

# Reinventing India's procurement laws: a global perspective

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## Abstract

A unified law is viewed as a panacea for the current challenges in public procurement in India. In 2012, the Indian government attempted to create a statutory framework for public procurement by introducing Public Procurement Bill 2012. This Bill did not become a law and public procurement in India continues to be governed by a set of executive instructions. The central question remains: What should India's legal framework for public procurement be? This paper explores this question through a comparative analysis of the similarities and differences in procurement laws in four jurisdictions, including India. The objective is to identify fundamental rules that underpin well-designed procurement frameworks that will guide India's efforts to create a robust law for public procurement.

*Keywords: public procurement, regulation, comparative law*

## Introduction

Public procurement is a commercial transaction in which the government is the purchasing party. There are, however, some features that distinguish these transactions from other commercial transactions: First, unlike commercial transactions between private parties that use private funds, a public procurement transaction, uses taxpayers' money. Second, the scale of expenditure differs when the government is a party. Transactions of public procurement account for a substantial portion of national expenditure both in India and other countries (Sharma and Thomas 2021). Third, service delivery to citizens depends on the quality and extent of public procurement. Governments must, therefore, conduct procurement activities with the highest levels of transparency, accountability, efficiency and planning.

The complexity of procurement transactions means that unlike in other commercial transactions, procurement is governed by a special framework of rules that dictate processes and procedures. The legal framework sets the rules of the game and determines what public officials can and cannot do during purchases. The process for issuing tenders, evaluating bids and managing contracts are some examples of elements of the public procurement system that are driven by the legal framework.

What should a legal framework for public procurement consider? The framework must recognise the role of government as an agent acting on behalf of private citizens. A framework must also consider that private parties have limited resources to negotiate with the government or challenge government action. An additional complexity is that the state does not undertake transactions with strictly commercial incentives. For instance, governments often choose to sign contracts with domestic firms even when

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there are benefits to contracting with international suppliers. Schooner 2002 posits that the rules must consider: (i) competition, (ii) integrity, (iii) transparency, (iv) efficiency, (v) consumer satisfaction, (vi) best value (vii) wealth distribution, (viii) risk avoidance and (ix) uniformity. However, there are inherent tensions between these objectives - framing rules for one element might impinge on another. The art is in balancing these effectively (Clifford McCue and Swanson 2015).

There are indications that the current framework in India is not fulfilling these objectives and failures in public procurement are many. For instance, one strand of literature highlights that corruption is the major challenge despite the existing transparency requirements in the existing framework (Tabish, Neeraj, and Jha 2011). Other literature highlights the complexity of processes, lack of standardisation of bid documents, delays in the procurement process, competency of procuring officials and anti-competitive behaviour (Hazarika and Jena 2017, Malholtra 2012). Manivannan and Zaveri 2021; Mehta and Uday 2022; Mehta and Thomas 2021 also highlight the challenges in different stages of the procurement, such as tendering, payments and anti-competitive markets. While there are differences in the diagnosis of the problems, there is a consensus that the Indian public procurement system faces major challenges which require reforms.

The adoption of a uniform law on procurement is viewed as the first step towards reform in the literature (Panda and Sahu 2013) and in policy discourse as is evident from these statements:

“A Public Procurement Act complemented by a set of Procurement Rules will improve the transparency of the process and accountability of public officials. The law would discourage the corrupt elements from short-cutting procedures in the name of ‘public interest’ unless the action could be defended in a court of law.” Dhall 2021

“...regulate public procurement with the objectives of ensuring transparency, accountability and probity in the procurement process, fair and equitable treatment of bidders, promoting competition, enhancing efficiency and economy, maintaining integrity and public confidence in the public procurement process...” (Public Procurement Bill 2012)

A barrier to the reforms process is the lack of established literature that examines the question: *What should India's legal framework for public procurement be?* The existing literature is fragmented across specific aspects of the procurement framework and the suggestions are specific to the element studied. Goyal 2022 focus on flexibility in rules for procurement during exceptional episodes such as emergencies. Oshani Perera and Goswami 2007 focus on sustainable public procurement. Verma 2013 focus on the link between competition and public procurement rules for India. Panda and Sahu 2019 surmise that enforcement is a challenge in the current framework. This paper aims to close this gap in the literature. The approach employed involves studying the elements of the existing legal framework for public procurement in India, in comparison with procurement frameworks in other countries. The comparative analysis is used to identify those elements that are absent in the Indian framework when compared with the legal frameworks in other countries perceived to have better public procurement laws. The differences in between the legal frameworks could indicate the areas for improve-

ment in the Indian legal framework and those that must be considered in a new law on public procurement.

## The Indian legal framework for public procurement

The legal framework for public procurement in India is a product of the quasi-federal structure of governance set out in the Constitution. Since public procurement is a process that underlies the functioning of any government entity, rule-making for public procurement follows the constitutional design. The Constitution sets out two separate lists of subjects upon which the Union and states can legislate to the exclusion of the other. In the context of public procurement, the jurisdiction of the Union and state governments is defined by two elements: (1) the item being procured, and (2) the entity undertaking the procurement. For items and entities that fall within the jurisdiction of the Union government, procurement rules are decided by the Union government. For items and entities within States' jurisdiction, rules are framed by states. A third list contains subjects upon which both the Union and state may legislate. This is the Concurrent List for which rules are framed by both the Union and state governments for their respective entities. There is a possibility that, within a single field, multiple levels of government and governmental bodies may undertake procurement. As an example, in "health" the Union, state, municipal bodies as well as public sector enterprises (PSEs) and specified entities may each undertake their own procurement. An entity-based typology of the Indian legal framework of procurement rules is as follows:

**Procurement by Union government and its agencies:** The Union procurement legal framework is varied. For general procurement, the General Financial Rules 2017 (GFR) are to be followed. There are separate manuals that specify detailed procedures for procurement of goods, services and works. There are also manuals, guidelines and model contracts set by the relevant ministries or departments that guide procurement procedures. For example, the Ministry of Petroleum and Natural Gas has issued notifications and policies for public procurement.<sup>2</sup> Similarly, the Ministry of Defence has a procurement procedure for the defence sector.<sup>3</sup> These manuals fill in the details of the broad framework set out in the GFR. In addition to these instruments, public procurement transactions have also to follow central laws that apply to commercial transactions in India, such as the Contract Act 1872, Sale of Goods Act, 1872, the Arbitration and Conciliation Act, 1996, and the Competition Act, 2002.

A significant component of the legal framework that governs public procurement involves the Central Vigilance Commission (CVC). There are two ways in which the CVC plays a role. First, as an authority to address corruption related complaints in relation to procurement. Second, the CVC can issue guidelines and circulars that govern aspects of the public procurement process.<sup>4</sup> In some cases, sectoral laws that govern public procurement.<sup>5</sup>

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<sup>2</sup>See, Policy to provide Purchase Preference (linked with local content)(PP-LC) in all Public Sector Undertakings under the M/o P&NG

<sup>3</sup>See, Defence procurement procedure

<sup>4</sup>See, CVC circular on Posting of details on the award of tenders/contracts on websites (Circular No. 005/VGL/4)

<sup>5</sup>See, S. 86 (1)(b), Electricity Act 2003

State governments and their agencies: Some state governments have enacted laws on public procurement.<sup>6</sup> These laws operate in addition to general financial rules in the state.<sup>7</sup> Just as for the central procurement process, general commercial, competition and criminal laws also apply to state level procurement transactions. In addition, there may also be manuals, guidelines and model contracts which guide public procurement in the state. At the state-level, CVC guidelines tend to have a stronger role, given that only some states have enacted laws on procurement. thy Other specified entities: Ordinarily, the GFR is deemed to apply to autonomous bodies to the extent that the bye-laws of such body have separate financial rules which have been approved by the Union Government.<sup>8</sup> Additionally, there are instruments created under laws which apply to procurement from specified entities. For example, the Public Procurement Policy for MSEs Order requires Public Sector Undertakings (PSU) to carry out specified levels of procurement with Micro and Small Enterprises (MSME) and earmarks a mandatory, the annual target of procurement contracts from MSMEs.<sup>9</sup>

International entities: Procurement for projects which receive financial or technical assistance from multilateral or other international agencies, such as the World Bank (WB) or Asian Development Bank (ADB), are often governed by various organisational guidelines specified by such entities. In addition, rules regarding domestic supplier preference, trade policy for specified items and Foreign Direct Investment (FDI) norms may apply to public procurement with foreign entities.

### **The General Financial Rules**

The GFR are a set of executive instructions for the government to manage its business in a financially prudent manner. It covers many subjects such as principles of financial management and is, therefore, not an instrument exclusively on public procurement. It applies to all Union government ministries, departments and subordinate bodies. It also applies to autonomous bodies set up by ministries or departments which are connected with a specified subject matter funded either wholly or partially by the instituting department. These bodies are permitted to have their own bye-laws which may provide for a separate set of financial rules. However, these rules have to be approved by the Union government.<sup>10</sup>

The GFR's stated objectives are accountability, efficiency, economy, transparency, fair and equitable treatment and competition.<sup>11</sup> There are, however, inherent conflicts between these objectives. For instance, efficiency may not always be aligned with economy. The most efficient suppliers may not always be the most economical. Similarly, efficiency may require significant pre-procurement planning and design activities to be undertaken which may add to the overall cost of procurement. The objectives of accountability and transparency also cause a degree of trade-off with efficiency and economy. Processes designed to enhance transparency and accountability may add to the time and cost of procurement and may introduce rigidity in the procurement process (Clifford McCue and Swanson 2015). The GFR also aims to protect local in-

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<sup>6</sup>See, Tamil Nadu Transparency in Tenders Act, 2018

<sup>7</sup>See, Orissa General Financial Rules

<sup>8</sup>Rule 1, GFR 2017

<sup>9</sup>See, Public Procurement Policy for Micro and Small Enterprises Order, 2018

<sup>10</sup>Rule 1 GFR 2017

<sup>11</sup>See, Rule 144, Ibid

dustries through buy preferences. For instance, the development of certain sections of suppliers such as micro, small and medium enterprises (MSME) by mandating a part of procurement from them.<sup>12</sup> Local preference is directly in conflict with the objective of competition and potentially efficiency. An accommodation of any one objective, necessarily implies a tradeoff with a another.

Table 1: The tradeoffs and competing objectives in the GFR

Provision example	Objective served	Trade-off
Publication of procurement plan	Transparency, accountability	Efficiency, economy
Open tenders	Transparency, competition	Efficiency
Pre-bid conferences	Competition	Efficiency
L1	Economy, competition	Efficiency

Source: Author's analysis

The procurement process begins with the procuring entity creating a plan for procurement. This process typically involves identification of the quantity, quality of the good, service or work to be procured, the preparation of an estimate and designing of tenders. The GFR does not have detailed rules on procurement planning but requires all ministries and departments to publish an annual procurement plan on their website.<sup>13</sup> This provision is motivated by accountability and transparency and not an efficient procurement plan. The manuals do set out more detailed rules on how to undertake planning. For instance, the works Manual guides procuring entities in preparing a preliminary project report, cost estimation and applying for approvals.<sup>14</sup> Similarly, detailed provisions on the design of tenders, tender specifications, and resources to be relied on when making specifications are found in the Manuals and not the GFR.<sup>15</sup> The GFR's only requirement is that specifications must be clear and based on national technical regulations or international standards "as far as possible".<sup>16</sup>

The Manuals prescribe the technical particulars such as warranty requirements, drawings, packing and marking requirements and the form of bid documents which is the Standard Bid Document.<sup>17</sup> They also prescribe specifications for different contract types. For instance, for Engineering, Procurement and Construction Contracts (EPC), the procuring entity need only specify the core requirements of design and construction allowing the contractor freedom to specify details.<sup>18</sup> When read together with the

<sup>12</sup>See, Public Procurement Policy for MSEs Order 2018; Public Procurement (Preference to Make in India), Order 2017

<sup>13</sup>Rule 144 (ii), (iii), GFR 2017

<sup>14</sup>Chapter 2 Manual on Procurement of Works 2019

<sup>15</sup>1.10, Basic Principles of undertaking works, Manual on Procurement of Works 2019; 2.1 Need Assessment, Manual for Procurement of Goods 2017; 2.8 Reference Documents Used in the preparation of Estimates, Manual on Procurement of Works 2019

<sup>16</sup>Rule 144 (ii), (iii), General Financial Rules 2017

<sup>17</sup>4.2, Manual on Procurement of Works 2019; Para 2.2 Formulation of Technical Specifications, Manual for Procurement of Goods 2017

<sup>18</sup>3.2.5 Agency for Procurement, Types of Contract Bidding Systems and Modes of Procurement, Manual on Procurement of Works 2019

Manuals, the Indian legal framework has fairly detailed rules on tender design. These rules service the objective of transparency and accountability.

The process that follows planing is tendering. The GFR has detailed rules on tendering. Procurement may be done by advertised open tender, limited tender or single tender. For certain procurement below specified threshold values which are subject to change, the procurement may take place directly without open tendering. In case of reserved items or purchases made pursuant to the MSME policies, purchases under rate contracts or by purchase committees.<sup>19</sup> In all cases except for rate contracts where only award details are to be published, it is mandatory for procuring entities to publish their tender enquiries, corrigenda and bid awards on the CPPP.<sup>20</sup> These provisions are supplemented by the Manuals.<sup>21</sup>

Before the actual bidding a pre-bid conferences may be organised in case of turn-key or sophisticated contracts for either goods, services or works for bidders to clarify doubts with the procuring entity before bidding.<sup>22</sup> Already issued tenders can be amended after the pre-bid meeting in the form of corrigenda. The new General Instructions on Procurement and Project Management 2021 (GIPP), now allow for a pre-tender conference, where procuring entities can obtain inputs from the market on tender specifications for complex procurement even before writing up a tender.<sup>23</sup>

Once the tender is finalised, vendor may bid. All bids have to be made through the e-procurement portal. There are some exceptions, such as rate contracts, confidential and nationally sensitive cases and tenders floated by Indian missions abroad.<sup>24</sup> The GFR has detailed step-wise processes for receipt of technical and financial bids and purchases through electronic reverse auctions.<sup>25</sup> It sets floor and ceiling limits on the bid security, the form of such security to be submitted with the bid and the return of the amount.<sup>26</sup>

After the bids are received, procuring entity must evaluate the bids. the GFR does not have detailed rules on bid evaluations. The Manuals have some supplementary rules. For instance, they set out a time limit for bid evaluation and further designates this based on the level of the procuring officer and the value of procurement.<sup>27</sup> Previously, the contract was be awarded to the lowest responsive bidder except for specialised contracts where the cost-quality method could be used.<sup>28</sup> The General Instructions now permit the cost-quality method for works contracts as well.<sup>29</sup> A contract must be signed within 21 days from the issue of a letter of acceptance.<sup>30</sup> A performance security is to be given by the awardee which is valid for a specified period beyond the date of completion of all contractual obligations.<sup>31</sup> The GFR does not provide a separate mechanism

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<sup>19</sup>Rules 153, 154, 155, 156, 158, 161, 162 GFR 2017

<sup>20</sup>Rule 159 (i) and (iv) Ibid

<sup>21</sup>3.5 Preparation of Bid Documents by Procuring Entity, Manual on Procurement of Works 2019

<sup>22</sup>Rule 173 (x) GFR 2017

<sup>23</sup>9.2 GIPP

<sup>24</sup>Rule 160 (i), (iii), (iv) and (v) GFR 2017

<sup>25</sup>Rules 163, 16, 167, 173 Ibid

<sup>26</sup>Rule 170 Ibid; 4.11 Manual for Procurement of Works

<sup>27</sup>5.6 Ibid

<sup>28</sup>Rule 173(xvi) GFR 2017

<sup>29</sup>15.2 General Instructions

<sup>30</sup>Rule 225 GFR 2017

<sup>31</sup>Rule 171 Ibid

for settlement of any disputes arising during the pre-contracting stage. A dispute in this stage may be resolved only by way of a Writ Petition filed in an appropriate high court challenging the executive abuse of power.

The GFR has a separate chapter on contracting which applies to all government contracts and not just contracts of procurement.<sup>32</sup> The provisions in this chapter appear to be aimed at ensuring uniformity in some areas such as price variations and to protect the government as a contracting party by specifying terms such as the payment of liquidated damages by the suppliers and requirements of a warranty clause. The GFR also prescribes the amount and manner in which advance payment may be made to suppliers. It sets a ceiling and floor for different classes of suppliers and distinguishes between contracts with private firms and a public sector undertaking (PSU). For instance, in the former case, the ceiling amount for advance payment is lower (30 per cent) than for PSUs (40 per cent).<sup>33</sup>

There are limited rules on monitoring during the lifespan of the contract. The GFR simply states that contracts should be monitored. Whenever there is a breach of the provisions in a contract, a notice must be issued. It also requires a review of guarantees provided by the suppliers with some regularity.<sup>34</sup> The Manuals also provide detailed rules on contract monitoring.<sup>35</sup>

After the delivery of the procured good, service or work, a procuring entity must ensure timely payment to vendors. However, there are no provisions for ensuring timely payment or for imposing any penalty for not doing so in the GFR. The recent GIPP does set out time limits for payments of bills to contractors. For bills delayed for more than 30 days, interest may be paid. While the GIPP has addressed the problem of late payments, the provisions lack teeth. For instance, payment of interest is not mandatory.<sup>36</sup> Further, the GFR also does not provide for a separate mechanism for settlement of any disputes that may arise during the contracting stage or in the post-contracting stage. Disputes may be resolved by way of a Writ Petition filed in an appropriate high court or by arbitration if the contract so provides.<sup>37</sup>

### **General Financial Rules juxtaposed with the Public Procurement Bill, 2012**

The Public Procurement Bill 2012 (Bill), was introduced with the aim of regulating public procurement by Union ministries, departments, undertakings and other entities set up by the Union government or bodies substantially funded by the Union government.<sup>38</sup> States will continue to have their own procurement laws. Procurement for projects under financial assistance from international bodies, will be covered by the procedures specified by them.

The Bill exempts Union procurement (i) for emergencies to manage disasters; (ii) for national security or other strategic considerations specified by the Union government and (iii) where the procurement is less than INR 50 lakhs. The law specifies a blanket

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<sup>32</sup>Chapter 8 Ibid

<sup>33</sup>Rule 172 Ibid

<sup>34</sup>Rule 226 Ibid

<sup>35</sup>Chapter 6, Manual for Procurement of Works 2017

<sup>36</sup>12 GIPP

<sup>37</sup>Rule 227, GFR 2017

<sup>38</sup>S. 3, Public Procurement Bill 2012

exemption to all provisions in Chapter 2 of the Bill.<sup>39</sup> These include important provisions like the Code of Integrity to the procuring entity and bidder, grievances mechanisms, publication on the Central Public Procurement Portal, competition related provisions, qualification of bidders. This differs from the existing GFR, which only exempts tenders below a specific threshold from purchase without a quotation and <sup>40</sup> open tendering,<sup>41</sup>. Other provisions with respect to the Code of Integrity,<sup>42</sup>, transparency<sup>43</sup> apply to all procurement. The exceptions to applicability specified in the Bill should be removed. While transparency provisions might increase the cost of procurement, they are necessary to avoid anti-competitive practices and corruption.

In addition to the listed exemption, the Bill empowers the government to increase this limit by notification for different classes or categories of procuring entities. While procurement laws in other countries specify thresholds, they do not give discretionary power to the government to extend these to a specific class or category of procuring entities beyond those specified in the law.<sup>44</sup>

The Bill also extends purchase preference powers that are in the GFR. While the GFR specifies cases where a purchase preference may be applied, the Bill gives residuary powers to the Union to extend purchase preferences beyond the cases specified in the Bill.<sup>45</sup> The GFR has a similar provision but limits the power of the government to increase the categories to preferences on the ground of promotion of locally manufactured goods or locally provided services.<sup>46</sup>

The Bill allows bidders to apply for review of the decision of the procuring entity.<sup>47</sup> The bidder may then approach a Procurement Redressal Committee to appeal the decision of the procuring entity. This was not provided for in the GFR. This is a good introduction as it gives bidders the opportunity to challenge tender awards without going to courts directly. However, the Procurement Redressal Committee consists of members of the procuring entity albeit they may not be associated with that procurement. This might be a conflict of interest.

Unlike the GFR, the Bill introduces a grievance redressal at the post-contract award as well. The mechanism involves a Grievance Redressal Committee constituted by the procuring entity. The application must be disposed off within a period of thirty days. Specialised grievance redressal is not present in the GFR. There is a specialised dispute resolution system in the US laws for all litigation with the government. This considers the imbalance of power challenge previously highlighted in this article. However, while in the US, the forum consists of judicial members, the committee contemplated under the Bill consists of members from the procuring entity. This may lead to a conflict and effectively defeat the purpose of the Bill.

Under the Bill allows a procuring entity to debar a bidder for (i) violating the Code of

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<sup>39</sup>Clause 4, Public Procurement Bill 2012

<sup>40</sup>Rule 154, GFR 2017

<sup>41</sup>Rule 162, Ibid

<sup>42</sup>Rule 175, Ibid

<sup>43</sup>Rule 173, Ibid

<sup>44</sup>See for example: 5 of Public Contracts Regulation 2015 and Article 4, Directive 2014/24/EU

<sup>45</sup>Clause 11, Public Procurement Bill 2012

<sup>46</sup>Rule 153 (iii) GFR 2017

<sup>47</sup>Clause 41, Public Procurement Bill 2012



Integrity; (ii) an unapproved withdrawal from the bidding process; (iii) failure to sign a contract or for (iv) poor performance. These provisions may have the effect of discouraging bidders from participating the first place. The penalty for poor performance also threatens to be an obstacle to vendors especially where contract management is not done well. Table 2 sets out the differences between the provisions highlighted above and those in the GFR.

Table 2: Summary comparison of the GFR and Bill 2012

Provision	In the Bill	In the GFR
Exceptions to applicability	Extends to many sections including the Code of Integrity	Specific and does not extend to transparency provisions
Discretionary powers to extend exceptions	Present	Absent
Extended purchase preferences provisions	Present with no limitation	Present but limited to local purchase
Introduction of a bid protest mechanism	Present	Absent
Introduction of a bid protest mechanism	Present	Absent
Penalties for bidders	Present	Absent

## Procurement laws in other countries

The European Union (EU) public procurement rules are embodied in a set of directives issued by the European Commission (EC). These rules have to be converted into national legislation by member states within specified deadlines. At present, there are three main directives that govern public procurement - the EU Directive on Public Procurement;<sup>48</sup> the EU Directive on procurement by entities operating in the water, energy, transport and postal service sectors;<sup>49</sup> and the EU Directive on the award of concession contracts.<sup>50</sup> EU countries were to include the new rules in their national legislation by April 2016, with the exception of provisions on e-procurement which were to be included by October 2018. While these are the main directives applicable to public procurement, there are also other directives that direct payments and the provision of remedies such as the Remedies Directive for the public sector,<sup>51</sup> and the Remedies Directive for the utilities sector,<sup>52</sup> which are also relevant.

In addition to this, the freedoms embodied in the Treaty on the Functioning of European Union such as free movement of goods and freedom to provide services continue to apply to public procurement. Similarly, the provisions in the WTO Agreement on

<sup>48</sup>Directive 2014/24/EU of the European Parliament and of the Council, 26 February 2014 (repealing Directive 2004/18/EC)

<sup>49</sup>Directive 2014/25/EU of the European Parliament and of the Council, 26 February 2014 (repealing Directive 2004/17/EC)

<sup>50</sup>Directive 2014/23/EU of the European Parliament and of the Council, 26 February 2014

<sup>51</sup>Directive 89/664/EEC

<sup>52</sup>Directive 92/13/EEC

Government Procurement is also applicable to all EU countries. The European Court of Justice has issued a large number of decisions on public procurement in EU.<sup>53</sup> In fact, in many instances, the EU Directives themselves make references to case-laws set out by the Court of Justice of the European Union.<sup>54</sup>

While the EU directives are fairly detailed however granular levels of detail are absent when compared with other legal frameworks such as the US public procurement legal framework. This is presumably on account of the fact that the EU directives set a minimum standard for countries in the EU. Most countries augment these rules with domestic amendments and regulations. It applies to public procurement of goods and services by governments and government bodies in EU countries. The EU law sets thresholds for contracts which are to be governed by the EU rules. Lower value tenders are governed by national rules which are to be made based on the general principles of the EU.

Public procurement policies are determined by the EC and the European Parliament. In addition to this, each country has its own appointed authorities that oversee public procurement transactions within their jurisdiction. For instance, the directives suggest that member states create central purchasing bodies.<sup>55</sup> Similarly, member states are to ensure that application of public procurement rules are being monitored by setting up bodies and governance structures for the same.<sup>56</sup>

In the United Kingdom (UK), the public procurement legal framework consists of a combination of treaty requirements and domestic legislation which incorporate the rules set out in the EU directives as well as any existing domestic legislation. The three main EU Directives on public procurement, apply to procurement in the UK.<sup>57</sup> The WTO Government Procurement Agreement also applies.

In addition to these treaties and directives, domestic legislation such as the Public Contracts Regulations 2015, the Local Governments (Transparency Requirements) Regulations 2015, the Utilities Contracts Regulations 2016, Concession Contracts Regulations 2016, Small Business Enterprises and Employment Act 2015, Late Payment of Commercial Debts Regulations 2013 and Public Services (Social Value) Act 2012 are some laws which apply to public procurement.

The legal framework applies to all local and governmental bodies. There are some exceptions to the applicability on the legal framework for tender processes in cases where the procurement value is below a specified threshold. Similarly, there are specific exclusion set out for some service contracts.<sup>58</sup> The Crown Commercial Service is the authority responsible for creating and implementing the legal framework and making

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<sup>53</sup>See, Dutch Coffee Case C-368/10 and *Evropaïki Dynamiki v. European Environment Agency* T-331/06

<sup>54</sup>See, Clause 11 and 31 of the Preamble of the Directive 2014/24/EU

<sup>55</sup>Article 37 (1), Directive 2014/24/EU

<sup>56</sup>Article 83, Ibid

<sup>57</sup>The EU Directive on Public Procurement (Directive 2014/24/EU of the European Parliament and of the Council, 26 February 2014 (repealing Directive 2004/18/EC)), the EU Directive on procurement by entities operating in the water, energy, transport and postal service sectors (Directive 2014/25/EU of the European Parliament and of the Council, 26 February 2014 (repealing Directive 2004/17/EC)) and the EU Directive on the award of concession contracts (Directive 2014/23/EU of the European Parliament and of the Council, 26 February 2014)

<sup>58</sup>S.10 PCR 2015

policies on procurement.

The public procurement framework in the United States (US) follows its federal structure. In this federal set-up, the procurement framework can be examined at two levels: the federal level and the state or local level. At the federal level, the legal framework in the US comprises many statutes and international agreements. There is no single instrument that governs public procurement. The principal instruments governing federal procurement are the Federal Acquisition Regulation (FAR),<sup>59</sup> and the United States Code.<sup>60</sup> In addition to these statutes, legislation such as the Federal Property and Administrative Services Act 1949,<sup>61</sup> the Armed Services Procurement Act 1949,<sup>62</sup> the Competition in Contracting Act 1984, the Truth in Negotiations Act 1963, the Prompt Payment Act, 1982 and the Contract Disputes Act 1978 also apply to public procurement transactions.

The FAR applies to most federal departments, with the exception of some authorities such as the Federal Deposit Insurance Corporation, the US Postal Service and Federal Aviation Administration. These entities have their own rules for procurement which are like those in the FAR.

There are also some exceptions to the applicability of these rules in certain cases of procurement. For instance some types of service procurement by entities such as the National Aeronautics and Space Administration (NASA) and the Department of Defence involving advanced research and prototype development are not subject to public procurement rules. Similarly, in specified cases, where the procurement contract value is below a given threshold, the rules applicable to procurement have been simplified.

The regulation of public procurement is done by a separate entity from within the government. The primary responsibility for regulation, policy making and rules for practice in public procurement lies with the Office of Federal Procurement Policy (OFPP) which is in the Office of Management and Budget (OMB). In addition to this, there are co-ordinating authorities such as the Defence Acquisition Regulation Council which represents the Department of Defence. In addition to these, an administrative tribunal called the Board of Contract Appeals also has the authority to hear post-award claims by firms who have been awarded public procurement contracts.

### **Procurement rules and processes in EU, UK and US**

The PCR in the UK and directives in EU, do not contain very detailed rules on procurement planning. We find provisions that require procuring entities to inform potential contractors or their procurement plans, through market consultations, implying that planning is a requirement before procurement.<sup>63</sup> There is no express provisions on what the contents of the procurement plan should be or how they should be prepared. The FAR in the US has relatively more detailed rules. For instance, the FAR sets out rules on how procurement planning is to be done by the procurement entity for each fiscal year. This is to ensure that the government meets its needs in the most effective,

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<sup>59</sup>Title 48 Code of Federal Regulations

<sup>60</sup>Titles 10 and 41 Ibid

<sup>61</sup>41 U.S.C.

<sup>62</sup>10 Ibid

<sup>63</sup>Article 41, Directive 2014/24/EU

economical, and timely manner. As part of this process, the government develops acquisition plans and the resources required for Procurement.<sup>64</sup> . It culminates in an acquisition plan which consists of information such as a statement of need, cost, plan of action, potential sources, acquisition considerations, risks, budgeting, logistical considerations and contract administration issues.<sup>65</sup>

On tender design, the PCR in the UK and the EU Directive on Public Procurement, have two sets of provisions on tender design: specifications and bundling of tenders. The PCR has principle-based provisions on specification requirements which are suggestive rather than mandatory. For instance, technical specifications may specify whether the transfer of intellectual property rights will be required.<sup>66</sup> It also contains provisions that mandate how technical specifications are formulated.<sup>67</sup> The second concerns the bundling or unbundling of tenders. The PCRA permits procuring entities to award contracts in the form of separate lots and determines the size and subject matter of these lots.<sup>68</sup> Procuring entities have to indicate reasons for not sub-dividing the tender into lots indicating a preference for unbundled tenders.<sup>69</sup> There are no detailed rules on the contents of the tender documents in the PCRA or the EU Directives. The FAR in the US has more detailed rules on the design of tenders. They prescribe the form and contents of invitations to tenders,<sup>70</sup> and detailed information relevant for bidders such as key terms of contract,<sup>71</sup> the contract schedule<sup>72</sup> evaluation factors for awards<sup>73</sup> and logistical information for bidders.<sup>74</sup> There are also some specific rules for some types of tenders including for construction, shipbuilding, fixed prices contracts.<sup>75</sup> The FAR also has rules on how bundling or consolidation of tenders is to be done.<sup>76</sup>

For the next process - tendering, the PCRA and EU Directives require that procurement documents be published online for open competitive bidding and timelines for publication of tenders.<sup>77</sup> The regulations also specify the conditions under which restricted tendering or contracting through negotiation may be done.<sup>78</sup> The FAR is more principle-based than prescriptive when compared with those in the PCRA, EU Directives. The FAR requires tenders to be published within sufficient time before the public opening of bids.<sup>79</sup> The FAR also specifies the conditions under which open tendering may not be done.<sup>80</sup>

The PCR in the UK, procuring entities may conduct market consultations to prepare

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<sup>64</sup>7.000 and 7.102, FAR

<sup>65</sup>7.105 Ibid

<sup>66</sup>Regulation 42, PCR 2015

<sup>67</sup>Regulation 42 (11), Ibid

<sup>68</sup>Regulation 46 (1), Ibid

<sup>69</sup>Regulation 46 (2), Ibid

<sup>70</sup>14.202.1- Part 1 - The Schedule FAR

<sup>71</sup>14.201-7 Contract Clauses, Ibid

<sup>72</sup>14.201-9, Ibid

<sup>73</sup>14.201-5 Ibid

<sup>74</sup>14.201-5, Ibid

<sup>75</sup>14.201-1, Ibid

<sup>76</sup>7.107, Ibid

<sup>77</sup>Regulation 53, PCR 2015

<sup>78</sup>PCRA 26, 27, 28, 29 Choice of Procedures, Public Contracts Regulations 2016; Article 27, 28, 29, 31, 32 Directive 2014/24/EU

<sup>79</sup>14 FAR

<sup>80</sup>Part 15, Part 17, Part 18 FAR

the procurement documents based on the proceedings.<sup>81</sup> However, there is no express provision in the PCR for pre-bid meetings. The EU framework alludes to the concept of information meetings.<sup>82</sup> The FAR in the US prescribes that market research be done before preparation of bid documents which includes holding pre-solicitation conference.<sup>83</sup> The FAR also permits a pre-bid conference to be held for complex acquisitions as a means of briefing prospective bidders and explaining complicated specifications and requirements to them as early as possible after the invitation has been issued and before the bids are opened.<sup>84</sup> The FAR also permits the amendment of tender documents after the pre-bid meeting.<sup>85</sup>

Bidding is to be done electronically under the PCR and EU Directives. The PCR does not specify how the financial guarantee is to be arrived at but alludes to the existence of one in all tender documents.<sup>86</sup> The FAR allows for facsimile bids as well as electronic bids.<sup>87</sup> The FAR also requires a bid guarantee to be furnished which is a specified percentage of the contract value.<sup>88</sup>

Once bids are received, the FAR in the US, prescribes detailed procedures for the receipt, handling, opening, and disposition of bids including mistakes in bids, and subsequent award of contracts.<sup>89</sup> For instance, at the appointed time, the procuring officer shall personally and publicly open all bids received, read the bids aloud to persons present and have the bids recorded.<sup>90</sup> There are prescribed forms for recording bids.<sup>91</sup> There is no time limit prescribed for bid evaluation. The UK and EU do not have prescriptive procedures for bid evaluations.<sup>92</sup>

There are rules on award of tenders in these legal frameworks. Under the FAR, the bidder offering the lowest price meets the evaluation criteria may be awarded the contract.<sup>93</sup> The FAR also sets out the different contracts that might be entered into as well as the considerations for choosing a contract type.<sup>94</sup> The legal framework also prescribes certain terms to be incorporated in contracts including clauses of authorised deviation in some cases.<sup>95</sup> These include clauses on limitation of government liability, payment clauses and clauses on sub-contracting. The FAR also designates specialised officers called contracting officers for conducting contract execution, performance compliance, terminations, modification, negotiation and so on.<sup>96</sup> In the framework in the US there are very detailed provisions on reporting of contracts for the Federal Procurement Data System, contract record retention and management of contract files.<sup>97</sup> There are also

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<sup>81</sup> Regulation 40, 41, Preliminary Market Consultations, PCR 2015

<sup>82</sup> Article 57 Directive 2014/24/EU

<sup>83</sup> 10.001 (a)(2) (i) Market Research, 10.002 (a) (2) (viii) FAR

<sup>84</sup> 4.207 Pre-bid conference and 15.201 Ibid

<sup>85</sup> 14.208 Amendment of invitation for bids

<sup>86</sup> 54(6)(f) PCR 2015

<sup>87</sup> 14.202-7,8, 14.203-1 FAR

<sup>88</sup> 52.228-1 Ibid

<sup>89</sup> 14.400 Ibid

<sup>90</sup> 14.402-1, Ibid

<sup>91</sup> 14.403 1, Ibid

<sup>92</sup> 56 PCR 2015

<sup>93</sup> 14.404-1, 14.408-7 FAR

<sup>94</sup> Part 15 and 16, Ibid

<sup>95</sup> Part 52 and 53, Ibid

<sup>96</sup> 4.1 Ibid

<sup>97</sup> 4.6, 4.7, 4.8 and 4.17, Ibid

detailed provisions on publishing contract specific related information.<sup>98</sup> In the framework in the US, there are references to advance payments to suppliers, however, there are no provisions that set the ceilings and floors limits on payments.<sup>99</sup>

In the UK, the tender is to be awarded to the tenderer that submitted the best tender based on the award criteria, the tender with the lowest cost or the tender with the best price-quality ratio.<sup>100</sup> The law also requires the submission of reports to the Cabinet Office with details of each procurement contract executed.<sup>101</sup> In addition to this, the legal framework requires record-keeping and documentation of all procurement procedures and contracts above a specified threshold value for a minimum specified time.<sup>102</sup>

There are detailed rules on dispute resolution. In the US, a claim called a bid protest may be filed by interested parties. An interested party is a firm that has submitted a bid or one that is eligible to do so. A bid protest can be filed with the contracting agency - to ensure administrative action was in keeping with the policies of the Government Accountability Office - to determine whether there is a violation of law related to administrative action, the District of the Court of Federal Claims - to determine a violation of a provision of law. In the US, in the post-contract stage, there is a separate mechanism under which disputes may be filed.

In the EU, the Remedies Directive<sup>103</sup> requires member states to set up appropriate review procedures including for making bid protests. For instance, in Austria and Belgium handling of protests is done by the contracting authority. Here it is relevant to note that the framework has a procedure for addressing disputes at this stage.

Unlike in some other EU countries, the legal framework in the UK does not set up a separate dispute resolution forum for disputes at the pre-award stage, however, parties may approach the High Court to challenge a breach of duty by the contracting party. The Court may set aside the decision of the procuring entity, order the amending of a document and also award damages. The framework does not appear to provide for alternate dispute resolution at this stage.<sup>104</sup>

The FAR also designates specialised officers for performance compliance.<sup>105</sup>

In the US, the legal framework provides for payment of interest if a governmental agency fails to pay a firm for each of the deliveries made or services rendered within the specified payment period. The interest is to be paid to the firm.<sup>106</sup> In the UK the legal framework requires payment to vendors within 30 days of the issue of the invoice, failing which there is a penalty imposed.<sup>107</sup> The EU legal framework sets out the requirement for timely payment by public authorities to vendors. In the event of a failure to pay, the legal framework provides for the imposition of interest to the vendor.<sup>108</sup>

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<sup>98</sup>Part 5 Ibid

<sup>99</sup>18.122 Ibid

<sup>100</sup>34, 56 PCR 2015

<sup>101</sup>S.84 Ibid

<sup>102</sup>S.84 Ibid

<sup>103</sup>Directive 2007/66/EC of 11.12.2007

<sup>104</sup>S.97 and 98 PCR 2015

<sup>105</sup>4.1 FAR

<sup>106</sup>31 US Code S.3902

<sup>107</sup>S.113 PCR 2015

<sup>108</sup>Directive 2011/7/EU on late payments in commercial transactions

The Contract Disputes Act 1978,<sup>109</sup> applies to disputes between federal contractors (or sub-contractors in some cases) and the Federal Government. Either party may bring a claim. The prescribed procedure is that a claim must be made within the prescribed time to a contracting officer. The contracting officer must then issue a decision on the claim. The decision of the contracting officer may be challenged at the Board of Contract Appeals or the Federal Court of Claims.

In the EU, the Remedies Directive<sup>110</sup> requires members states to set up an appropriate review procedures including for making bid protests. For instance, in Austria and Belgium handling of protests is done by the contracting authority. Here it is relevant to note that the framework has a procedure for addressing disputes at this stage. In the EU, two main directives govern grievance redressal - the Remedies Directive for the Public Section,<sup>111</sup> and the Remedies Directive for the utilities sector.<sup>112</sup> These directives set out some basic rules relevant for dispute resolution such as the requirement for a standstill period to access remedies, time limits and penalties for violation.<sup>113</sup> The Remedies Directives give procedural autonomy and discretion to countries in prescribing specific timelines and procedures. However, dispute resolution for public contracts are to be governed by the larger in-principle framework set out the Remedies Directives.

There are two kinds of grievance redressal structures in the EU. In the first type of structure, an aggrieved party may approach the regular domestic judicial authority. For instance, in the UK, such cases are to be filed in the High Court. In these cases, there is no separate dispute resolution mechanism for public contracts. In some countries, such as Austria, dispute resolution is carried out by an administrative court which is where complaints against the administrative decision are to be filed.<sup>114</sup>

We find that (i) not all countries have uniform laws on procurement, but yet have systems that seem to be working fairly well; (ii) while laws may be fragmented, rules are not. A single subject matter is contained within a single instrument; (iii) the US has a specialised dispute resolution system for government contracts; (iv) the rules on tendering in other countries are similar to those in India; (v) there are provisions for pre-tender meetings for procuring entities to prepare tender documents; (vi) contracting and contract management is done by specified officers; (vii) there are strong frameworks to combat payment delays to vendors.

## Conclusion

Our findings from the review of laws to identify some key gaps in the current Indian legal framework - structural and procedural. While isomorphic mimicry is not our aim, these may be a roadmap for India in thinking about how to design a new procurement law.

At the outset, a procurement framework must face parliamentary scrutiny and public

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<sup>109</sup>Sections 7101-7109 at 41 USC

<sup>110</sup>Directive 2007/66/EC of 11.12.2007

<sup>111</sup>Directive 89/665/EEC

<sup>112</sup>Directive 92/13/EEC

<sup>113</sup>An amending directive - Directive 2007/66/EC

<sup>114</sup>Directive 92/13/EEC

debate. The GFR is a set of executive instructions rather than a law passed by the legislature. Procurement laws in other countries are instruments passed by the legislature. This presents the fundamental problem that despite government procurement being a process that utilises taxpayer money, the rules that dictate the process or limit the powers of government are not subject to parliamentary scrutiny.

Further, all rules on procurement must be binding or enforceable. A large part of the framework also consists of manuals and guidelines. Courts have previously held that guidelines have no statutory force and are therefore not binding on the government authority to whom it pertains.<sup>115</sup> Further, many Courts in India have taken the view that Manuals, are not statutory instruments and therefore have no statutory force and are not binding.<sup>116</sup> There are some exceptional cases where the court has stated that a Manual which has been approved by the Cabinet and notified under the orders of the governor has the force of law.<sup>117</sup> However, largely the position is that these are non-statutory instruments which cannot be enforced and which are not binding. Procurement rules in other countries are binding and enforceable as they are laws issued by the legislature and are laws.<sup>t</sup>

Further, India may not need a single law. A criticism of the legal framework on procurement in India is that it consists of multiple instruments (Panda and Sahu 2010). In our review we find that the UK,<sup>118</sup> US,<sup>119</sup> and EU,<sup>120</sup> all have multiple laws for procurement.

The provisions in legal framework must not be fragmented. Unlike other countries, in India, a single aspect of procurement is addressed across many instruments. Often a gap in the provisions of one instrument is patched up by another. For instance, GFR prescribes detailed rules for the publication of tenders at the first stage of procurement. However, there are no provisions requiring publication of contract details. This has subsequently been addressed by the CVC in a circular, wherein it has directed all organisations to post details of all contracts and purchases made above a value threshold covering at least 60% of the value of the transactions every month.<sup>121</sup> Another example is the Office Memorandum requiring the payment of interest for delayed payments.<sup>122</sup>

The L1 may be retained. Across all reviewed laws L1 is the preferred method of selecting a bidder. For instance, In the US the FAR prescribes that the contract be awarded to the bidder 'whose bid, "conforming with all the material terms and conditions" of the invitation for bids, is the lowest in price. In the UK, the award is to be made to the "eco-

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<sup>115</sup>Committee of Management District v State of UP (2005 (4) AWC 3482, 2005 (2) ESC 1252)

<sup>116</sup>Travelite (India) v. Union of India and Ors. (WP (C) 3774/2013, C.M. No. 7065/2013); Thumkunta Madhava Reddy v. The State of Telangana and Ors. WP. No. 18726 of 2020

<sup>117</sup>Dinesh Yadav v. State of Bihar and Ors. 2019 (Civil Writ Petition No. 14455 of 2017)

<sup>118</sup>See, Public Contracts Regulation Act 2016, the Utilities Contracts Regulations 2016 and the Late Payment of Commercial Debts Regulations 2013

<sup>119</sup>Federal Acquisition Regulations, the Prompt Payment Act 1982, the Contract Disputes Act 1978, the Armed Services Procurement Act 1949 and the Competition in Contracting Act 198

<sup>120</sup>See, EU Directive on Public Procurement, EU Directive on procurement by Entities Operating in the Water, Energy, Transport and Postal service sectors, the EU Directive on the Award of Concession Contracts Remedies Directive for the public sector and the EU Remedies Directive for the Utilities Sector

<sup>121</sup>See, CVC circular on Posting of details on the award of tenders/contracts on websites (Circular No. 005/VGL/4)

<sup>122</sup>See, Office Memorandum No. F6/18/2019-PPF dated 3 July 2020



nomically advantageous tender” identified on the basis of the price or cost, and “may include the best price-quality ratio”. Under the GFR, the contract must be awarded to the lowest responsive bidder, except for service contracts where the quality-cost-based method is permitted for specialised work.

The L1 criteria using a Quality-Cost selection method for procurement as introduced by the new GIPP in India has permitted the Quality-Cost selection method for works and non-consultancy contracts. This is a step in the right direction.

There must be improved reporting and record keeping. There are many reporting requirements and record-keeping obligations on the procuring entities in other countries such as the UK, US and even within the EU. These include reporting and record keeping of disputes, contracts, procedures employed and so on. They are aimed at increasing government accountability and in some cases, there are publishing requirements which are aimed at transparency. The GFR or the manuals in India do not have this level of reporting or record-keeping requirements. A law must have extensive reporting requirements. These reports must be available to the public.

There must also be pre-tender market consultations. In the US, UK and EU we find provisions that prescribe market consultations *prior* to the tender being issued. In the US we also see provisions allowing for a pre-bid conference, but not in the UK and EU. In India, provisions for market consultations or pre-bid meetings *after the tender is issued* but before the bidding takes place. The difference is that while other jurisdictions have a chance to design tenders based on market consultations in the first instance, in India, already issued tenders will have to be amended after the pre-bid meeting.

Further, there is a need for a strong delayed payment framework. There are no provisions for ensuring timely payment or for imposing any penalty for not doing so in the principal instrument in India. We find provisions for prompt payment in the principal legal instruments in the UK and EU. This is a gap even in the 2012 procurement bill in India. Robust provisions on payment delays will also reduce the risk of procurement contracting with the government.

There is also a need for a separate system for disputes on government contracts. The Contract Disputes Act 1978,<sup>123</sup> applies to disputes between federal contractors (or sub-contractors in some cases) and the Federal Government, which is not the case in India or the UK. A separate redressal system must be independent and free from delays given that procurement contracts are commercial contracts involving large sums of money where delays could ultimately affect citizens.

A procurement law must have a detailed procedure for bid-protests. The GFR does not have a separate mechanism for settling ex-post or ex-ante disputes arising out of government contracts, unlike some other jurisdictions. For instance, in the US, a claim called a bid protest may be filed by interested parties. An interested party is a firm that has submitted a bid or one that is eligible to do so. A bid protest can be filed with the contracting agency (to ensure that the administrative action was in keeping with policies of the Government Accountability Office or the District of the Court of Federal Claims (to determine a violation of a provision of law). Similarly, in the EU, the Remedies Directive, requires member states to set up appropriate review procedures including for making bid protests.

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<sup>123</sup>Sections 7101-7109 at 41 USC

The legal framework in India is blamed for poor outcomes in public procurement. There is often a push for developing countries to improve their legal frameworks to secure better outcomes. In India too there have been suggestions and attempts to adopt a universal legal framework for public procurement. The Public Procurement Bill 2012 based on the UNCITRAL model law was a model law that attempted to unify the rules on procurement and align them with international legal frameworks. But will this work for India?

The similarities between procurement laws we highlight in this paper suggest that even with similar rules there can be differences in procurement outcomes. One reason for this is the influence of the state's capacity to implement the rules. In the absence of good institutions, even the best rules fail. This finding is inline with Roy and Uday 2020 and Erica Bosio and Shleifer 2020.

From this perspective, we conjecture whether bridging the gaps and differences identified between the laws in India and other countries will really solve the challenges meant to be addressed by a legal framework in procurement: accountability, transparency and efficiency to address the agency problem and imbalance of power problem that is inherent in commercial transactions where the government is a counter-party. Given what we know about the level of state capacity, perhaps not. Yet could some of the documented inefficiencies be reduced with appropriate rules? For instance, Roy and Sharma 2020 demonstrate the extent of corrigenda to tenders being issued. Could a requirement for *pre-tender* market consultations with potential bidders in like other countries (rather than pre-bid consultations as under the GFR) solve the issue of corrigenda and reduce the cost of tendering?

Similarly, we ask: is a law that is deliberated on and issued by the parliamentary representatives of people, on the rules of government spending of public money better than executive rules which do not require parliamentary deliberation? Perhaps it is. In this context, it might be better to have a framework of rules which are all binding and enforceable in the form of a parliamentary law rather than manuals and guidelines which courts have held may not be enforceable or binding on executive authorities. Perhaps the argument for a parliamentary law on procurement in India lies in the need for better separation of powers - having the parliament issue a law and the executive implementing it. In this view, procurement laws in India also pose a challenge against the constitutional rubric of the separation of powers.

While the legal framework cannot guarantee better outcomes, it is an important element as it sets the rules of the game and the differences we identify are potentially areas for policy intervention. Even in this, isomorphic mimicry of the rules and systems from other countries is not the way forward, but it may be a useful guide in thinking about what should and could inform well-designed public procurement laws.

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