

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

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# 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

<b>Stages of procurement</b>	<b>Processes</b>
Stage 1: Pre-award to award	<ol style="list-style-type: none"><li>1. Procurement planning</li><li>2. Eligibility and registration of suppliers</li><li>3. Tendering</li><li>4. Bidding</li><li>5. Dispute settlement</li></ol>
Stage 2: Award to completion	<ol style="list-style-type: none"><li>6. Contracting</li><li>7. Initial payment</li><li>8. Monitoring</li><li>9. Dispute settlement</li></ol>
Stage 3: Completion to payment	<ol style="list-style-type: none"><li>10. Completion</li><li>11. Final payment</li><li>12. Dispute settlement</li></ol>

## Key takeaways

# Key takeaways

## Unique elements and problems in public procurement

	<b>Unique element</b>	<b>Problem</b>	<b>Question</b>
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

	<b>Unique element</b>	<b>Problem</b>	<b>Objective</b>	<b>Tools of regulation</b>
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
<b>Transparency</b>	- Publication of tender information	✓
	- Detailed tendering rules	✓
	- Record keeping	X
<b>Efficiency</b>	- Electronic processes	✓
	- Detailed planning rules	X
<b>Competition</b>	- Open tenders norm	✓
	- Specified exemptions	✓
<b>Accountability</b>	- Audits	✓
	- Reporting	X
	- Timelines for decisions, payments and refunds	✓ (in some cases)
	- Designation of specialists	X
	- Independent oversight authority	✓ (CVC post-facto oversight)
<b>Fairness</b>	- 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