



# Competitive Public Procurement in the States: Challenges & Reforms

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# Schooner's Desiderata, Unwrapped:

## Cluster 1

- End-User Satisfaction
- Economy
- Best Value
- Efficiency
- Risk Avoidance

## Cluster 2

- Integrity
- Uniformity
- Transparency
- Competition
- Accountability

## Cluster 3

- Tied-Aid
- Disguised Investments
- Socio-Economic Goals

# Identifying Sector Regulators and Other Stakeholders in State Procurements:

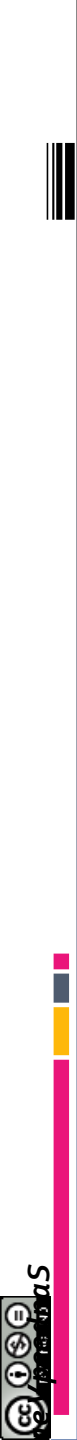
- State Finance and Planning Departments
- State Infrastructure/ Investment Promotion Boards and Agencies
- State Public Works Departments, Utility Departments, concerned Central Departments
- Executive Procuring Departments, State Finance Departments
- State Chief Vigilance Officers
- State Lokayuktas
- CAG; Local Audit Offices
- High Courts

# Some Back-of-the Mind Issues:

- **Applicability of the Competition Act**
  - State Public Procurements
  - State **Public Procurements**
  - Article 299 procurements
- **Jurisdictional Overlaps & Forum-Shopping**
  - Nature of Allegation/ Complaint
  - Agency(ies) empowered to Intervene
- **Scope of CCI Intervention and its Role**
  - Mandate for Competition: Wide?
    - Competition can be restricted only under certain circumstances
    - **Agreements/Actions**-in-Concert
  - Mandate for Competition: Narrow?
    - Onus of Proof lies on Complainant in most cases
    - Agreements/Actions-in-**Concert**
    - **AAEC-type** ACAs and **Particular** Abuses of Dominance
  - Presumed or Otherwise
  - The 6/13 Dimensions of Investigation
  - Interventionist or Advocacy-oriented

# Public Procurement in the States: Some Recent Trends

- Greater Pressures to Perform & to Deliver—increasing need for faster procurements, with latest specs
- Increasingly Complex Procurements—More multi-bid, multi-criteria, longer-duration procurements
- Increasing Procurement of Services, rather than of Goods
- PPP Procurements
- Substantial Infrastructure Procurements
- Non-Competitive Auctions, particularly in case of land-related transfers
- Infusion of Electronic Government Procurement, government websites
- NREGS Procurements and the like—community-based procurements for rural development and other community action projects
- Government Contracts and Tied-Investments

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# Challenges for Competitive Procurement in the States

# Greater Pressures to Perform & to Deliver: Challenges for Competitive Procurement

- Use of the Nomination Process
- Use of Limited Tendering
- Use of QCBS-like processes
- Use of Biased Specs and other terms and conditions
- Conflicts-of-Interest
- Auction of Disputed Assets

# Increasingly Complex Procurements: Challenges for Competitive Procurement

- Maintaining spec-neutrality while tracking the market
- Designing appropriate weightage for QCBS-like procurements
- Maintaining evaluation-neutrality in QCBS-like systems
- Contract admin and oversight for longer-duration government contracts
- Handling Conflicts-of-Interest



# Increasing Procurement of Services: Challenges for Competitive Procurement

- Bundling Design and Availability of Service Providers
- Clarity and Sufficiency of NIT information on performance and outcomes
- Design and Measurement of QOS
- Oversight issues with QOS-default
- Identification of the "L1" Bid
- Resources for constant performance-tracking
- Loss of institutional memory
- Enhanced institutional dependence
- Incumbent Bidder Syndrome

# PPP Projects: Challenges for Competitive Procurement

- Managing complex administrative, legal and financial relationships
- Non-Compete Clauses
- Special Competitive Procurement Procedures for Selection of Private Partners
  - The “Ravi Development versus MHADA” Judgment of the SC
- Very long-duration contracts
- Risk-Allocation and Management
- Other general characteristics of Complex Procurements
- Sharing of Sensitive Commercial Information
  - CIC Orders in the “Navroz Mody versus Mumbai Port Trust” case

# Land-Based Projects: Challenges for Competitive Auctions

- Auctions of Disputed Properties
- Auctions without Specific Development Rights
- Court-mediated Sole-Source Auctions and Transfers of Rights
- Piece-Meal Transfer of Rights
- Tied-Investments disguised as Government Contracts

# Websites and Electronic Government Procurement (EGP): Challenges to Competitive Procurement

- Mandatory e-EGP versus Hybrid systems
  - Quantum and Costs of Accessing Information
    - Website proliferation
    - Traditional methods versus e-Methods
  - Quantum and Costs of Contract-Participation
    - e-Tendering
    - e-Reverse Auctions
    - Traditional Methods
- Procurement of EGP Services (Third-Party Providers)
- Oversight mechanisms for Technical Challenges to contract-award decisions and for Fraud

# The NREGS and other Community-Based Projects: Challenges for Competitive Procurement

- Ground Rules for Competition and Procurement
- Relative Importance of Contract Administration Issues, viz., inspections, quality-control and timely payments

# Listing Competition-related Issues in Public Procurement:

- **Unequal Contract Formation**
  - Access to Information
    - Informational Asymmetry
  - Access to Opportunity
    - Meaningful Participation
  - Evaluation Bias
  - Conflicts of Interest
  - Set-Asides
    - Blanket Exemptions in favour of Particular Entities
  - Inherent Bidding Asymmetries
    - Biased/Defective Specs
    - Local and Other Bidders
    - SMEs and CPSEs
    - Unsolicited Proposals (Swiss Challenges and Others)
- **Unequal Contract Administration**
  - The salient role of Inspections, Quality Control Systems and Timely Payments
  - Incumbent Bidders *versus* New Entrants
- **Other Non-Competitive Practices**
  - Bid Rotation
  - Complimentary Bidding
  - Sub-Contracting
  - Bid Collusion
- **Criminal Practices**
  - Corruption and Fraud

# Competition in Public Procurement: CCI-relevant Provisions

- Fraud
- Corruption
- Agreements/Actions-in-Concert
  - Horizontal Agreements—Anti-Competitive Agreements
    - Some are presumed to be ACAs
    - Other agreements require Proof
    - Important Categories
      - Limits provision of Services (P-ACA)
      - Bid-Rigging/Collusive Bidding (P-ACA)
      - Tie-In Arrangements
      - Exclusive Supply Agreement
      - Refusal to Deal
  - Vertical Agreements—Abuse of Dominant Position
    - Important Categories
      - Impose Unfair/Discriminatory conditions in the Purchase of Goods or Services
      - Indulge in Denial of Market Access
      - Make Conclusion of Contract subject to acceptance of supplementary obligations which, by their commercial usage, have to connection with the subject of such contracts
- Other Procurement Actions governed by and subject to
  - Central/State Acts, Rules and Regulations
  - Court Judgments

# Classifying CCI-related Issues in Public Procurement:

## Anti-Competitive Agreements

- Bid Rotation
- Complimentary Bidding
- Sub-Contracting
- Bid Collusion

## Abuse of Dominant Position

- Mandatory EGP
- Swiss Challenge-based or other special competitive procedures for Unsolicited Proposals
- Blanket Exemptions
- Biased Specs
- Defective Evaluation
- Certain Conflicts-of-Interest

## Other Non-Competitive Practices

- Other Conflicts-of-Interest
- Defective Evaluation
- Inadequate Information
- Unequal K-Administration
- Incumbent Bidders
- Defective Specs
- Defective Auctions



# Competitive Public Procurement in the States: Challenges & Roles

Criteria	Challenges	CCI's Role
Certain Abuse of Dominance Issues	Easier to Detect; Onus on Complainant to Prove Abuse (no presumptions)	CCI empowered to intervene
Certain Anti-Competitive Agreements	Difficult to Detect; Difficult to Prove (presumption applies only in certain cases)	CCI empowered to intervene
Other Unilateral Defaults by Procuring Entity not amounting to "Vertical Agreements"	Relatively Easier to Detect	CCI to play advocacy role; Other oversight agencies play an important role

# Pro-Competition Reforms for Public Procurement in India (1):

- Embedding CA provisions within Central/ State Procurement Rules and Policies
  - E.g., The Tamil Nadu Transparency in Tenders Act and other Central/ State Rules with 50/50 or 60/40 formulae
  - Self-Certifications and Open Processes for (1) Procurement Planning; (2) Market Research; (3) Detection of Bid-Rigging and Collusion
  - Limiting Post-Award Contract Changes
- Setting up Efficient Oversight Mechanisms
  - Need for Clearer Mandates and Jurisdictions
  - Need for Clearer Responsibilities and Specific Intervening/ Remedy-Granting Powers
  - Riding Circuit to reduce Costs of Bid-Challenge
  - Space for Concurrent Audits
  - Transparency in the working of Oversight Mechanisms

# Pro-Competition Reforms for Public Procurement in India (2):

- **Specific Pro-Competition Interventions by CCI**
  - Unsolicited Proposals—Swiss Challenges and Other Special Competitive Procedures
  - Mandatory EGP
  - Certain Conflicts-of-Interest
  - Blanket Exemptions, Turnkey Projects and “Preferred” Suppliers
- **Building Strong Procurement Capacities**
  - Empowered Bodies dealing exclusively with Government Contracts—An Across-the-Board Requirement
  - CCI could lead the Initiative, together with CVC and FinMin
- **Regular Exchange of Ideas and Developments**
  - Using the “Thomson West Government Contracts Year-in-Review” Conference as a Model
  - Networks with Important Stakeholders

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