisions on these changes are so crucial that the next step could only be taken after addressing the change. Delay in decisions by the project executing authority

can also lead to litigation due to inadequate utilisation/idling of resources of the contractor. There is frequently a feeling among officials that indecision is safe while a decision may lead to adverse consequences for the decision maker. Therefore, there is a need for project executing authorities to put in place a system of resolution of the issues coupled with timelines for various levels to take decisions.

Project executing authorities may review the flow chart of decision making and remove redundancies for faster decision making. They may also fix timelines for taking decisions on variations, extra items and changes in scope and specifications, etc to avoid delay and litigation arising out of delayed decisions.

7.6.6 Structuring contracts for timely completion

- i) *Optimal sharing of risks* has been a balanced way of ensuring that the time and costs of completion of a project do not go way off the mark. Structuring contract clauses keeping in mind the principle of '*responsibility for each risk shall be with the party best equipped to handle it*' has enabled contracts to lead to lower risk perception by bidders and as a result offer better prices. Contract clauses need to be further screened using this principle.
- ii) *Scope & Design creep* are widely stated causes for project delays. Changes in scope or design midway or at start cause time and cost variations. It may be therefore essential to consider options thoroughly and spend time on designs exhaustively at the time of DPR preparation and before procurement.
- iii) *Timely release of payments* to contractors raises the confidence level of contractors to mobilise more resources for early completion. DMRC's practice of releasing 80% of the Interim Payment Certificates (Bills) within 14 days of claim by contractor and the rest within 28 days of certification by the Engineer. Building these payment clauses into contracts raises contractor confidence, reduces project risk perception and enables better prices.
- iv) Embedding a *fair price variation clause* in contracts that mimics the market forces of escalation/reduction would lower risks to contractors and to the public organisation as well. PV clauses would vary from contract to contract, depending the structure of materials and costs.
- v) *Dispute Resolution Board (DRB)* may be created by express consent of the procuring entity and the contractor to monitor the project execution at various

stages of completion. This is a conciliation forum to resolve disputes amicably. The primary function of DRBs is to monitor the progress of the project with respect to contract requirements. In case of any non-compliance with respect to the contract, the Board immediately interferes and suggests ways to resolve the dispute. DRB mechanism may be embedded in contracts.

- vi) *Encourage institutional arbitration*: Settlement of disputes through Institutional arbitration is better than ad-hoc arbitration. Institutional arbitration provides an established format with a proven record ensures impartial decision-making and adherence to pre-established rules and procedures.

7.6.7 **Aligning the Interest of The Stakeholders**

- i) The incentive structure for all the key stakeholders of public procurement ought to be such that the system itself will ensure timely delivery of the projects / works in a qualitative manner within approved cost. A balanced framework and work culture, where risk and rewards are properly shared amongst stakeholders and timely completion of quality projects is the common goal, can be the bedrock of efficient project management. An incentive structure, which may include pecuniary as well as non-pecuniary aspects (Including public recognition), linked with measurable parameters of outcome / output, can help align the interests of stakeholders. An ethics based regime, where integrity of all the stakeholders is nurtured, can help increase efficiency in all aspects of project management.
- ii) Public authorities may devise strategies to provide incentives to contractors /concessionaires/ consultants/ architects/ other stakeholders by various means, including bonus, better rating and recognition for early/ timely / quality completion of the projects. Similar strategies may be devised for recognition of engineers/ officers/ other team members for early / timely and quality completion of the projects. The practice of mentioning the names of the contractor and the project in charge publicly at work sites may be implemented. Such recognition may be in a form which has long shelf life so as to associate the contractor and project In-charge with the life of the project.
- iii) “Coming together is a beginning; keeping together is progress; working together is success”. It is an accepted fact that the success of any project is dependent on a well-coordinated team working towards a common goal. For successful execution of any project within specified time, cost and quality, the interest of

Chapter 7: Registration of Contractors and Governance Issues

all the stakeholders need to be aligned. Coordinated efforts of all stakeholders such as contractors, consultants, public authority and project executing authority and public representatives will bring about the best possible outcome.

ANNEXURE

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 other Mercantile Laws
	Other Laws relevant to Public Procurement (e.g. Right To Information Act, 2005; The Micro, Small and Medium Enterprises Development Act, 2006; Prevention of Corruption Act, 1988 etc)
II – Rules and Regulations	General Financial Rules, 2017
	Delegation of Financial Power Rules
	Any other financial, vigilance (e.g. CVC Guidelines), 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 the Procurement of Good/ Works and Consultancy Services (including non-consultancy 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/ enlistment document(s). Other documents at hierarchy levels II and III mentioned above shall have no locus standi in such relationships.

Annexure 2: Bid Opening Attendance Sheet cum Report

(Refer Para 4.10 (iv))

[Name of Procuring Entity]

Bid (Techno-commercial/ Financial) Opening Attendance Sheet cum Report

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						
Tender No			Title			Date of Opening
Offer No.	Bidder's Name	Bidder's Ref and Date	Submission of Requisite EMD (Y/ N)	Submission of other Mandatory Documents (Y/ N)	Rate Quoted and Taxes/ Duties	Signature of Representative
--/ ---						
--/ --						
--/ --						

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 3: Tender Committee Minutes Format

(For Techno-Commercial/ Financial Bids)

(Refer Para 5.5.1 (v) and 5.6.11)

Organisation: _____					
Minutes of Tender Committee Meeting (Techno-commercial/ Financial Bids)					
Section I: Top Sheet					
File No:				Date:	
Description				Estimated Cost:-	
Tender Published In				Date of Publication	
Bid Validity				Bid Opening Date	
Past 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: Salient Feature of the Tender					
Review background of indent; 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 mode of bidding; bidding document contents; bid publication; level of competition obtained; issues if any noticed during bid-opening (bids not opened due to lack/ unsatisfactory EMD, etc.) and any other procurement of this requirement in process (at various stages)					
Review special conditions, restriction if any, on participation of bidders; purchase preferences, requirements prescribed in bid documents (EMD, document submission, etc.)					
Section III: Preliminary Evaluation					
Review handling of any complaints received					

Review/ confirmation of quantity and period of delivery required			
Discuss preliminary evaluation for determining substantially responsive bids and for minor corrections and clarifications			
Section III: Evaluation of Responsive Bids			
Bid-wise deliberation should be recorded			
In case of evaluation of Financial Bids			
<ul style="list-style-type: none"> i). Start with review of techno-commercial evaluation ii). Insert a summary table of evaluated price in the order of L1, L2, etc. iii). Deliberations should be in the sequence of L1, L2, etc. 			
Section IV: Summary of Recommendations			
Bid-wise recommendation should be recorded			
In case of evaluation of financial bids,			
<ul style="list-style-type: none"> i) Give a summary of recommended bids, award value, bid expiry date and special conditions, if <p>Also mention that the rates recommended are considered reasonable (and basis for such determination).</p> <p>Total value of the recommendations for determining level of acceptance authority.</p> <p>Mention that none of the TC members have any conflict of interest with the parties recommended for award.</p> <p>Request acceptance of recommendations by competent authority and that it's within his powers of acceptance as per SoPP/ DFPR.</p>			
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 4: Invitation and Declaration for Negotiations

(Refer Para 5.6.6 (iv) (c))
Invitation for Negotiations
(On letterhead of the procuring entity)

No: _____ Dt: _____

To M/ s _____ Registered A/ D

Sub: Tender No ----- opened on -----for the supply of -----

Dear Sir,

The rates quoted in your tender are considered high. You are therefore, requested to come for negotiations of rates, on..... (date) at..... (time) at..... (venue).

You should, however, come for negotiations **only** in case you are prepared to furnish before such date the declaration appended herewith.

A copy of the form in which you may submit your revised offer after negotiations is enclosed.

Yours faithfully,

Enclosure:

(Authorised Officer)

(1) Form of Declaration

(2) Form of Revised Offer

FORM OF DECLARATION

(To be signed and submitted before start of negotiations)

(On company letterhead)

No: _____ Dt: _____

To _____

Sub: Tender No ----- Opened on -----for the supply of -----

Ref: Your invitation for negotiations No: dated:

Dear Sir,

I _____ duly authorised on behalf of M/ s. _____ do declare that in the event of failure of the contemplated negotiations relating to Tender No. _____ opened on _____ my original tender shall remain open for acceptance on its original terms and conditions.

Yours faithfully,

Place: _____

Date: _____

Signatures of bidder, or officer
authorised to sign the bid documents
on behalf of the bidder

Annexure 5: Format of Revised Offer in Negotiations

(Refer Para 5.6.6(iv) (d))

Revised Offer in Negotiations

(On company letterhead)

From.....

Full address.....

To

Sir,

**Sub: Tender No ----- opened on -----for the supply of -----
-----**

Ref: Your invitation for negotiations no: dated:

1. On further discussions with your representatives onin
response to your letter no dated

We are not prepared to reduce the rates already quoted in the original tender,
which will remain valid up to.....

Or

1. I/ we reduce my/ our rates as shown in the enclosed schedule of items.

2. I/ we am/ are aware that the provisions of the original bidding
document remain valid and binding on me.

3. I/ we undertake to execute the contract as per following Schedule.....

4. I/ we agree to abide by this tender on the revised rate quoted by me/ us, it
is open for acceptance for a period of 120/ 180 days from this date, *i. e.*, up to
..... and in default of my/ our doing so, I/ we will forfeit the
earnest money deposited with the original tender/ attached herewith. Eligibility as
valid tenderers shall be deemed to be the consideration for the said forfeiture.

Yours faithfully,

Signatures of bidder or
Officer authorised to sign the bid
documents on behalf of the bidder

Annexure 6: Letter (Notification) of Award (LOA) of Contract

(Refer Para 5.7.1)

Name of the procuring
entity _____

Letter of Award of Contract

Confidential

Contract No: [Insert date]

Contract Title:

To,

M/ s. [Insert name & address]

Sub: Award of contract for contract no: [insert contract number] and contract title: [insert contract title]

Reference: Your offer no. [insert offer number] against our tender no. [insert tender no] opened on [insert date of opening of tender]

Dear Sir/ Madam

I am directed to inform you that after evaluating the bid documents submitted by you on [enter date] Government of India is pleased to inform you that you have been selected as the successful bidder for the supply of [enter description]. The total purchase price shall be [enter amount] as indicated in your financial bid submitted on [enter date], in accordance with the procedures intimated in the relevant bid documents.

You/ your authorised representative(s) are requested to be personally present at [insert address] for the signing of the contract by [enter date].

In this respect, we also request you to submit the performance security of [insert amount of Rupees in words] by [insert date]. Security deposit being 10 (ten) percent of the total cost = Rs. _____.

Please apply for refund of EMD deposited over and above the SD of if any.

You are requested to execute necessary agreement within seven days from the date of issue of this letter in the enclosed agreement form. Special adhesive stamp of Rs.10 (ten) and revenue stamp of Re. one shall be affixed on the enclosed agreement form. Treasury receipts of EMD and SD shall be deposited in office within the stipulated time limit as above.

This notification concludes the legally binding contract between you and the Government of India, till issue of a formal contract.

Yours truly,

[Authorised Officer]

Enclosure: Agreement Form along with the schedule of delivery

Annexure 7: No Claim Certificate

(Refer Para 6.6.1)

(On company letterhead)

To,
(Contract Executing Officer)
Procuring Entity _____

NO CLAIM CERTIFICATE

Sub: **Contract Agreement no. ----- dated -----for the supply of ---**

We have received the sum of Rs. (Rupees
_____ only) in full and final settlement of
all the payments due to us for the supply of _____
under the above mentioned contract agreement, between us and Government of
India. We hereby unconditionally, and without any reservation whatsoever, certify
that with this payment, we shall have no claim whatsoever, of any description, on
any account, against Procuring Entity, against aforesaid contract agreement
executed by us. We further declare unequivocally, that with this payment, we have
received all the amounts payable to us, and have no dispute of any description
whatsoever, regarding the amounts worked out as payable to us and received by
us, and that we shall continue to be bound by the terms and conditions of the
contract agreement, as regards performance of the contract.

Yours faithfully,
Signatures of contractor or
Officer authorised to sign the contract documents
on behalf of the contractor
(Company stamp)

Date: _____

Place: _____

Annexure 8: A Sample MOU

(Refer Para 3.1.4 (iv); The sample is for illustrative purpose only and procuring entity may change the format suiting to their requirement. If felt necessary, procuring entity may also get the MOU document vetted from the Ministry of Law/ or procuring entity's legal cell)

MEMORANDUM OF UNDERSTANDING⁵⁴

between

[Name of Procuring Entity]

and

[Name of Project Management Consultant PWO/ PSU]

for

Construction of *[Name of Work(s)]* at *[Name of Location(s) of Work]*

This, Memorandum of Understanding (hereinafter called "MoU") signed between *[Name of Procuring Entity]* (hereinafter called "Procuring Entity") represented by its Chief Engineer of one part,

And

[Name of Project Management Consultant PWO/ PSU] (hereinafter called "Project Management Consultant") represented by its Chief Engineer on other part.

'Procuring Entity' and 'Project Management Consultant' are also referred to individually as 'Party' and collectively as 'Parties' wherever the context so requires

Whereas 'Project Management Consultant' have agreed to undertake the work of Construction of abovementioned Work(s) at abovementioned location(s) for 'Procuring Entity' as a 'Deposit Work' on Project Management Consultant (PMC) basis.

Now, therefore it is agreed between the Parties that:

A) Assigning of Work by 'Procuring Entity' to 'Project Management Consultant'.

1. *{In case of MoU of collection of works or of framework nature 'Procuring Entity'*

⁵⁴ The present sample is based on MoU with PWO. Work to PSUs is to be assigned on the basis of competitive bidding amongst them and the MoU in such cases would be based on the provisions in the bidding documents. This MoU would normally be for a specific standalone work, but could also be for a Project consisting of a collection of related works. In case of MoU with Public work Organisations (PWOs) it could also be as a long-term framework MoU. In case of MoU of collection of works or of framework nature, extra provisions are shown in italics within *{brackets}*, which can be omitted in standalone MoUs

will assign a work to the 'Project Management Consultant' through a letter after due approval of the competent authority. A work specific MoU would be signed along with approval of Preliminary Estimates.}. 'Procuring Entity' will provide all relevant available documents related to Land, Site Details, functional and space requirements (or Various Facilities, Special Requirements/ Features and Broad Specifications for specialised Equipments and Plants), Layout Plans etc for facilitating Project Execution by 'Project Management Consultant' along with A & E Consultants

2. 'Project Management Consultant' shall appoint, if any, competent Architectural and Engineering (A & E) Consultant commensurate with size and nature of the work after following due process.

(B) Approval of Preliminary Project Report (PPR) & Detailed Project Report (DPR)/ Preliminary Estimate (PE)

3. Preliminary Project Report (PPR) shall be prepared by 'Project Management Consultant' based on functional & space requirements as intimated by 'Procuring Entity' and submitted to 'Procuring Entity' for its approval. *{It would be a joint endeavour on part of both 'Procuring Entity' and 'Project Management Consultant' in consultation with consultants & experts to develop Standard Plans & Specifications for Works & Services including Furniture, Equipments, Plants etc. pertaining to various categories of Works etc.}*⁵⁵
4. Based on approved PPR, 'Project Management Consultant' shall prepare Detailed Project Report (DPR)/ Preliminary Estimate (PE) consistent with their norms & standards, containing Milestones and commensurate activities to be accomplished against each Milestone & Baseline Programme in the form of CPM Network depicting clearly Dates of Start and Completion of the work *{along with Work specific draft MoU}*⁵⁵ and submit it to 'Procuring Entity' along with all relevant input information, documents and Drawings etc. for approval of 'Procuring Entity', within 8 (eight) weeks of receipt of approval for PPR. 'Project Management Consultant' shall use C.P.W.D. Analysis of Rates⁵⁶ for Delhi (DSR) for framing the DPR/ PE. Non - DSR Items shall be incorporated in the Detailed Estimates only when these are not either readily available in DSR. Detailed reasons and justifications for including Non-DSR Items shall have to be furnished by 'Project Management Consultant'. 'Procuring Entity' shall accord approval to DPR/ PE *{and Work specific Draft MOU}*⁵⁵ containing Milestones and commensurate activities to be accomplished against each Milestone & Baseline Programme in the form of CPM Network and issue Administrative Approval (A/A) & Expenditure Sanction (E/S) in about 8 (eight) weeks of its submission by 'Project Management Consultant'.

⁵⁵ Applicable to framework MoUs or MoUs for collection of projects

⁵⁶ Replace by any other relevant Schedule of Rates for the concerned location/ project

5. On receipt of the A/A and E/S, the 'Project Management Consultant' shall prepare and accord Technical Sanction (TS) to detailed and coordinated design of all the Architectural, Civil, Electrical, Mechanical, Horticulture and any other services included in the scope of the sanction and of the Detailed Cost Estimates containing the detailed specifications and quantities of various items prepared on the basis of the schedule of rates maintained by CPWD or other Public Works Organizations.

(C) Release of Funds, Payment of Bills

6. 'Project Management Consultant' has agreed to charge [*insert the Fee agreed*] for carrying out the assigned Deposit Work.
7. 'Procuring Entity' shall release Initial Deposit of 10% of the approved preliminary estimate amount to 'Project Management Consultant' within 2 (two) weeks of issuing A/A & E/S {and signing work specific MoU along with Milestones & Baseline Programme between Chief Engineers of 'Procuring Entity' & 'Project Management Consultant', whichever is later}⁵⁵.

7.1 'Procuring Entity' shall release additional deposit up to 10 (ten) % of approved estimate amount to 'Project Management Consultant' within 2 (two) weeks of award of first major construction contract on the basis of specific request made by 'Project Management Consultant' in this regard along with proper reasons and justifications acceptable to 'Procuring Entity' for additional requirement of fund over and above already released initial deposit of 10 (ten) % of approved preliminary estimate amount in terms of Clause – 7 above.

8. After the Initial and Additional Deposit as per clause 7 and 7.1 above and subsequent release of Fund shall be in the form of recoupment of the expenditure made by 'Project Management Consultant' on the work as per monthly expenditure statements which shall be submitted in Monthly Expenditure Statement (MES) in a form similar to CPWD Form – 65 (Account of Deposit works). While submitting MES, and placing demand for release of fund in the form of recoupment of the monthly expenditure already incurred on the work, 'Project Management Consultant' will also submit a comprehensive report on progress of physical completion of various activities and Milestones vis-a-vis earlier planned activities/ Milestones for the overall completion of the specific work mutually decided between 'Procuring Entity' & 'Project Management Consultant' {and included as part of work specific MOU}⁵⁶ for enabling 'Procuring Entity' to keep effective check on utilization of fund as well as physical progress of the work.
9. The fund subsequent to Initial Deposits shall be released by 'Procuring Entity' to 'Project Management Consultant' within 4 (four) weeks of submission of request by 'Project Management Consultant' along with all documents as

described in Clause - 8 above. As per the monitoring of physical and financial progress indicators, 'Procuring Entity' will take necessary steps for recoupment of the monthly expenditure incurred on the basis of the Fund Utilization Certificate.

10. If any fund requirement is specifically made by 'Project Management Consultant' after the work has been assigned to 'Project Management Consultant' for undertaking pre-construction activities related to the Project Execution etc., the same shall be released by 'Procuring Entity' within 2 (two) weeks of such specific demand provided the amount is within ceiling limit of Rs 25 (twenty-five) lakh. The amount so released to 'Project Management Consultant' shall be adjusted from, Initial Deposit amount.
11. 'Project Management Consultant' shall intimate 'Procuring Entity' about any excess expenditure likely to be incurred over and above the approved Projected Cost and also about possibility of time overruns, as soon as it comes to the knowledge along with reasons and justifications thereof for necessary approvals from 'Procuring Entity' before continuing/ incurring the extra/ additional expenditure.
12. The 'Project Management Consultant' shall be responsible for certifying and making payment of Bills of the Contractors/ Agencies engaged by them and make available Final Statement of Accounts in Standard Format to 'Procuring Entity' & also provide copies of Final Bills for all Contract Packages and other expenditure incurred related to Project Construction after the Completion of the Work. In addition, should 'Procuring Entity' ask for any other details from 'Project Management Consultant' regarding Utilization of Fund at any stage, Detailed Estimates, Technical Sanctions, Award of Works, Running Bills etc., the same shall be provided by 'Project Management Consultant' readily.
13. The 'Procuring Entity' shall settle compensation/ levies, if so required to be paid based on recommendation by 'Project Management Consultant' related to the Project works, under Workmen's Compensation Act or any other Act or Law of the Central or the State Government.

(D) Execution of Work

14. The 'Project Management Consultant' shall obtain necessary Statutory Approvals/ Permission/ Clearances/ Certificates from the concerned Local Bodies & Statutory Authorities like District Authorities, Municipal Corporation, Panchayati Raj Institutions, Town Planning Board, Electricity Board/ Fire Department, State/ Central Pollution Control Boards, State/ Central Environmental Authorities, Forest and Wild-life authorities etc (for e.g. removal of trees, re-locating utilities; conversion of railway level crossings, laying of railway sidings needed by the work; rehabilitation and resettlement of persons affected by the work; traffic control; mining of earth and stone; interfering

Annexures

protected monuments; blasting permission, environmental/ forest/ wild-life clearances; and shifting of religious shrines etc) to start the work have been obtained. The 'Procuring Entity' shall be responsible for providing all assistance to 'Project Management Consultant' in this process.

15. Works shall not be awarded by 'Project Management Consultant' to contractors till all statutory approvals/ certificates/ permissions required for taking up the work, are in place.
16. 'Procuring Entity' shall make the work site available free from encumbrances to 'Project Management Consultant'. 'Procuring Entity' shall also ensure Availability of auxiliary services - like roads, power, water, solid & liquid waste disposal system, street lighting and other civic services. 'Project Management Consultant' shall provide necessary support in this process.
17. 'Project Management Consultant' shall permit 'Procuring Entity' to inspect or monitor the works, either itself or through Third party as and when it desires for assessing actual progress and quality of construction and any other aspects.
18. 'Procuring Entity' shall provide security clearance and ensure free access for 'Project Management Consultant' staff/ Employees and their workers working at Work site in case these are required. 'Project Management Consultant' shall provide necessary support in this process.
19. 'Project Management Consultant' shall ensure adequate availability of men & material by their contractors.
20. 'Project Management Consultant' shall ensure that it's Contractor(s) implement required Health, Safety & Environmental (HSE) practices at the Construction Sites and they also comply with all statutory obligations related to workmen deployed at the Construction Site. 'Project Management Consultant' will act as Principal Employer in respect of all Statutory Obligations related to workmen deployed at the site in execution of the work.
21. 'Procuring Entity' shall permit and facilitate to the 'Project Management consultant' all utilities required for construction e.g. drawl of Ground Water, obtaining electricity connection, putting up Labour Camps/ Huts inside the available space for facilitating construction by contractors engaged by 'Project Management Consultant'. 'Project Management Consultant' shall provide necessary support in obtaining permission, if any, of Local Bodies in this regard. The cost in this regard borne by 'Procuring Entity', if any, should not be duplicated as reimbursement by the 'Project Management Consultant'.
22. As soon as the work is allocated, 'Project Management Consultant' shall prepare and submit to 'Procuring Entity' an Integrated Programme Chart for the execution of work showing clearly all activities from the start of work to completion with details of manpower and other input information required for the fulfilment of the timelines given therein. 'Project Management Consultant'

will intimate 'Procuring Entity', Project Team, both on - site and off-site, starting from Chief Engineer to Junior Engineer associated with execution of the work. The Programme Chart should inter-alia include descriptive note explaining sequence of the various activities, CPM Network Milestones etc. This will form Base Line Programme and the subsequent progress of the work shall be reviewed with reference to this during periodic Progress Review Meeting preferably monthly. Any increase in time period from the Base Line Value shall be construed as Time Overrun

23. 'Project Management Consultant' shall be responsible for providing Physical Progress Reports to 'Procuring Entity' in the form of CPM (Critical Path Method) Network on monthly basis for reviewing of the progress of the work vis - a vis Base Line Programme and taking all necessary remedial actions, after taking into account 'Procuring Entity's observations made in respect of quality and progress of .the work during the monthly/ periodic Project Review Meetings. To ensure timely completion of work as per mutually agreed time-schedule/ milestones and within agreed Cost.
24. 'Project Management Consultant' shall also be responsible for providing to 'Procuring Entity' Financial Progress Reports of the project and up to date Expenditure incurred on the work on monthly basis along with Certificate of Utilization of Fund against Fund earlier released to 'Project Management Consultant' by 'Procuring Entity'.
25. 'Project Management Consultant' shall be responsible for total Project Management including day-to-day supervision of works, maintenance of all project records and executing the works as per prescribed guidelines, their own Works Manual, Codes, Books of Specifications etc and also in accordance with relevant and extant provisions of General Financial Rules (GFR), 2017.

(E) Project Management, Cost and Time Control

26. 'Project Management Consultant' shall implement a system of 'Project Team Concept' with dedicated group of Engineers under single and unified command for implementation of projects from concept to completion and call composite tenders to reduce the number of packages for better management. 'Project Management Consultant' shall be obliged to adopt all the above said measures to successful completion of the works within Approved Cost and agreed Time period.
27. 'Project Management Consultant' shall be responsible for managing the Project from concept to commissioning effectively and efficiently to ensure desired/ proportionate pace of progress and completion of work is achieved progressively vis-à-vis approved Plans & Specifications and in Terms and Conditions of the MOUs and mutually agreed milestones and timelines and approved cost, taking with due diligence all required pro-active remedial

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measures including provision of stringent and elaborate enforceable Clauses to this effect and also making time as the essence of contract in the Bid and Contract Documents. 'Project Management Consultant' shall provide for clauses in the contract and established procedure to recover liquidated damages from their contractors/ agencies. The liquidated damages recovered from the contractors for delay, if any, shall be credited to 'Procuring Entity' in the project accounts.

28. The approved Initial Project Cost & Timeline should not exceed during execution of the Project except for reasons like increase in cost index during construction period, revised specifications or extra work over approved estimate carried out at the request of 'Procuring Entity' etc. In case of either increase in earlier approved cost or timeline, detailed reasons and justifications, based on verifiable facts and figures, shall have to be provided by 'Project Management Consultant' along with comprehensive proposals for revision in earlier approved Project Cost & Timeline, which shall be intensively examined by 'Procuring Entity' in consultation with 'Project Management Consultant' before approval is accorded to their proposals. No additional expenditure over and above the earlier approved Project Cost shall be incurred by 'Project Management Consultant' without prior approval of 'Procuring Entity'. Upward Revisions in either Cost or Timeline should be an exception rather than a rule and for achieving this objective, all required efforts shall be made by 'Project Management Consultant'
29. At any time, it appears to 'Procuring Entity' that the actual progress of the work does not conform to the approved programme referred above and intimated to 'Project Management Consultant' by 'Procuring Entity', detailed reasons and justifications for such delays shall have to be provided by 'Project Management Consultant', which shall be examined by 'Procuring Entity' to re-Schedule the Programme, if any. Progress Review Meetings preferably monthly shall be held between 'Project Management Consultant' and 'Procuring Entity' for reviewing the progress of works based on Baseline Programme/ Milestones etc. and also for resolving co-ordination issues, if any including fixing priority of some works, facilities and services for their early completion and handing over to 'Procuring Entity' for putting item to use for intended purpose. A&E Consultants may also participate. 'Project Management Consultant' will also designate a nodal officer in respect of specific work for coordinating with 'Procuring Entity' and A & E Consultant. Such designated nodal officer shall be suitably empowered and authorized to take decisions in work related issues so that delays are minimized for achieving timely completion of work.

(F) Disputes, Enquiries and Queries

30. 'Project Management Consultant' shall be responsible for observing due diligence and adopting all possible measures at various stages of work

execution so as to avoid Arbitration/ Litigation and other hindrances and the work is completed within optimum cost and time in a hassle free environment

31. 'Project Management Consultant' shall be responsible for defending all Arbitration and Court Cases arising out of execution till the works end examining the Arbitration Award/ Decree of Court or Law/ liability by appropriate authority in 'Project Management Consultant' and forwarding the same along with a comprehensive report on the circumstance leading to the Arbitration/ Court Cases and the reasons and justification as to why an appeal against such awards/ decree was not considered necessary briefing out inter-alia details of the award and clear cut recommendations. The decision of the competent authority in 'Project Management Consultant' to accept the award or challenge the same in a Court of Law will be binding on the 'Procuring Entity'.
32. 'Procuring Entity' shall settle and pay the final claims which may be decreed by a Court of Law, Tribunal or by award of an Arbitration in relation to the deposit work, based on recommendations of 'Project Management Consultant'.
33. 'Project Management Consultant' shall be responsible for redressing and complying with the observations of CTE/ CVC, Auditors, Statutory Authorities, Local Bodies, Municipal Corporation etc. pertaining to the work under intimation to 'Procuring Entity'. Providing all work related information promptly to 'Procuring Entity' for replying to Parliament Questions, queries from various Constitutional & Statutory Authorities.

(G) Completion and Handing-over of Completed Work and Facilities

34. 'Project Management Consultant' shall obtain work Completion/ Occupancy Certificates & Clearances for completed Work and Facilities before handing over the same to 'Procuring Entity' for putting them to functional use. 'Procuring Entity' shall provide all assistance in this process.
35. 'Project Management Consultant' shall hand over to 'Procuring Entity' or its Authorized Representative completed Work including all Services and Facilities constructed in accordance with the Approved Plans, Specifications fulfilling all techno-functional requirements agreed with 'Procuring Entity' along with Inventory, As built - Drawings, Maintenance Manual/ Standard Operating Procedure (SOP) for Equipments and Plants, all clearances /Certificates from Statutory Authorities, Local Bodies etc.
36. On completion of the work, a Project Completion Report (PCR) shall be submitted by 'Project Management Consultant' duly bringing out the Final Project Completion Cost, Total Time period taken to complete the work and also completed Project Components as against the approved Cost, Time and Project Components. The PCR shall be submitted along with Final Project Accounts including return of unspent balance amount to 'Procuring Entity' within one month of settlement of final bills of the contractors/ other agencies deployed

on the work by 'Project Management Consultant'.

(H) Termination of MoU

37. If 'Procuring Entity' decides to terminate this MOU or decides to drop/ abandon the work after substantial preliminary work has been done by 'Project Management Consultant' on the work, both 'Project Management Consultant' and 'Procuring Entity' shall mutually decide the loss incurred by 'Project Management Consultant' for payment by the latter to the former. In case of abandonment of project/ work by 'Procuring Entity' during construction stage, 'Procuring Entity' shall pay to 'Project Management Consultant', after determining the value of the works, goods and contractors documents and any other sums due to them for work executed in accordance with the MOU, to help liquidate only such liabilities as were squarely needed towards construction/ consultant agencies engaged on the work, in a fair and reasonable manner.

(F) Miscellaneous

38. **Disputes between 'Procuring Entity' and 'Project Management Consultants'**: As dispute resolution mechanism for implementation of the provisions of this MoU, at the first instance the issues involved shall be brought before Chief Engineer of 'Procuring Entity' and concerned Chief Engineer of 'Project Management Consultant' for their resolution. In case, however, disputes/ differences between the parties do not get resolved, the matter shall be escalated to higher level in 'Procuring Entity', and 'Project Management Consultant', who shall be above the level of CE in the respective organizations. They shall submit a comprehensive report and recommendation to 'Procuring Entity' and 'Project Management Consultant' for facilitating final decision in the matter.

39. Individual and joint responsibilities of the Parties shall be as per clauses mentioned above.

40. No amendment in Terms & Conditions of the MoU shall be valid and effective unless it is in writing and duly signed by authorised representatives of 'Procuring Entity' and 'Project Management Consultant'. Each party shall give due consideration to any proposal for amendment/ modification made by other party with proper justifications thereof.

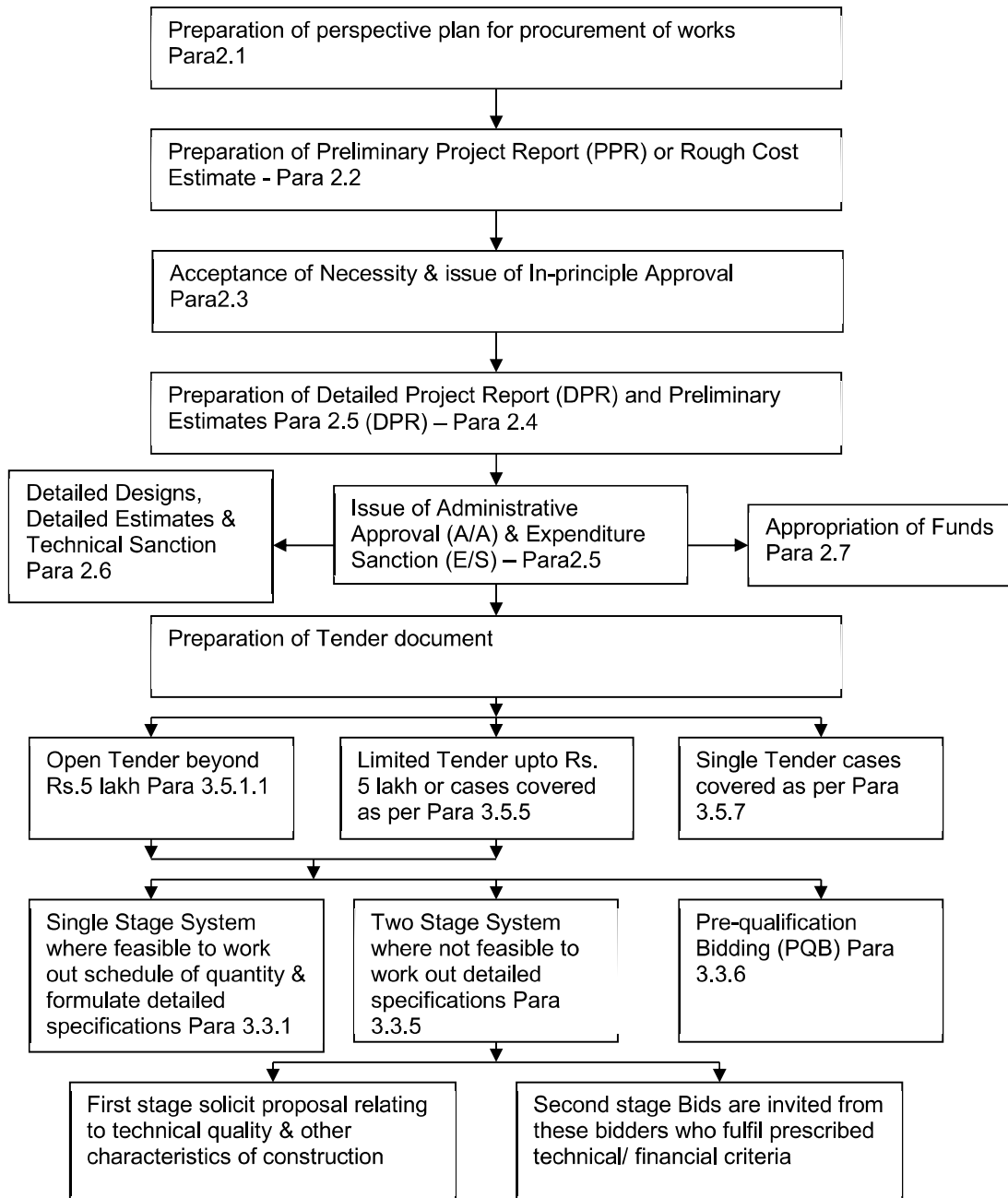
41. Provisions, if any, made in respect of deposit works in 'Project Management Consultant's Works Manual or Codes shall stand modified to the extent of the stipulations made in this MoU for execution of 'Procuring Entity' works by 'Project Management Consultant'.

Signatures and Witnesses

Date: _____ Place: _____

Annexure 9: Flowchart of Process of Procurement of Works

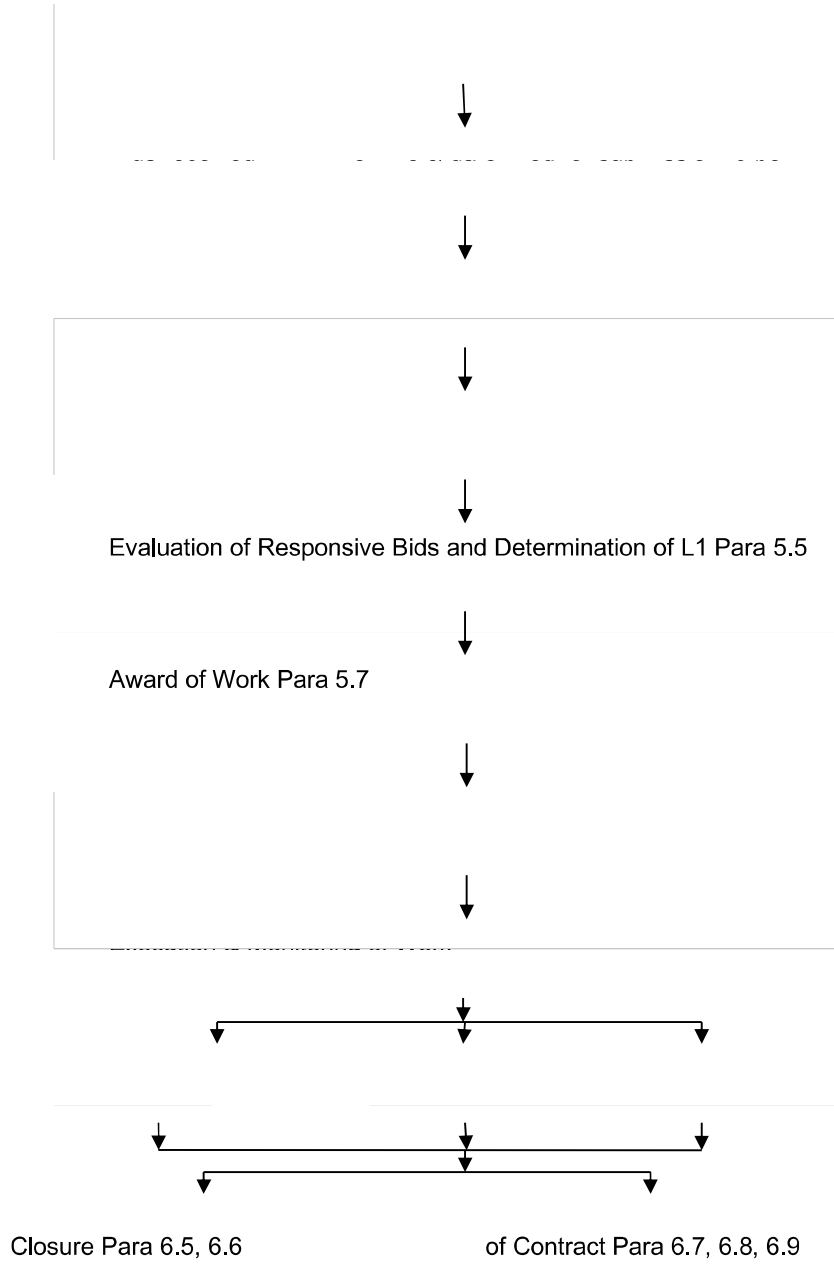
(Refer Para 1.11)



.....contd: Submission and Evaluation of Bids

Annexures

Procedure for Submission and Evaluation of Bids –a flowchart



Annexure 10: Additional Resources relating to Procurement of Works

(Refer Para 2.8)

Department of Expenditure, Ministry of Finance

Manuals for Procurement of Goods and for Procurement of Consultancy and other services: <http://doe.gov.in/manuals>

GFR, 2017: <http://doe.gov.in/order-circular/GENERAL%20FINANCIAL%20RULES>

Department of Economic Affairs, Ministry of Finance

PPP Cell, Infrastructure Division:

<https://www.pppinindia.gov.in/>

CPWD Publications: http://cpwd.gov.in/Documents/cpwd_publication.aspx

Manuals

CPWD Works Manual [2019](#)

CPWD Maintenance Manual [2012](#)

General Conditions of Contract (GCC)

GCC 2014- [PDF](#)

Plinth Area Rates

Supplement for Specialized E&M Works 2014 - View in [PDF](#)

Plinth Area Rates 2012 - View in [PDF](#)

Analysis of Rates for Delhi

2016 -[Civil Vol-I](#), [Vol-II](#)

2016 -[E & M](#)

Schedules of Rates (Civil)

Delhi Schedule of Rates 2016 - [Vol-I](#), [Vol-II](#)

DSR2016-(E&M) in [PDF](#)

Specifications (Civil)

[Specifications Volumes I](#)

[Specifications Volumes II](#)

Other Publications

[Various Local Approvals and Clearances Required For Large Scale Project in Metro Cities](#)

CVC - Circulars on Tenders: http://cvc.nic.in/proc_works.htm

CVC – CTE Reports: http://www.cvc.nic.in/cte_menu.htm

Central Public Procurement Portal (CPPP): <https://eprocure.gov.in/cppp/>

Annexure 11: Format for seeking the approval of the Competent Authority for inviting Global Tender Enquiry for procurements less than Rs. 200 crores

(Refer Para 3.5.4)

- (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 basis 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.

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 12: 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 3.5.6 (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
37	Mannequins (Laerdal) for training of CPR for COVID Preparedness

S.No	Name of Medical Device/ Equipment
	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
82	AO TRS Modular Drive for Drill/Reamer
83	AO TRS Modular Sagittal saw system
84	Battery Oscillator

Manual for Procurement of Works

S.No	Name of Medical Device/ Equipment
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 13: Model Clause/ Certificate to be inserted in tenders etc. w.r.t Order (Public Procurement No.1)

[Refer para 1.4 and Appendix-1 (Para 4(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 14: Example of Formula for Price Variation Clause

[Refer Para 6.5.6]

(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_0 .
- 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, $\left(\frac{M_1}{M_0}\right)$ and $\left(\frac{L_1}{L_0}\right)$ should be multiplied by a correction factor of exchange rates $\left(\frac{E_0}{E_1}\right)$, 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.”

Appendix 1: Advanced Concepts of Value for Money and Fundamental Principles of Public Procurement

1.0 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.

2.0 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-Cycle-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:

- i) **Procurement price.** The amount paid to the vendor/ contractor for the product, service, or capital equipment;
- ii) **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;
- iii) **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
- iv) **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

3.0 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.

4.0 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 enlistment 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. Fundamental principles of public buying: 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 Entity should be satisfied that the selected offer adequately meets the requirement in all respects;*
- g) *The Procuring Entity 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 Entity 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 Micro and Small Enterprises (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 been issued on or before the date of the order (23rd July 2020); and (ii) cases falling under para 13 below.

2. Transitional cases

⁵⁸ Inserted vide Department of Expenditure (DoE), Ministry of Finance (MoF) OM No. F,6/18/2019-PPD dated 23,07,2020.

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-13. 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 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.

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.

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

- 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.
- 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.

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.

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),

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

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
 - 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

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

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.

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.

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 Entity, 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 enlistment of bidders, if applicable;
- e) Particulars of issue, receipt, opening of the bids and the participating bidders at each stage;
- 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 Procuring Entities, consultants, banks.

Appendix– 2: Legal Aspects of Public Procurement

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

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

“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.”

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 SOPs. Rule 224, 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 Elementary Legal Practices

2.1.1 **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.

2.1.2 **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.

2.1.3 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.

2.1.4 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

2.2 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.

2.2.1 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

2.2.2 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.

2.2.3 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.

2.2.4 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.

2.2.5 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.

2.3 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.

2.4 Free consent of both Parties

2.4.1 The consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation 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, misrepresentation 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 there presentations made had been true.

2.4.2 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.

2.4.3 Distinction has also to be drawn between a mistake off act 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.

2.5 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 actor a promise which is illegal or impossible has no value.

2.6 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.

2.7 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. Procuring Entity is not bound to consider a tender, which is received beyond that time.

2.8 Communication of Acceptance

A date is invariably fixed in tender forms up to 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.

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 foolproof mode like registered post acknowledgement due, etc.

2.9 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.

2.10 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 Procuring Entity to forfeit the earnest money.

2.11 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.

2.12 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.

2.13 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 there of 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.

2.14 Stamping of Contracts

Under entry 5 of Schedule I of the Indian Stamp Act, an agreement or memorandum of agreement for correlating 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).

2.15 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.

2.16 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 and Arbitration and Conciliation (Amendment) Act, 2015

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:

Determine admissibility, relevance, materiality and weight of any evidence;

- i) Decide on their own jurisdiction;
- ii) Decide on interim measures;
- iii) Termination of proceedings; and
- iv) 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 to Rs 30 (thirty) lakh for various slabs of disputed value from Rs five lakh to above Rs 20 (twenty) crore - with a sole arbitrator entitles to 25 (twenty-five) percent extra above the model fee). However 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.
 - d) **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.
 - e) **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 five percent 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.

iii) **Procedural and Jurisprudence simplified**

i) **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.

ii) **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.

iii) **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.

iv) 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.

iv) **Seeking interim relief from courts [section 9]**

i) Seeking the assistance of the court in taking evidence [section 27]

ii) Appealing against the order of a court where the court refuses to refer the parties to arbitration. [section 37(1) (a)]

iii) 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:
 - i) On its own motion on the basis of information and knowledge in its possession, or

- ii) 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
 - iii) 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:**
 - i) Section 3 of the Competition Act, 2002 dealing with anti-competitive agreements;

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- ii) Section 4 of the Competition Act, 2002 which discusses abuse of dominance;
- iii) Section 5 and 6 of the Competition Act, 2002 dealing with the regulation of combinations.
- iv) 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.
- v) 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.
- vi) 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:
 - vii) Agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise
 - viii) Practice carried on by any association of enterprises or association of persons
 - ix) Decision taken by any association of enterprises or association of persons
- x) 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.
 - 1. Agreements regarding Prices
 - 2. Agreements regarding Quantity/ Quality

3. Market Allocation

4. Bid Rigging

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.

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.

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:

4.1 **Collusive bidding:** Agreement between firms to divide the market, set prices or limit production – involves, kickbacks and misrepresentation of independence

- i) Bid Rotation
- ii) Bid Suppression
- iii) Complementary Bidding
- iv) Subcontracting arrangements
- v) Market Allocation

4.2 The Act gives wide discretion to CCI to frame the remedies to overcome the anticompetitive situation:

- i) Declare Anticompetitive Agreements Void
- ii) 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

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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
3. Order the parties to Cease & Desist
4. Modification of agreements
5. Remedy Damage to reputation
6. Fix Individual Liability
7. Grant Interim orders
8. Any other order as CCI deems fit

4.3 Who can file the information: Raising issues regarding anti-competitive behaviour for action by CCI under the act is called filing the information:

1. Any person, consumer or their association or trade association can file information before the Commission.
2. Central Govt. or a State Govt. or a statutory authority can also make a reference to the Commission for making an inquiry.
3. "Person" includes an individual, HUF, firm, company, local authority, cooperative or any artificial juridical person.

4.4 What are the issues on which information can be filed?

1. The information can be filed on the issues like anti-competitive agreements and abuse of dominant position or a combination.
2. Class of consumers.

4.5 The fee -

1. 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,
2. Rupees 20,000/ -(twenty thousand only) in case of firms, companies having turnover in the preceding year upto Rupees one crore, and

3. 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:
 - i) The sovereignty, strategic, scientific or economic interests of India, or the incitement of an offence
 - ii) Records of deliberations of the Council of Ministers
 - iii) That which is forbidden to be published by a court or if it may result in contempt of court;
 - iv) A breach of privilege of legislatures;
 - v) Commercial confidence, trade secrets, intellectual property (if it harms a third party);
 - vi) That relayed in a fiduciary capacity;
 - vii) That received from a foreign government;
 - viii) That which could endanger a person's safety etc.;

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- ix) That which would impede an investigation etc.;
- x) Personal matters or invasion of privacy.
- v) However, if information related to (b), (e), (f), and (j) is available under the Right to Information Act, 2005, then it can be disclosed under the Act.
- vi) 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.
- vii) 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.
- viii) 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 is complaint to the Designated Agency.
- ix) 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.
- x) 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.
- xi) 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.

- xii) 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.
- xiii) 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.
- xiv) 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.
- xv) 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.
- xvi) 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.
- xvii) 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.
- xviii) 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.

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- xix) 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)

(The details given in this appendix are generic in nature are not prescriptive part of this Manual. Procuring Entities may settle and decide the details with the service provider)

1.0 Electronic procurement (e-procurement)

- i) Electronic Procurement (e-Procurement) is the use of information and communication technology (specially the internet) by the Procuring Entity 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. As per GFR 2017, it is now mandatory for Ministries/ Departments to receive all bids through e procurement portals in respect of all procurements.
- ii) Ministries/ Departments which do not have a large volume of procurement or carry out procurements required only for day-to-day running of offices and also have not initiated e-procurement through any other solution provider so far may use e-procurement solution developed by NIC. Other Ministries/ Departments may either use e-procurement solution developed by NIC or engage any other service provider following due process.
- iii) These instructions will not apply to procurements made by Ministries/ Departments through Government E-Markets (GeM).
- iv) In individual cases where national security and strategic considerations demands confidentiality, Ministries/ Departments may exempt such cases from e-procurement after seeking approval of concerned Secretary and with concurrence of Financial Advisers.
- v) In case of tenders floated by Indian Missions abroad, Competent Authority to decide the tender, may exempt such case from e-procurement.

2.0 Service Provider

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

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- 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 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:

- 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 advertised in newspapers and 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;

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- 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 Procuring Entity 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; 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.

