

INTEGRITY PACT IN PUBLIC PROCUREMENT AND CONTRACTS WITH ROLE OF IEM IN IP

By

A K Arora

BE(Civil), M Tech (Civil), M Phil (Strategic Studies), FIV, FIE, FIRC,FIITA, MIBC

Former Director General (Pers), MES

Independent External Monitor - HLL Infra Tech Services Ltd

Independent External Monitor – Department of Telecom

Arbitrator - NHAI, ICADR, ICA, DDA, NHPC, RITES, AAI, SCOPE, BHEL & IRC

Empanelled member of World Bank Dispute Board of ICA

Inquiry Authority – Min of Defence, Culture, Labour and Civil Aviation

Presentation Outline

- ▣ Background & Relevance
- ▣ Elements of Public Procurement
- ▣ Mechanism of IP
- ▣ Implementation and Applicability
- ▣ Role of IEM
- ▣ Implementation Status in MES
- ▣ Integrity Pledge

Background

- ▣ Integrity Pacts were developed as a tool for preventing corruption in public contracting by bringing transparency.
- ▣ An Integrity Pact is both a signed document and approach to public contracting which commits a contracting authority and bidders to comply with best practice and maximum transparency.
- ▣ A third actor, usually a representative of civil society monitors the process and commitments made.
- ▣ Monitors commit to maximum transparency and all monitoring reports and results are made available to the public on an ongoing basis by putting IEM reports on the websites.

Indian perspective

- ▣ Governments spend huge sums of money on public procurement -- funding roads, bridges, schools, housing, water and power supply & other community improvements... But with these vast expenditures, opportunities for corruption are rife.
- ▣ Ranks 76/168 in the Corruption perception Index with a Score 38/100
- ▣ China is at 77 and Pakistan at 117
- ▣ Denmark, Finland and Sweden top the chart
- ▣ Afghanistan, North Korea and Somalia form the bottom rung of the CPI ladder.

World perspective

- ❑ India rose by 3 points to 78 in 2018 Corruption Perceptions Index
- ❑ China slipped by 10 ranks to 87th place
- ❑ The US also fell, from 16th to 22nd position
- ❑ Defence procurement corruption in India has been assessed to be "high", with a large mass of its procurements shrouded in secrecy with low levels of accountability.
- ❑ Corruption in defence procurement in three of its neighbours China, Sri Lanka and Pakistan has been found to be "very high".
- ❑ 2018 report also has praise for India. It says, "The use of integrity pacts have been a powerful binding instrument, involving independent monitoring by the Central Vigilance Commission."

Chronology

- The concept of IP developed by Transparency International -1990
- Second Administrative Reforms Commission (ARC) in its IV Report on Ethics in Governance made recommendation for IP's adoption in order to make contracting process more transparent in 2006
- IP first adopted in India by
 - ONGC in 2006
 - **MoD in 2006 on all the contracts above INR 100 crores.**
- Policy on IP by CVC in 2007 for all major procurement agencies to ensure transparency, equity and competitiveness in public procurement and issued a model IP Agreement vetted by Solicitor General of India.
- A detailed SOP was issued in 2009 for implementation of IP and appointment of IEMs.
- Latest guidelines of January 2017 make it mandatory for all procurement agencies to have an IP and make suitable provisions in the contracts above threshold limits.
- Orders for adoption in MES issued in September 2017.

Relevance of IP to dispute Resolution

- ▣ The Topic is very relevant in 2019
 - Introduction of New Procurement Policy
 - Reiteration of IP in Govt procurement by CVC
 - New GFR 2017
 - Introduction in MES Contracts.
- ▣ Transparency reduces Disputes
- ▣ Facilitate Punitive actions for violation
- ▣ MoD was one of the first to introduce this in 2006.

Government procurement

- ▣ Procurement on behalf of a public authority,
 - goods
 - services
 - Consultancy
 - Constructions or turnkey
- ▣ With 10 to 20% of GDP, government procurement accounts for a substantial part of the National economy.
- ▣ There is no law exclusively governing public procurement. However, comprehensive Rules and Regulations in this regard are available

Statutory frame work and Law

- ▣ At the apex of the framework is
 - Article 299 of the Constitution of India stipulates that contracts legally binding on the Government to be executed in **writing** by officers specifically **authorized** to do so.
 - The Constitution also enshrines Fundamental Rights (In particular Article 19 (1) (g) – **Right to carry on a Profession**).
 - **the Indian Contract Act, 1872**
 - **Sale of Goods Act, 1930**
 - **other mercantile laws attracted in Public Procurement Transactions**
 - ▣ Arbitration and Conciliation Act, 1996
 - ▣ Competition Act, 2002 as amended 2007
 - ▣ Information Technology Act, 2000
 - ▣ Prevention of corruption act 1988 as amended in 2016
 - ▣ Integrity pact 2007

Rules and Regulations

- ▣ General Financial Rules (GFR), 2017, especially chapter 6
- ▣ Manual for procurement of goods 2017
- ▣ Manual for Procurement of Consultancy and Other Services 2017
- ▣ Manual for Procurement of Works
- ▣ Delegation of powers
- ▣ SOPs laid down by respective departments/ ministries.

Five R's of Procurement

- ▣ The entire process from the time need is identified till the need is satisfied should be designed to achieve a right balance.
- ▣ The word 'right' is used in the sense of 'optimal balance' and not the 'Best'
 - Right Quality
 - Right Quantity
 - Right Price
 - Right Time and Place
 - Right Source

Public Procurement Cycle

- ▣ The procurement process for goods, works and/or services typically involves the following cycle of activities
 - **Need Assessment:** Need assessment, formulation of Specifications and Procurement Planning;
 - **Bid Invitation:** Preparing bid documents, publication, receipt and opening of bids;
 - **Bid Evaluation:** Evaluation of bids and award of contract; and
 - **Contract Execution:** Contract management and closure;
 - **Disposal of Scrap & Surplus:** Disposal of Scrap & Surplus through various modes of disposal.

Fundamental Principles of Public Procurement

- ▣ Transparency Principle
- ▣ Professionalism Principle
- ▣ Broader Obligations Principle
- ▣ Extended Legal Responsibilities Principle
- ▣ Public Accountability Principle

Transparency Principle

- ▣ To ensure transparency, fairness, equality, competition and appeal rights.
- ▣ This involves simultaneous, symmetric and unrestricted dissemination of information to all likely bidders, sufficient for them to know and understand the availability of bidding opportunities and actual means, processes and time-limits prescribed for completion of registration of bidders, bidding, evaluation, grievance redressal, award and management of contracts.
- ▣ It implies that such officers must ensure that there is consistency (absence of subjectivity), predictability (absence of arbitrariness), clarity, openness (absence of secretiveness), equal opportunities (absence of discrimination) in processes.

Professionalism Principle

- ▣ To ensure professionalism, economy, efficiency, effectiveness and integrity in procurement process.
- ▣ Avoid wasteful, dilatory and improper practices violating Code of integrity for Public Procurement .
- ▣ Ensure that methodology adopted should be reasonable , appropriate for the cost & complexity and effectively achieve the planned objective.
- ▣ All Ministries/Departments to prepare Annual Procurement Plan place on their website
- ▣ Each organisation should set out professional standards and specify suitable training and certification requirements for officials dealing with procurement matters.

Broader Obligations Principle

- ▣ Preferential procurement from backward regions, weaker sections and MSEs
- ▣ Reservation of procurement of specified class of goods from or through certain nominated CPSEs or Government Organisations
- ▣ broader social policy and programme objectives like make-in-India, Ease of Doing Business, job and employment creation etc.
- ▣ Facilitating administrative goals of other Departments like ensuring tax or environmental compliance, Energy Conservation, accessibility for People With Disabilities etc

Extended Legal Responsibilities Principle

- ▣ The Constitution of India has certain provisions regarding fundamental rights and public procurement.
- ▣ Courts also exercise additional judicial review (beyond contractual issues) over public procurement in relation to the manner of decision making in respect of fundamental rights, fair play and legality.
- ▣ Similarly responsibility and accountability to comply with the laws relating to Governance Issues like Right to Information (RTI) Act and Prevention of Corruption Act, and so on.

Public Accountability Principle

- ▣ Accountable for all the above principles to several statutory and official bodies in addition to administrative accountability. like
 - the Legislature and its Committees
 - Central Vigilance Commission
 - Comptroller and Auditor General of India
 - Central Bureau of Investigations
 - Other enforcement agencies

What is a contract

- ▣ Contract is a legally binding or valid agreement between two parties.
- ▣ Contract is legally valid if the agreement contains all of the following elements:
 - **offer** and **acceptance**;
 - an **intention** between the parties to create binding relations;
 - consideration to be **paid** for the promise made;
 - **legal capacity** of the parties to act;
 - **genuine consent** of the parties; and
 - **legality** of the agreement.
- ▣ **An agreement that lacks one or more of the elements listed above is not a valid contract.**

Nomenclature of various selection methods

- ▣ Price based System – Least Cost Selection (LCS)
- ▣ Quality and Cost Based Selection (QCBS)
- ▣ Direct Selection: Single Source Selection (SSS)

Dispute Resolution

- ▣ Normally, there should not be any scope for dispute between the purchaser and supplier after entering into a mutually agreed valid contract.
- ▣ However, the conditions governing the contract should contain suitable provisions for settlement of such disputes or differences binding on both parties. The mode of settlement of such disputes/differences should be through arbitration.
- ▣ when a dispute/difference arises, both the purchaser and supplier should first try to resolve it amicably by mutual consultation.

Concept of “Res Prit Domine”

- ▣ **Risk Follows Ownership.**
- ▣ This concept simply means that, as a general rule, risk follows the ownership, irrespective of whether the delivery (or transfer of possession of goods) has been made or not
- ▣ If the goods are damaged or destroyed, the loss shall be borne by the person who was the owner of the goods at that time – irrespective of whosoever is in the “possession of the goods”.

Doctrine of Caveat Emptor

- ▣ The Sales of Goods Act lays down this important concept that the buyer must act with due diligence when buying goods; **it is not a seller's duty to point out the defects in goods.**
- ▣ This is a doctrine which is not in consonance with modern times but, unfortunately, is a legal position.
- ▣ This, however, does not apply if the buyer's consent to buy is obtained by the seller by knowingly concealing the defects which could not have been discovered by the buyer reasonably at the time of procurement

GFR-2017

Standards of Financial Propriety

- ▣ Every officer incurring or authorizing expenditure from public moneys should be guided by high standards of financial propriety.
- ▣ Every officer should also enforce financial order and strict economy
- ▣ See that all relevant financial rules and regulations are observed, by his own office and by subordinate disbursing officers.

Code of Integrity for Public Procurement (CIPP)

- ▣ As per procurement Policy 2017, Maintain highest standard of ethics and should not indulge in the following prohibited practices, either directly or indirectly, at any stage
 - Corrupt practice
 - Fraudulent practice
 - Anti-competitive practice.
 - Coercive practice
 - Conflict of interest
 - Obstructive practice

IP is a tool to improve Integrity in public procurement and reduce litigation.

Integrity Pact (IP)

- ▣ The Pre-bid Integrity Pact is a tool to help Governments, businesses and civil society to bring transparency in public contracting
- ▣ binds both buyers and sellers to ethical conduct in all activities from pre-selection of bidders, bidding and contracting, implementation, completion and operation related to the contract.
- ▣ Oversight by Civil Society thro IEM.
- ▣ This removes insecurity of bidders, that while they themselves may observe Integrity, but their competitors may resort to it unfair means and win contract.

Commitment of PA

- ▣ Non indulging in Bribe/ consideration directly or thro intermediaries
- ▣ At pre bid stage, Treat all bidders alike and share same information with all.
- ▣ shall endeavor to exclude from the Tender process any biassed or interested person
- ▣ At post bid stage any decision that could affect the bid of other bidders/ non competitive practice.
- ▣ At post bid stage any decision that could appear unfair.
- ▣ If misconduct on part of such official(s) is reported by the BIDDER with full and verifiable facts such a person shall be debarred from further dealings related to the contract process even without completion of a formal inquiry.

Commitments of BIDDERS

- ▣ will not offer any bribe/ inducement in exchange for any advantage in the bidding, evaluation, contracting and implementation of the Contract.
- ▣ will not collude with other parties interested in the contract to impair the transparency, fairness and progress of the bidding process, bid evaluation, contracting and implementation of the contract.
- ▣ commits to refrain from giving directly or indirectly any complaint without supporting it with full and verifiable facts .
- ▣ not indulge in fraudulent practice ,means or willful misrepresentation or omission of facts or submission of fake/forged documents to induce public official to act.

Obligations for Proactive Disclosures

- ▣ **Conflict of Interest:**
 - bidders, suppliers, contractors and consultants, are obliged under CIPP to suo-moto proactively declare any **conflicts of interest**
- ▣ **previous transgressions :**
 - bidder must declare, whether asked or not in a bid document, **any previous transgressions** of such a code of integrity with any entity in any country during the last three years or of being debarred by any other Procuring Entity.
- ▣ **Encourage voluntary disclosures:**
 - such declarations would **not mean automatic disqualification** for the bidder making such declarations but would require evaluation. Failure to do so would amount to violation of this code of integrity

Criteria For Project Selection

- ▣ **Projects with more relevant social or economic impact**
 - – not just in terms of contract value but the strategic importance of the project for the sector or the region
- ▣ **Projects that use combined funds**
 - (federal, national or international, combined with local funds, for example) and where different levels of transparency and accountability exist.
- ▣ **Projects where the risks (real or perceived) of corruption may threaten viability**
 - or projects which are necessary but has been questioned for corruption in the past. Complex projects (politically, technically) where a third party's involvement could facilitate decision making and trust in the process along the way.
- ▣ **Small-scale projects which deliver services to beneficiaries**
 - Very sensitive projects in terms of public opinion, or whose costs represent a big portion of the national or local budget.

Threshold limit

- ▣ Threshold value for signing IP fixed by Ministry Of Defense is Rs. 2 Cr, in keeping with the CVC guideline to cover 80% to 90% of the value of procurement threshold limit is to be worked out individually.
- ▣ Defense PSUs like HAL & BEL have a threshold value which varies and ranges from Rs. 2 crore to Rs. 20 crore.
- ▣ based on an ABC analysis BEML had fixed the threshold value for obtaining IP as above Rs. 5 crore and this was revised to above Rs. 2 crore based on Ministry of Defense directive on 05.09.2013.

Calculation of threshold limit

- ▣ Threshold limit is to be calculated by carrying ABC Analysis separately for :
 - ▣ Consultancy Contracts
 - ▣ Services Contracts
 - ▣ Works Contracts
 - ▣ Procurement orders/Contracts
- ▣ Threshold limit so decided should cover bulk (80-90%) expenditure.

CVC Instructions

- ▣ Only those vendors / bidders, who commit themselves to IP with PA, would be considered competent to participate in the bid process
- ▣ Any bid not accompanied by Integrity Pact duly signed by the bidder shall be considered to be a non-responsive bid and shall be rejected straightway.
- ▣ Single source Tenders not excluded from IP.

Examples of effectiveness

MoD unilaterally terminated a Euro 556 million contract with **Agusta Westland** on 1st of January 2014 for breach of pre-contract integrity pact on the allegations of bribery.

In March 2012 MoD cashed bank guarantees put forth by the **Israeli Military Industries** and blacklisted six companies amidst allegations of 3 bribery and breach of the pre contract integrity pact.

Provisions of Model Integrity Pact

- ▣ Commitment of the Principal
- ▣ Commitment of the Bidder/ Contractor
- ▣ Disqualification from tender process and exclusion from future contracts
- ▣ Compensation for damages
- ▣ Declaration of bidder that no previous transgression during last three years
- ▣ Equal treatment to all bidders/ Contractors/ Sub contractors
- ▣ Naming the IEM and specifying the role
- ▣ Expires 12 months after last payment and 6 months after award of contract for other bidders
- ▣ Model agreement suggested by CVC

Implementation

- ▣ IP is implemented through an Independent Monitor representing civil society and independent of government mechanism of vigilance.
- ▣ Has a advisory role to the CMD/CVO on bringing out systemic shortcomings and suggesting improvements as wells adjudication of complaints/ disputes referred by the vendor/ bidder.
- ▣ **Not a replacement of CVO**

Punitive Provisions



Bids under consideration

- ▣ Forfeiture or encashment of bid security
- ▣ calling off of any pre-contract negotiations
- ▣ rejection and exclusion of the bidder from the procurement process

Contract already awarded

- Cancellation of the relevant contract and recovery of compensation for loss incurred by the procuring entity
- Forfeiture or encashment of any other security or bond relating to procurement;
- Recovery of payments including advance payments, if any, with interest thereon at the prevailing rate;

Additional Provisions

- Removal from the list of registered contractors and banning/ debarment of bidder for a period not less than one year;
- In case of anti-competitive practices, information may be filed under a signature of the JS level officer, with Competition Commission of India;
- Initiation of suitable disciplinary or criminal proceedings against any individual or staff found responsible.

Penalties For failure to implement IP

- ▣ officials will be subject to penal action.
- ▣ bidders will face
 - cancellation of contract
 - forfeiture of bond
 - liquidated damages and
 - blacklisting.
- ▣ Action will not require criminal conviction but be based on “no-contest” after the evidence is made available or there can be no material doubts.
- ▣ Disputes in IP implementation would be resolved by arbitration detailed in IP.

Independent External Monitor

- ▣ IEM is a representative of Civil Society and is independent of Government control and has no stake in the Procurement/Contract.
- ▣ Selected by the Ministry/CMD through a search mechanism in consultation and with the approval of CVC.
- ▣ IEM is an Eminent person having domain knowledge and retired from the level of Addl Secy and above or CMD of a PSU and has never served in that organisation/ Ministry

Role of IEM

- ▣ Commences after receiving any complaints about any tender / contract by any bidder/ third party or upon referring a matter in relation to a tender / contract by public auth for opinion of IEM.
- ▣ To oversee implementation of IP to
 - prevent corruption
 - subjectivity or any other unethical practices.
 - Loss or denial of contract
 - Forfeiture of the bid or performance bond
 - Liability for damages
 - Exclusion from bidding on future contracts (debarment)Criminal or disciplinary action.

Role of IEM (Contd..)

- ▣ To monitor and review tendering process from inception to culmination of contract and compliance to the Integrity Pact
- ▣ To ascertain that all parties have acted in a fair and transparent manner.
- ▣ IEMs not subject to instructions by representatives of parties and will perform their functions neutrally and independently
- ▣ Contentious issue may be referred to the IEM of the contract either by public authority or by a bidder / contractor or by CVO.
- ▣ IEM to have access to all Officers and all records of PA as well as bidder relating to the matter connected with.
- ▣ Role is of advisory nature and once given is not subject to review.

Duties of IEM

- ▣ If IEM observe or suspect an irregularity, he will inform Division head and once IEM is satisfied that an irregularity has taken place, he may inform C&MD or CEO.
- ▣ A violation of Integrity Pact will be reported to CMD/CEO and request the Management to discontinue or heal the violation, or to take other relevant action.
- ▣ IEM would examine all complaints received and give recommendation / views to the CMD /CEO, at the earliest.
- ▣ May also send his/her report directly to the CVO and the commission, in case of suspicion of serious irregularities requiring legal / administrative action.
- ▣ The role of CVO of the Organisation shall remain unaffected

IP in MES

- ▣ Sept 2017 – directions to include IP in MES Contracts above 20 crore
- ▣ January 2018- Two I E M appointed
- ▣ January 2018- Director Contract, E-in-C br appointed nodal officer
- ▣ Oct 2018- Approved format of IP Issued
- ▣ Oct 2018- Threshold limit refixed at Rs 2 Cr
- ▣ April 2019 – Certain provision amended.

CVC Directive

- ▣ Once the IP has been adopted, it should cover all the tenders / procurements above a specified threshold value and follow IP in letter and spirit.
- ▣ All officials dealing with the procurement, contracting and monitoring of the public resources to
 - log on to CVC website.
 - Take the pledge and obtain a certificate
 - Confirmation to be sent to IEM

Integrity Pledge

- ▣ I believe that corruption has been one of the major obstacles to economic, political and social progress of our country. I believe that all stakeholders such as Government, citizens and private sector need to work together to eradicate corruption.
- ▣ I realise that every citizen should be vigilant and commit to highest standards of honesty and integrity at all times and support the fight against corruption.
- ▣ I, therefore, pledge:
 - To follow probity and rule of law in all walks of life;
 - To neither take nor offer bribe;
 - To perform all tasks in an honest and transparent manner;
 - To be accountable for my actions;
 - To act in public interest;
 - To lead by example exhibiting integrity in personal behavior;
 - To report any incident of corruption to the appropriate agency.

- Integrity is telling myself the truth and honesty is telling other people the truth.
- - Spencer Johnson.

For clarification : dg@dipmcouncil.org

- ▣ **Patrick Spencer Johnson** (November 24, 1938 – July 3, 2017) was an American physician and author, known for the ValueTales series of children's books, and for his 1998 motivational book *Who Moved My Cheese?*

- ▣ *The value of believing in yourself: the story of Louis Pasteur*
- ▣ *The value of patience: the story of the Wright brothers*
- ▣ *The value of humor: the story of Will Rogers*
- ▣ *The value of kindness: the story of Elizabeth Fry*
- ▣ *The value of imagination: the story of Charles Dickens*
- ▣ *The value of courage: the story of Jackie Robinson*
- ▣ *The value of curiosity: the story of Christopher Columbus*
- ▣ *The value of saving: the story of Benjamin Franklin*
- ▣ *The value of sharing: the story of the Mayo brothers*
- ▣ *The value of understanding: the story of Margaret Mead*
- ▣ *The value of dedication: the story of Albert Schweitzer*
- ▣ *The value of fairness: the tale of Nellie Bly*
- ▣ *The value of fantasy: the story of Hans Christian Andersen*
- ▣ *The value of honesty: the story of Confucius*

*Thank
you*



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