

The role of the legal framework in public procurement: evidence from a cross country comparison

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22 January, 2021

Structure of the presentation

1. Setting the context
2. Questions
3. Approach
4. Key takeaways

Setting the context

- ▶ Most jurisdictions have a specific legal framework that governs public procurement transactions.
- ▶ Legal frameworks are often evaluated based on their fulfilment of identified objectives.
- ▶ The objectives should be (Panda et al. 2013, Allen et al. 2011, World Bank 2017):
 - ▶ competition
 - ▶ efficiency
 - ▶ transparency
 - ▶ accountability
- ▶ In reality there are often trade-offs between these objectives (McCue et al. 2015)

Questions

Questions

- ▶ Question: *What is the role of the legal framework in public procurement?*
 - ▶ what makes transactions for public procurement different from other commercial transactions?
 - ▶ what are the problems that the legal framework attempts to solve?
- ▶ Question: *What are the tools of regulation in public procurement?*
- ▶ Question: *How does the Indian legal framework for public procurement compare with other countries?*

Approach

Approach

- ▶ Review the legal frameworks:
 - ▶ to identify the problems that the framework attempts to solve
 - ▶ to identify the tools for regulation
- ▶ US, UK and EU - broad contours and key provisions
- ▶ Attempt to identify gaps in the Indian legal framework when compared with other legal frameworks

Approach - review framework

Table: Framework for review of procurement laws

Stages of procurement	Processes
Stage 1: Pre-award to award	<ol style="list-style-type: none">1. Procurement planning2. Eligibility and registration of suppliers3. Tendering4. Bidding5. Dispute settlement
Stage 2: Award to completion	<ol style="list-style-type: none">6. Contracting7. Initial payment8. Monitoring9. Dispute settlement
Stage 3: Completion to payment	<ol style="list-style-type: none">10. Completion11. Final payment12. Dispute settlement

Key takeaways

Key takeaways

Unique elements and problems in public procurement

	Unique element	Problem	Question
1	Use of public funds for a commercial transaction	Principal-agent problem	How can regulation ensure an agent acts in the best interest of the principal when using public funds?
2	Government as a party	(i) Imbalance of power problem (ii) Non-commercial incentives	How can regulation address this imbalance? How can regulation ensure that the government acts in a commercial manner?

Table: Unique elements and problems

Key takeaways

How other countries address the unique problems in public procurement

	Unique element	Problem	Objective	Tools of regulation
1	Use of public funds for a commercial transaction	Principal-agent	Transparency and accountability	Detailed tendering rules Extensive reporting Designating persons Government contracting
2	Government as a party	(i) Imbalance of power (ii) Non-commercial incentives	Transparency, accountability, fairness Competition and efficiency	Special redressal forums Open tender process Procurement planning

Table: Unique elements, problems and some tools of regulation

Key takeaways

Comparison with the GFR

Objective	Tool	Presence of provisions
Transparency	- Publication of tender information	✓
	- Detailed tendering rules	✓
	- Record keeping	X
Efficiency	- Electronic processes	✓
	- Detailed planning rules	X
Competition	- Open tenders norm	✓
	- Specified exemptions	✓
Accountability	- Audits	✓
	- Reporting	X
	- Timelines for decisions, payments and refunds	✓ (in some cases)
	- Designation of specialists	X
	- Independent oversight authority	✓ (CVC post-facto oversight)
Fairness	- Separate dispute forum	X
	- Penalty for payment delay	X

Table: Tools of regulation in GFR

Key takeaways

- ▶ Key of focus of legal frameworks: principal-agent problem and imbalance of power problem
- ▶ Variations in the design and the tools used to address these problems
- ▶ Indian approach to the principal-agent problem:
 - ▶ rules limiting discretion in some areas
 - ▶ limited use of accountability tools
- ▶ Other countries - wider toolkit for regulation

Key takeaways

- ▶ Indian approach to the imbalance of power problem:
 - ▶ long way for improvement
- ▶ Other countries - wider toolkit for fair treatment

Key takeaways

- ▶ The role of the legal framework should be to provide a design that acknowledges and attempts to solve for the unique problems in public procurement.
- ▶ Some considerations while designing a legal framework:
 - ▶ better laws may not necessarily result in better outcomes (Sukhtankar et al. 2014 and Bosio et al. 2020)
 - ▶ unclear how to gauge the value of competing objectives - no objective way in which measured
 - ▶ prescriptive rules and procedures also increase costs - no objective standard to judge when rules become burdensome

Thank you