

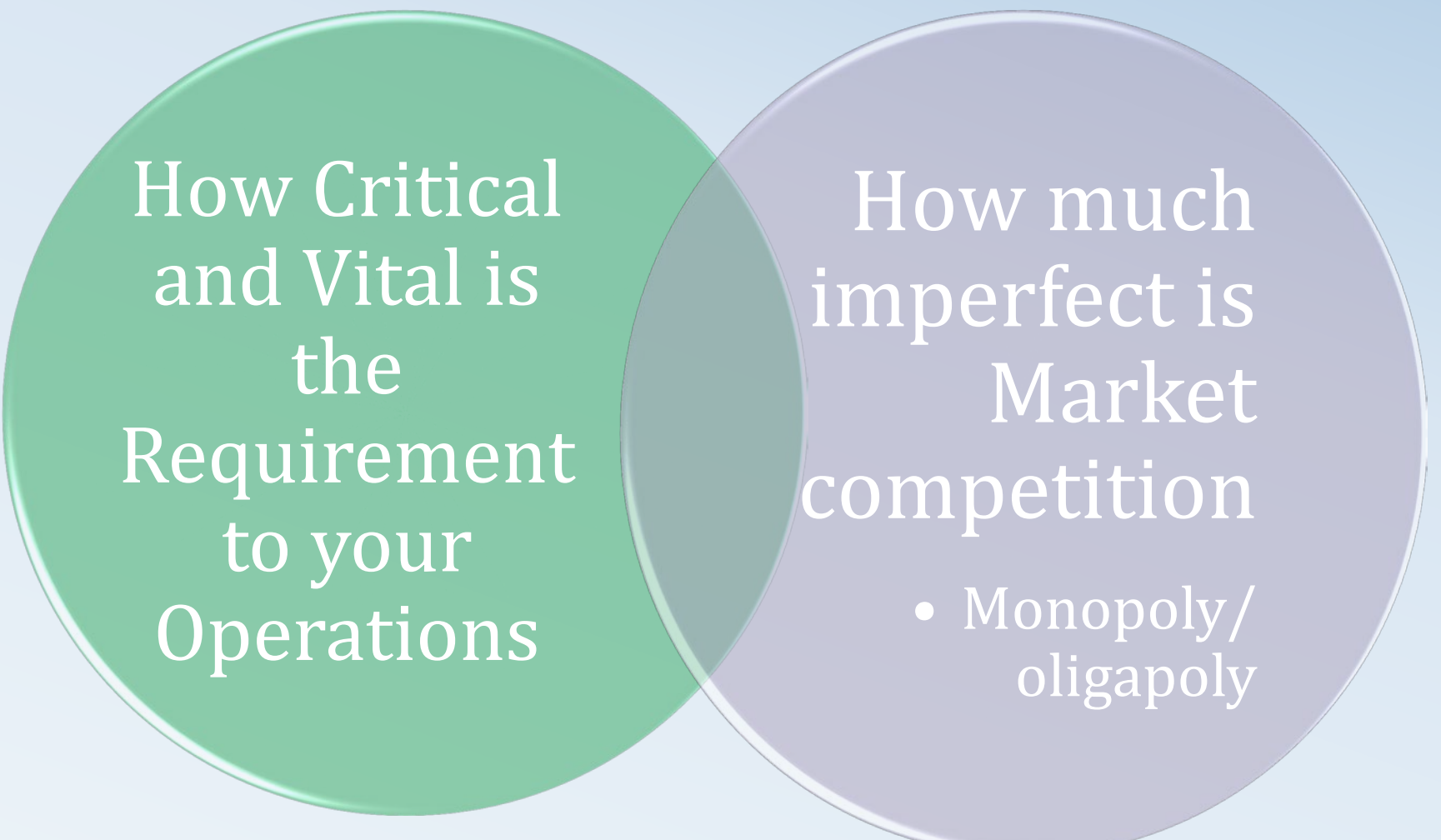
# Improving Competition in Public Procurement

Experience  
from India



Girish  
Bhatnagar  
&  
Kalesh Kumar

# Adverse Procurement Conditions

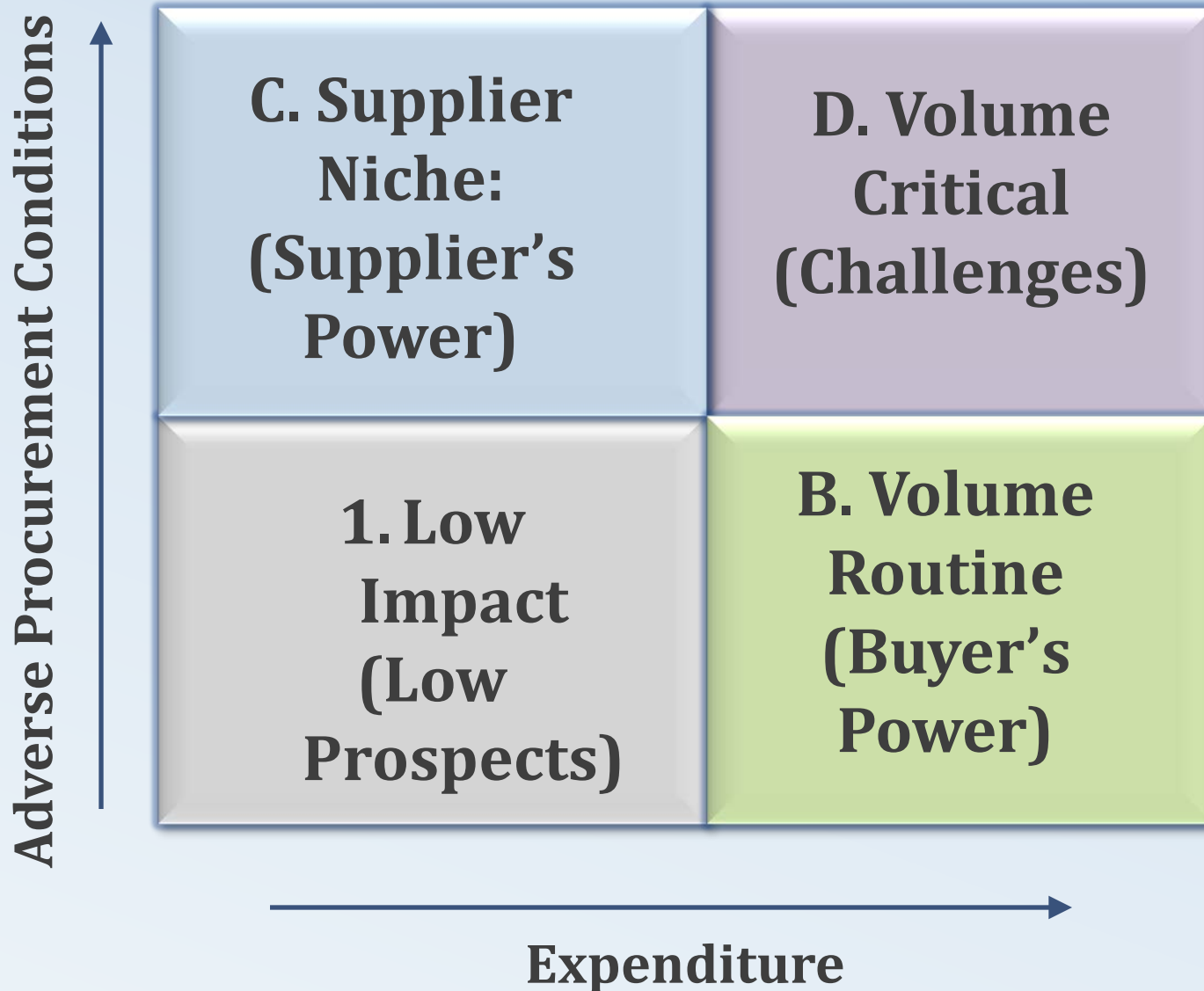


How Critical  
and Vital is  
the  
Requirement  
to your  
Operations

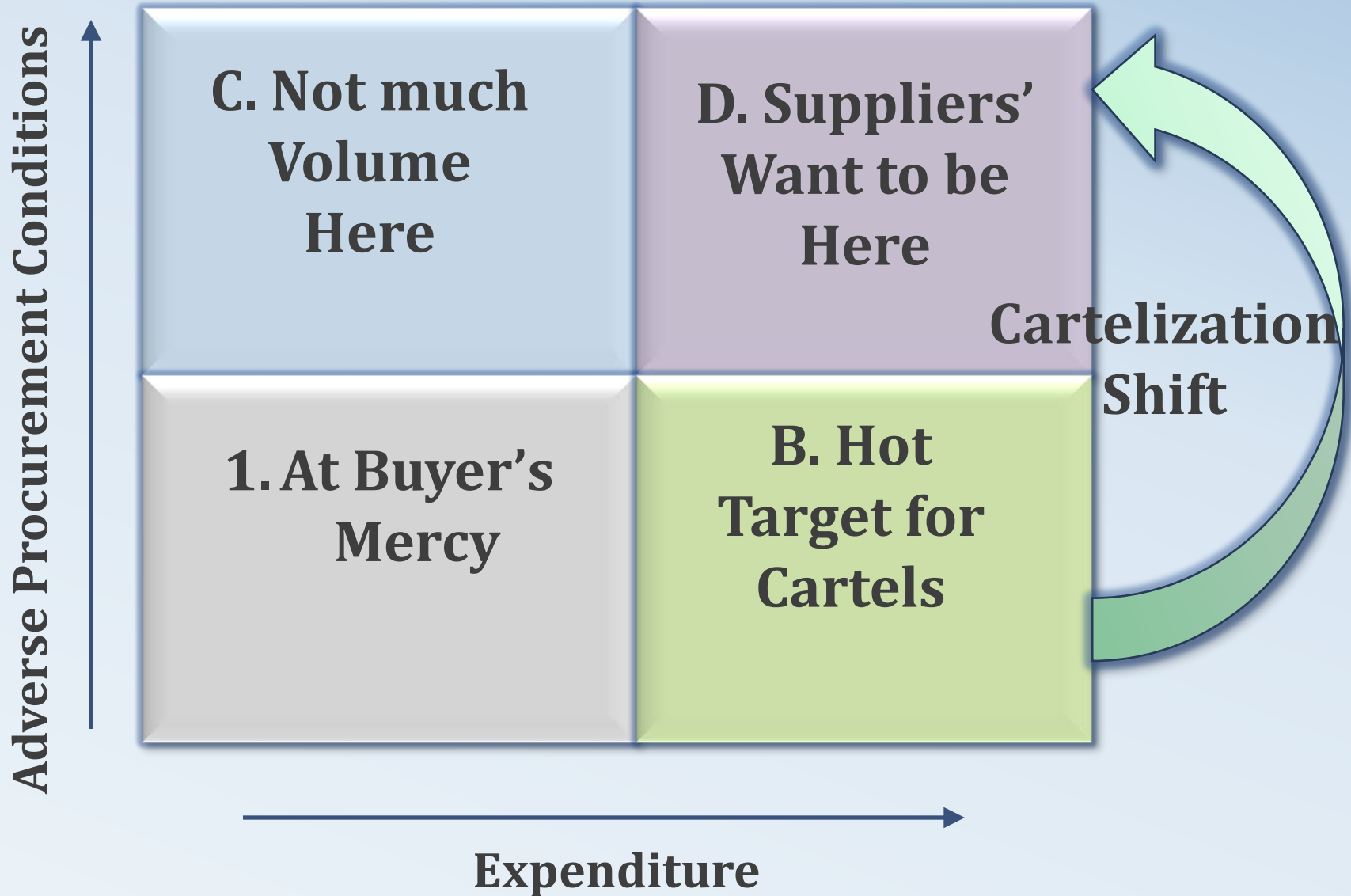
How much  
imperfect is  
Market  
competition

- Monopoly/  
oligapoly

# Categorization for Procurement Policies



# Where will Cartels Attack



# Essentials for Good Competitive Bidding

- Adequate number of sellers
- Sellers eager to bid
  - if Demand  Supply
  - buyer's integrity is good
  - No black Market/ rent-seeking Exists
- No Rings and Cartels
- Large value of orders within the capacity of Majority of Suppliers
- Clear specifications
- Enough time for bidders
- Adequate time for delivery of goods
- Transparent and Fair reputation of Buyer

# Essentials for Collusive Bidding

- Industry/ associations not committed to fair play
- Rewards of Co-operation outweigh that of Competition Plus Penalties
- Opportunity of Bidders to meet regularly and hold prolonged negotiations for Horizontal Agreements
- Conditions facilitating Agreements – prolonged status quo
  - Repetitive Purchase of same kind of goods - no technology change
  - Predictable flow of demand packaging and Timing

# Stages of Competition Risk in Procurement

- **Need Assessment** – Requirement Quantity & Specifications
- **Procurement Planning** – Packaging, Bundling & Slicing; Type of Bidding – Stages; Method of Procurement – restricted/ open
- **Bidding & Evaluation** – Transparency, publicity, Evaluation Criteria, Publishing Award, Grievance Mechanism/ de-briefing
- **Contract implementation and supervision** – Getting what you pay for
- **Policies and Procedures:** Inoculating Procurement against Anti-competition

# Need Assessment – Quantity & Specifications

- **Participation of relevant stakeholders**, help in objective evaluation of need and relevance of the specification as they are being defined;
  - Avoid sharing information with only a few vendors
- **Specifications and terms of reference:**
  - Generic not Tailor-made
  - Think of the Market: Do not leave out large supplier base
  - Avoid Properties which are subjective – feel, finish, workmanship, shade/ tone, as per sample
  - Avoid Trials, Presentations and Performance appraisals after Bid-opening



# Undifferentiated Specifications Facilitate Cartels

- Identical or simple requirements - little technological change - few, if any, substitutes - easier for firms to reach an agreement over time
- Performance specifications - rather than product Specification makes collusion difficult
- Define specifications allowing substitute/ alternative products - or in terms of functional performance and requirements whenever possible

# Procurement Planning – Packaging; Bidding – Stages; Restrictive/ Open

- **Buyer not aware** of the suppliers, competition and product choices – you would not notice Anti-competition Red-flags
- **Packaging, bundling and Slicing** of requirement to attract open competition – right size, right aggregation, to suit majority vendors
- **Exceptions to an open bidding** process to be avoided
- **When short-lists are used**, ensure transparency
- **Pre-qualification criteria (PQC)**: Potential of misuse or restrict competition. PQC relevant, clear, unambiguous, neither be very stringent nor very lax, fair competition.

# Stability of Demand and Packaging facilitates Cartels

- Same quantity and clubbing of demand - period after period, facilitates suppliers to arrive at an anti-competitive agreement
- Avoid predictability in contract requirements regarding the size and timing of tenders
- Avoid packaging contracts with almost identical values that can be easily shared among competitors
- Reconsider packaging and bundling of requirements. Whenever possible, allow bids on certain lots or objects within the contract, or on combinations thereof, rather than bids on the whole contract only

# Bid Conditions Restricting Competition

- **Protective entry barrier** helps bidders to reach an agreement on how to rig bids.
- Avoid unnecessary restrictions that may reduce the number of qualified bidders.
- Reduce constraints on foreign participation whenever possible
- Do not over-emphasise the exact performance records - consider other relevant experience
- Avoid large monetary guarantees from bidders and reduce the preparation costs of the bid
- Do not disclose or unnecessarily limit the number of bidders in the bidding process
- Avoid any kind of preferential treatment for a certain class, or type, of suppliers. Do not favour incumbents

# Procedural Platform – Bidders Conspire

- Certain procedures provide platform for suppliers to interact and conspire to devise anti-competitive strategies
- Use post-qualification to avoid collusive practices among a pre-qualified group. Avoid a very long period of time between qualification and award, as this may facilitate collusion
- Avoid bringing potential suppliers together by holding regularly scheduled pre-bid meetings. Open tenders enable communication and signalling between bidders. Use electronic bidding or allowing tender boxes in more than one location

# Bidding & Evaluation – Transparency, publicity, Evaluation Criteria, Award, Grievance Mechanism

- **Simplify System:** Costs, not requiring experts to fill in
- **Invitation to tender** (an open bid) well publicised; Sufficient Time
- **Evaluation criteria** objective not prone to being abused, clearly stated and demonstrably followed
- **Evaluation of bids** Objective - no room for manipulation and biased assessments;
- Comparison checks - companies that bought documents/ expressed interest and companies submitted bids. interviews vendors who no longer bid/ unsuccessful
- **Detect and Act against Cartels**
- **Contract awards** Publicised
- **Independent Grievance Redressal Framework:** de-brief, possible to seek review

# Contract implementation and supervision – Getting what you pay for

- Non-transparency in Execution creates an Asymmetry in Information available to vendors.
- **Contract changes and renegotiations** after the award should not vitiate the substance of the contract itself;
- **Subcontractors** and partners, chosen in a non-transparent way can be sign of Cartel
- **Contract Implementation** – Mirror PQC, Evaluation Criteria and Assumptions involved
- Ensure you get what you are paying for

# Inoculating Public Procurement against Anti-competition

- Implement a regular training programme on bid rigging and cartel detection for your staff
- Involve Industry/ Associations to adopt commitment against Anti-competition
- Include a warning about the punitive measures for anti-competitive practices in the bid document and in the Competition Law.
- Make it mandatory for bidders to sign a Certificate of Independent Bid Determination
- Establish a complaint mechanism for firms to convey competition concerns. Clearly identify the person or the office - ensure confidentiality
- **Leniency Clauses:** To encourage cartel breakers



# Inoculating Public Procurement against Anti-competition

- Reserve the right not to award the contract if Anti-competition is suspected – controversial – arbitrariness in face of anti-competition
- Stipulate bidding for at least 25% of Quantity
- Ensure that bidders disclose intention to use subcontractors
- Be particularly vigilant about joint bids by firms
- Avoid splitting contracts between suppliers with identical bids
- Beware of using industry consultants to conduct the tendering process. Ensure - sign confidentiality agreements - reporting requirement - improper competitor behaviour - potential conflict of interest

# Indian Railways Tryst with Cartels

# Competition Regime and Railways

- Railway had tried many cases with erstwhile MRTP but without much effect
- Railway Procurement was the first few cases taken up by CCI
- In a case of suspected cartel formation, DMW/ Patiala had reported a matter to CCI. The case was investigated and penalties were imposed on the companies at the rate of 2% of the average turnover of the company - Rs. 54.70 cr. for M/s Escorts Ltd., Rs. 5.70 cr. for M/s FTIL and Rs. 1.91 cr. for M/s Stone India Ltd.

# In case Cartel is suspected

- Deviation from normal Selection of Vendors:
  - Exclusion one or more firms based on characteristics
  - The instructions of ordering not more than 15% of quantity on Part II approved sources and 5% of quantity on new source – may be deviated
  - Firms quoting less than 50% (adjustable considering capacity of firms) quantity liable to be rejected.
  - Negotiations as an exception - cartel formation with unreasonable rates.
- Action for down gradation/deletion of such firms from list of approved sources
- Taking up the matter with Competition Commission of India
- Global Procurement in case of repeated Cartels

# Bid Documents Warnings - Cartels

- Deviating from normal selection of vendors – as discussed
- Downgrading/ deletion from List of Approved Sources
- Complaints to CCI and Penalties provided in Competition Act

# Reforms Approved Lists of Vendors

- Undertaking - quoting competitive rates and not be part of a cartel
- Downgrade/ Delete Cartel firms from Approved List
- Make it Transparent - publicise system of approval, status of requests
- Time frame and the criteria for approval of new vendors as well as for upgrading from Part-II to Part-I category clearly indicated.

# Bring New vendors to Break Cartels

- Where Approval is graded as Part-I / part-II
  - Upto 5% for new Vendors suitable for development
  - Upto 15% for Part II Vendors
  - These Limits can be increased in case of Cartel Suspicion
  - In inadequacy of approved vendors, these limits can be increased with prior declaration in Bid Documents
- Where approval is not graded
  - Upto 20% for new Vendors suitable for Development
  - These Limits can be increased in case of Cartel Suspicion
  - In inadequacy of approved vendors, these limits can be increased with prior declaration in Bid Documents
- Where number of approved sources or their capacity not adequate or cartel suspected - develop more sources through EOI – Timeframe laid down
- Offer from new sources found suitable - developed in a time bound manner - ascertaining the capacity/capability in Time bound manner

**Thank You for Listening**