

THE PUBLIC PROCUREMENT BILL, 2012



What is Public Procurement Bill???

“A bill to regulate Public Procurement by all Ministries and Departments of the Central Government, Central Public Sector Enterprises (CPSEs), autonomous and statutory bodies controlled by the Central Government and other procuring entities with the objectives of ensuring transparency, fair and equitable treatment of bidders, promoting competition and enhancing efficiency and economy in the procurement Process.”

The Union Cabinet today approved the Public Procurement Bill, 2012 for introduction in the current session of the Parliament. The Bill seeks to regulate procurement by Ministries/ Departments of the Central Government and its attached/subordinate offices, Central Public Sector Enterprises (CPSEs), autonomous and statutory bodies controlled by the Central Government and other procuring entities 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, safeguarding integrity in the procurement process and enhancing public confidence in public procurement. The Bill is based on broad principles and envisages a set of detailed rules, guidelines and model documents. The Bill builds on national and international experience and best practices, as appropriate for the needs of the Government of India.

The Bill would create a statutory framework for public procurement

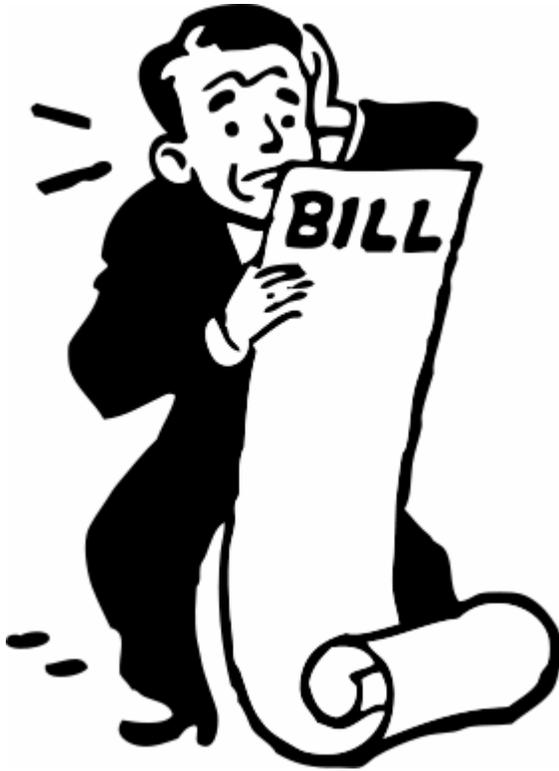
which will provide greater accountability, transparency and enforceability of the regulatory framework. The Bill provides for the following:

a. codifying the fundamental principles governing procurement, essential for achieving economy, efficiency and quality as well as combating corruption and legally obligates procuring entities and their officials to comply with these principles. In this context, the draft Bill provides mandatory provisions regarding key aspects of the procurement process and requires establishment of time frames for decision making.

b. Ensuring that competition will be maximized in procurement in the interests of economy, efficiency, integrity.

c. Providing for adequate flexibility to take into account diversity of needs and types of procuring entities, types of procurement needs and methods of procurement.

d. Providing for a strong framework of transparency and accountability through a public procurement portal and a grievance redressal system in which an independent mechanism, chaired by a retired High Court Judge, would review grievances.



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With government support, a Private Members' Bill that will require authorities to consider the economic, social and environmental well-being of their area when undertaking public procurements has attracted the interest of many commentators. It should make it on to the statute book in 2012, although the cost of government support has been that the original proposals of the Bill have watered down to such an extent that the actual impact of the Bill may not be very significant (beyond one or two very expensive court cases about exactly what the new duties under it actually are).

2012 has already seen a second Private Members' Bill concerning public procurement make it into print, the

Apprenticeships and skills (public procurement Contracts) Bill 2011, which is due to have its second reading on 20 January 2012. While there is no indication that this Bill will receive the support necessary to make it beyond this stage, the Bill does (as currently drafted) include certain specific requirements that would impact on the way that public contracts are let and then run.

The requirements of the Apprenticeships and Skills (Public Procurement Contracts) Bill 2011 are short. It would apply to all contracts with a value of more than £1 million and require contracting authorities to:

- * Give due consideration to the OGC Guidance issued in 2009 on promoting skills through public procurement, paying particular attention to ensuring that the provisions relating to apprenticeships and skills training are included where relevant.
- * Ensure the contractor makes continuous, nationally accredited skills training available to all members of the workforce, with not less than one hour per week of training to be provided to all employees for the duration of the contract.
- * Ensure that the total value of the skills training provided is at least equal to 1% of the value of the contract.
- * Require a contractor to advertise all vacancies for members of the workforce in all job centers in the local authority area where the main services will be delivered and in all job centers in neighboring local authority areas. These advertisements must include details of the training that will be provided.

Some of these requirements are far more specific than those that have survived in the Public Services (Social Value) Bill 2011 and as a result their impact would be far greater, which suggests that the chances of the Bill proceeding are relatively low. However, the current unemployment figures, particularly for young people, and also the political interest in encouraging means that this should not be taken to be a foregone conclusion.

This second “policy through procurement” Private Members’ Bill also hints at a new stage in the policy through procurement agenda. Much of the previous ten years has been punctuated by (greatly ignored) government guidance on various issues, for example, environmental, equality and social issues that should be taken into account during the procurement process. However, there has never been government appetite to actually legislate in these areas (for example, see the disappearance of anything relating to public procurement from the specific public sector equality duties regulations made under section 153 of Equality Act 2010). Individual MPs now appear to be using Private Members’ Bills to try and force the government’s hand in this area.

What else does 2012 hold for public procurement lawyers?

The key issues of interest are the obvious ones:

* The government's cuts mean that there is little money to spend but much to do, therefore innovative procurement models are likely to become more common.

* The government's transparency agenda will mean that the spotlight will be focused on how public authorities spend the money they do have.

* 2012 will see the proposals for public procurement reform at EU level develop. However this certainly will not come to fruition in 2012 (or 2013 or 2014 for that matter!).

* The government will unveil the new PFI (which may well in fact be the old PFI).

* We can also expect to see a new school building programme and other key coalition government initiatives, such as the Major Project authority, bed in.

Potentially of most interest will be that with the passing of another year as we should see more cases based on the, now not so new, Remedies directive (beyond those simply lifting automatic suspension) come through the system. What is the betting we see our first declaration of ineffectiveness?