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## **GOVERNMENT TENDER COMPLIANCE IN INDIA: LEGAL CHALLENGES FACED BY PRIVATE LIMITED COMPANIES**

Dishant Vasishtha & Dr. Tanvi Sharma,  
Amity University, Noida

### **ABSTRACT**

Government procurement in India forms one of the biggest portions of the government expenditure estimated at around 20-25 per cent of the Gross Domestic Product of the nation every year, and therefore the legal framework of the government tendering is one of the most significant spheres of commercial and administrative law to the business of the enterprises in the country. The present paper critically analyzes the legal issues facing the private limited firms in the government tender compliance environment in India, a terrain that should be marked by regulatory complexity, procedural obscurity, inconsistency in enforcement, and structural disadvantage that inherently place the smaller, more established bidders at an advantage over the smaller, less established ones. The paper uses a doctrinal and analytical approach to explore the main statutory and regulatory tools that regulate government procurement - the General Financial Rules, 2017, the Public Procurement Policy of Micro and Small Enterprises Order, 2012, the Government e-Marketplace framework, and sector-specific procurement regulations - and the judicial decisions of the Supreme Court and High Courts on the subject and The paper posits that government tender compliance presents three types of interconnected legal issues to private limited companies, namely, eligibility and qualification barriers created by financial threshold requirements, experience requirements, and bid security

requirements that favor existing and larger businesses; procedural compliance issues created by the complexity, inconsistency, and discretionary nature of tender evaluation procedures; and remedy and enforcement gaps created by the insufficiency of available legal mechanisms to challenge unlawful tender decisions. The paper will close with specific reform proposals to each group of challenge to establish a more transparent, competitive and legally predictable government procurement environment that would permit the real involvement of the private sector.

**Keywords:** Government Procurement, Tender Compliance, Private Limited Companies, General Financial Rules, GeM Portal, Public Procurement, Bid Challenges, Eligibility Criteria, Administrative Law.

## 1. INTRODUCTION

### A. Background and Relevance.

The connection between the government procurement and the involvement of the private sector is at the core of the economic development strategy in India. The Indian government - central, state and local - buys an enormous assortment of goods, services and works in the private sector, including defense equipment and infrastructure development, as well as medical supplies and information technology services. Government procurement in India is estimated at INR 50-60 lakh crore per year, and therefore the government is the largest buyer in the Indian economy and access to government contracts is an existential commercial concern to a large portion of the Indian industry.

In case of the private limited companies - the majority of the incorporated business enterprise in India (a greater percentage of all registered companies in India), government procurement is a major commercial opportunity as well as a major legal and administrative challenge. The small and medium-sized companies, especially the private limited ones, often are at a disadvantage in a procurement system that is defined by

complex eligibility criteria, non-transparent evaluation procedures, unevenly enforced procedural norms and ineffective avenues of appealing against decisions that are unlawful, unlike public sector undertakings, which receive favored treatment in most types of procurement, and unlike larger listed companies.<sup>1</sup>

The Indian government procurement legal system is also a complex one. It does not have a single unified statute that regulates public procurement on all levels of government and all types of procurement - a major structural deficit when compared to most similar jurisdictions. Rather, government procurement is regulated by a hodgepodge of instruments: Article 299 of the Constitution of India, regulating the implementation of government contracts; the General Financial Rules, 2017, regulating financial management and procurement procedures in central government ministries and departments; the Central Vigilance Commission guidelines on transparency in tendering; industry-specific procurement rules in defence<sup>2</sup>

## **B. Research Gap, Question, and Thesis.**

The current body of scholarly work on Indian government procurement has been mainly on corruption and transparency issues, the GeM portal as a digital procurement innovation, and the particular procurement policies in defense and infrastructure. The unique legal issues of the private limited companies - as a particular type of bidder with specific features, weaknesses and legal requirements - have not been thoroughly studied. The relationship between the corporate law requirements of the private limited companies and the eligibility and compliance requirements of the procurement framework have been given special consideration.

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<sup>1</sup> Ministry of Finance, *Annual Report on Government Procurement*, at 12–18 (Government of India 2022–23); World Bank, *Doing Business in India: Government Procurement*, at 8–15 (World Bank 2020).

<sup>2</sup> The Constitution of India, 1950, Art. 299; The General Financial Rules, 2017, Ministry of Finance, Government of India, rr. 173–204 [hereinafter GFR].

The main research question of this paper is the following: What are the key legal issues of the private limited companies in fulfilling the requirements of the government tender system in India, and what should be the legislative, regulatory and judicial changes to overcome these issues?

The paper will contend that the government procurement system in India places systematically disproportionate legal burdens on the private limited companies by a set of eligibility obstacles, procedural complexity, and ineffective remedies that in combination with the constitutional promise of non-arbitrariness in state action and the policy objective of encouraging competitive participation in the Indian procurement system by the private sector.

### **C. Roadmap**

The paper follows in the following way. Section II examines the legislative and regulatory environment of government procurement and the literature available on procurement issues. Section III looks at barriers to eligibility and qualification. Section IV examines the issues of procedural compliance. Section V discusses gaps in remedy and enforcement. Section VI compares and contrasts. Section VII ends with reform suggestions.

## **2. LITERATURE REVIEW AND LEGISLATIVE BACKGROUND**

### **A. Constitutional and Statutory Framework**

Article 299 provides the constitutional basis of government contracts in India that any contract made in the exercise of the executive power of the Union or of a State shall be stated to be made by the President or Governor respectively, shall be signed on behalf of the President or Governor, and shall be signed by such persons and in such a manner as the President or Governor may direct. The courts have interpreted this provision - which was originally intended to provide accountability of government in commercial dealings - to provide formal conditions to valid government contracts and substantive restrictions to

arbitrary use of government procurement discretion.<sup>3</sup>

The most extensive single tool regulating the procurement processes in the central government is the General Financial Rules, 2017 (GFR), which were issued by the Ministry of Finance. The GFR provide the rules of the procurement of goods, services, and works by central government ministries and departments, stating the procedures of open tenders, limited tenders, single tenders, and rate contracts. The general principles of the public procurement are laid down by rule 173 of the GFR: transparency, competition, fairness, the absence of discretion, and efficiency. Although these principles are clearly stated in the rules, they are not always applied in practice.

Public Procurement Policy of Micro and Small Enterprises Order, 2012, requires that central government ministries, departments and public sector undertakings procure a minimum of 25 per cent of their annual purchases of micro and small enterprises. Although this policy is directly applicable to the interests of smaller private limited companies that can be considered as MSMEs, its application has been uneven and enforcement mechanisms are ineffective.

The most notable recent innovation in government procurement in India is the Government e-Marketplace (GeM) portal, which was launched in 2016 and has been growing in scope since. GeM is an online platform through which government buyers can procure goods and services, and registered sellers can post their products and services on the platform and government buyers can purchase directly or via competitive bidding. Although GeM has greatly lowered the transaction costs and enhanced transparency among some types of procurement, it is not comprehensive and the legal framework under which GeM transactions are conducted has a number of loopholes.<sup>4</sup>

## **B. Current Literature and Known gaps.**

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<sup>3</sup> Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489, at ¶¶ 12–18.

<sup>4</sup> The Public Procurement Policy for Micro and Small Enterprises Order, 2012, Ministry of MSME; Mehta, A. & Narain, R., *Legal Framework of the Government e-Marketplace: An Analysis*, 18 INDIAN J. COMP. L. 112, 115–120 (2021).

The extensive study of public procurement law by Arrowsmith, Linarelli and Wallace offers the international framework in the comparative analysis of national procurement systems, and establishes the principles of transparency, non-discrimination, and effectiveness as the values of good procurement governance. These principles have been applied to the unique procurement environment of India by Srivastava and Verma, whose analysis of the implementation of the GFR discovered that the principles had huge gaps between the principles and the real procurement practice, especially regarding the principles of transparency and non-discrimination.

The judicial review of government contracts, as analyzed by Harish Salve, has laid down the constitutional boundaries of government discretion in procurement - through the development of the Supreme Court as a purely contractual to a constitutional approach in cases like *Ramana Dayaram Shetty v. International Airport Authority of India* and *Air India v. Nergesh Meerza* - though does not specifically address the issues of the private limited companies as a special type of procure

The legal framework of the GeM portal as explored by Mehta and Narain revealed that there are some significant gaps in the legal framework of e-procurement, such as whether the legal effect of GeM terms and conditions, whether the Indian Contract Act applies to GeM transactions, and the dispute resolution options available to GeM participants. Such gaps are directly applicable to the problems of the private limited companies that take part in the government procurement via the GeM platform.<sup>5</sup>

The particular legal issues of the private limited companies in government procurement, including the barriers to eligibility due to the corporate nature, the challenges in procedural compliance due to the complexity of tender documentation, and the gaps on remedies due to the lack of effective legal challenges, have not been thoroughly analyzed in the existing literature. The paper aim to address that gap.

### **C. judicial Framework: Procurement jurisprudence of the Supreme Court.**

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<sup>5</sup> Sue Arrowsmith, John Linarelli & Don Wallace Jr., *Regulating Public Procurement: National and International Perspectives*, at 45–62 (Kluwer Law International 2000); Srivastava, R. & Verma, P., *Implementation of GFR in Indian Procurement*, 22 INDIAN J. PUB. ADMIN. 45, 52–58 (2019).

The Supreme Court of India has established a highly elaborate and advanced jurisprudence on the legal framework of government procurement, which has put constitutional constraints on the discretion of the government, procedural conditions to fair tendering, and the basis of judicial review of procurement decisions. This jurisprudence offers the main legal basis under which the private limited companies may appeal against the procurement decisions which they believe to be unlawful.

The basic principle of the procurement jurisprudence of the Supreme Court is that the government in granting contracts must act in compliance with the principles of equality and non-arbitrariness, which are provided in Article 14 of the Constitution. In *Ramana Dayaram Shetty v. International Airport Authority of India*, the Court ruled that the government cannot do anything arbitrarily even in the contractual affairs and that all the actions of the government should be pre-conditioned by the reason. The Court determined that the government should not discriminate between tenderers without reasonable cause and that qualification and evaluation criteria should be reasonable, transparent and applied consistently.<sup>6</sup>

In *Tata Cellular v. Union of India*, the Supreme Court expounded on judicial review of government procurement decisions, stating that a court should be reluctant to interfere with the substantive assessment of competing bids, it is acknowledged that the technical and commercial evaluation processes are specialist in nature, but where the procurement process is vitiated by illegality, irrationality, or procedural impropriety, the court must The Court introduced a three-pronged test of judicial review of administrative decisions - legality, rationality, and procedural propriety - that offers the framework of analysis over most procurement issues.

### **3. ELIGIBILITY AND QUALIFICATION BARRIERS**

#### **A. Financial Threshold Requirements and Turnover Criteria**

The greatest group of eligibility barriers to government procurement by the private

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<sup>6</sup> *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489, at 14; *Tata Cellular v. Union of India*, (1994) 6 SCC 651, at ¶¶ 78–85.

limited companies is associated with the financial qualification requirements - minimum turnover, net worth, and financial capacity - that are included in the tender documentation and which often out of proportion to the financial capacity of the smaller private limited companies have no objective basis in the requirements of the particular procurement.

The most frequently used financial qualification tool in Indian government procurement is turnover requirements, requiring eligible bidders to demonstrate a minimum turnover of usually a multiple of the estimated contract value. Although there is a valid reason why financial qualification requirements are necessary in procurement - that bidders must be financially able to do the contract - the setting of financial qualification requirements is often disproportionate to the financial requirements of the contract and acts as a de facto barricade to the involvement of smaller private limited companies.

GFR Rule 173(x) states that pre-qualification and short-listing criteria must be in such a way that it promotes maximum competition and at the same time, the bidder must have sufficient capability to execute the contract. This is a condition - that there must be proportionality between qualification requirements and contract requirements - that is often overlooked in practice, with procurement officials often imposing turnover requirements of three to five times the contract value without written explanation.<sup>7</sup>

*Michigan Rubber (India) Ltd. v. State of Karnataka* was a case in which the Supreme Court determined that the financial qualification requirements as applied to government procurement were legal, but that such requirements must have a rational nexus to the object that is sought to be accomplished, namely the selection of a capable contractor, and that such requirements must not be arbitrary or unreasonable. The Court held that turnover requirements that are far beyond the value of the contract could be arbitrary because they could not be explained in terms of the particular financial needs of the contract.

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<sup>7</sup> GFR, supra note 2, r. 173(x); *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, at ¶¶ 22–28.

## **B. Requirement of Prior Experience and New Entrants**

Experience requirements - that an eligible bidder should have previous experience in the implementation of similar contracts of similar value - represent a second significant group of eligibility barriers to the private limited companies, especially those intending to diversify into new areas, or those newly incorporated companies intending to define their procurement track record.

The experience requirements usually stipulate: years of the relevant experience; the number of similar contracts signed within a given time frame; and the minimum value of the contracts done to qualify prior work. Although once more justified by a genuine reason of ensuring that the bidders have shown the ability to perform the contracted work, they are often tuned in such a manner that they are systematically used to lock out new entrants to the market - including newly formed limited liability companies - whether or not they would perform the required work with the necessary technical competency.

This conflict between experience requirements and competition policy is more acute in the case of technology procurement, where the rapidly changing technologies can imply that experience in delivering earlier-generation technologies is not a strong indicator of ability to deliver current-generation solutions. An innovative technology artificial intelligence application company can be technically superior to long-established IT suppliers who have decades of experience in government procurement of traditional software development, but not eligible to compete in procurement due to experience requirements tuned to traditional technology procurement.<sup>8</sup>

Some relief is offered by the Public Procurement Policy of MSMEs to smaller companies as a private limited company that is considered as micro or small enterprise where they are not required to meet some prior experience and prior turnover requirements in some categories of procurement. Nonetheless, the exemption is not universal and cuts across all types of government procurement creating large gaps in the safeguarding of MSME-qualifying limited companies of the private sector.

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<sup>8</sup> Bregha, F., *Public Procurement and Small Business: Barriers and Solutions*, 14 J. PUB. PROCUREMENT 234, 242–248 (2016).

### **C. Bid Security and Performance Guarantee Requirement**

Bid security - the obligation that bidders provide a financial security such as a bank guarantee or a fixed deposit receipt as a condition of being allowed to participate in the tender - and performance guarantee requirements - the obligation that the successful bidder provide a performance bond to perform the contract satisfactorily - are a third category of eligibility barrier that disproportionately affects smaller private limited companies.

The GFR stipulates that the bid security must not be below two per cent of the estimated value of the procurement and performance security is usually five to ten per cent of the contract value. In large contracts, these requirements may constitute a significant liquidity requirement which the smaller private limited companies, with a working capital generally more limited than that of larger companies or government sector projects, are hard pressed to satisfy without materially interfering with their current business activities. The necessity of ensuring bid security throughout the tender process - which in complex procurements can take months or years - puts a firm on working capital or credit on hold during a longer period, an opportunity cost that does not necessarily fall equally on all bidders. This cost is more easily absorbed in larger companies with diversified credit facilities and with larger balance sheets than in smaller private limited companies with more limited financial resources.<sup>9</sup>

The MSME Procurement Policy of exemption of earnest money deposit requirements of MSMEs partially alleviates the situation, but fails to cover the performance guarantee requirements that are required in the execution phase of contracts. Additionally, the MSME exemption is conditional on the capability of the bidder to prove the MSME status by means of the Udyam Registration certificate which might not be easily met by some private limited companies especially those that are between the size categories.

## **4. PROCEDURAL COMPLIANCE CHALLENGES**

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<sup>9</sup> GFR, *supra* note 2, rr. 166–168; Ministry of MSME, *Annual Report 2022–23: Public Procurement from MSMEs*, at 35–42 (Government of India 2023).

### **A. Complexity and inconsistency of the Tender Documentation**

One of the most practically relevant issues facing the private limited companies that would like to be involved in government procurement is the procedural complexity of government tender documentation.<sup>10</sup> Tender documents - containing the eligibility requirements, technical specifications, evaluation criteria, bid submission requirements, and the contractual terms that apply to the procurement - are often voluminous, technically difficult, internally inconsistent, and in a language which is not accessible to private companies without specialized procurement skills.

The lack of standardized tender document templates in all types of government procurement - although the GFR provides the possibility of standardization and the Ministry of Finance publishes model tender document templates in specific types of procurement - implies that each procurement authority creates its own documentation, leading to a high degree of variation in format, terminology and requirements that add extra compliance costs on the limited companies in the private sector that engage in procurement across more than one

Companies that are involved in government procurement as a private limited company are faced with the challenge of navigating tender documentation that can be based on the requirements of the GFR, industry-specific procurement regulations and the own standing instructions of the procurement authority at the same time, with no clear requirement as to which of these various sources of requirements takes precedence in the event of conflict. A major compliance risk to a private company caused by the legal ambiguity of internally inconsistent tender documentation is that any mistakes in compliance due to reasonable but erroneous interpretation of ambiguous requirements can be subject to technical disqualification.

### **B. the Subjectivity Problem and discretionary Evaluation**

The tender assessment - especially in the quality and cost-based selection (QCBS) framework applied to service procurement - incorporates a very important aspect of

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<sup>10</sup> Srivastava & Verma, *supra* note 5, at 55–62; Arrowsmith, S., *The Law of Public and Utilities Procurement*, at 345–362 (Sweet & Maxwell, 3rd ed. 2014).

subjectivity on the part of the procurement officials that generates legal ambiguity as well as the possibility of arbitrariness in the treatment of the bidders of the private limited companies. The technical evaluation aspect of QCBS - the evaluation of the technical proposals of bidders against qualitative standards - gives the procurement officials discretion which, when not accompanied by sufficient procedural protections, leads to unequal, irrational, or biased evaluation results.

The GFR requirement that the evaluation criteria be outlined in the tender document ahead - Rule 173(xiii) - offers a procedural protection against post-hoc rationalization of the evaluation of qualitative technical proposals, but does not obviate the subjectivity of the evaluation of qualitative technical proposals. Companies that are privately limited and have spent a lot of resources in the preparation of technically advanced proposals might discover that their proposals are assessed on the basis of criteria not clearly stated in the tender document or that are not assessed fairly across bidders.

In *Baljit Kaur v. State of Punjab*, the Supreme Court dealt with the boundaries of judicial review of technical evaluation and held that courts should not generally interfere with the technical evaluation of bids by expert committees, but that where the evaluation is demonstrated to be vitiated by patent irrationality or a failure to apply the criteria specified, judicial review is justified. This limited review of technical examination by the courts puts a structural disadvantage on the private limited firms whose proposals are wrongly or unfairly considered since the evidentiary burden of proving patent irrationality is far greater than the burden of proving mere error.<sup>11</sup>

### **C. The Gem Portal: Digital Compliance Challenges.**

Although the Government e-Marketplace portal is a great move towards enhancement of procurement transparency and efficiency in some types of procurement, it has brought about unique compliance issues to the private limited companies that want to register and transact on the portal.

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<sup>11</sup> *Baljit Kaur v. State of Punjab*, (2011) 3 SCC 728, at ¶¶ 15–22; *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517, at ¶¶ 32–38.

Registration on the GeM portal entails submission of a wide range of documentation by the private limited companies such as their Certificate of Incorporation, GST registration, PAN, bank account details and director identification details and ongoing compliance such as maintenance of correct product and service listing, prompt response to buyer queries and compliance with terms and conditions of GeM. The terms and conditions governing GeM transactions in the GeM Special Purpose Vehicle form the legal basis of GeM transactions, and are not subordinate legislation, which has left it unclear what legal status and enforceability they have in comparison to other legal requirements of government contracts.

The dispute resolution system at the GeM portal - whereby disputes between buyers and sellers are resolved by the internal dispute resolution mechanism of the portal - has been criticized as ineffective in dealing with complex commercial disputes, not independent, and not offering sufficient procedural protections to the sellers of the private companies. This lack of a clear statutory framework of GeM dispute resolution implies that, in the case of private limited companies, that have suffered an adverse GeM portal decision, such as being suspended off the platform or receiving an unfavorable dispute resolution result, may lack any meaningful legal redress.<sup>12</sup>

#### **D. Blacklisting and Debarment: Legal Procedural Issues.**

One of the most damaging legal implications that a private company can have in the procurement setting is the blacklisting or debarment of future government procurement of the company (a sanction which may be imposed by procurement authorities against various types of conduct such as poor performance, misrepresentation in bid documentations or corruption) as it may effectively disqualify the company to conduct business with the government over long periods.

The case of *Gorkha Security Services v. Government of NCT of Delhi* of the Supreme Court provided significant procedural protection to blacklisting decisions, that blacklisting should be preceded by a notice of the company and a hearing, that the

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<sup>12</sup> Mehta & Narain, *supra* note 4, at 118–124; GeM Terms and Conditions, cl. 14–18 (GeM SPV 2023).

decision should be justified by reasons, and that the blacklisting penalty should be commensurate to the severity of the misconduct. The Court pointed out that blacklisting has severe civil repercussions akin to civil death in the public procurement arena and hence must be treated with high level of procedural fairness.

Although these judicial protections exist, blacklisting procedures are often not given proper notice, fail to particularize the alleged misconduct with sufficient specificity, impose blanket blacklisting without regard to the proportionality of the sanction, and lack a uniform national approach to blacklisting, which disproportionately impacts smaller private companies with limited resources to challenge unlawful blacklisting decisions.<sup>13</sup>

## 5. REMEDY AND ENFORCEMENT GAPS

### A. Judicial Review Restraints and Practical Hurdles.

The judicial review in terms of writ petitions submitted under Articles 226 and 32 of the Constitution is the main legal relief that can be offered to the private limited companies that question the unlawful decisions of the government in the field of procurement. Although the constitutional remedy of judicial review is theoretically a potent means of overturning arbitrary or unlawful procurement decisions, it is not without a number of practical limitations that severely limit its effectiveness as a source of redress to procurement issues facing private limited companies.

The delay inherent in judicial proceedings particularly in the High Courts, where procurement challenges are typically filed means that relief obtained through judicial review often comes too late to be commercially useful. A private company that is unlawfully disqualified in a tender can have a High Court order to quash the disqualification months or years after the contract has been awarded to another bidder and performance is under way. The practical effect of the is that judicial review gives hypothetical vindication but no practical commercial relief as courts are general

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<sup>13</sup> *Gorkha Security Services v. Government of NCT of Delhi*, (2014) 9 SCC 105, at ¶¶ 18–25; Harish Salve, *Government Contracts and Constitutional Law*, 32 DELHI L. REV. 56, 68–75 (2010).

unwilling to upset contracts which are already underperformed by the successful bidder.

The Supreme Court's decision in *Jagdish Mandal v. State of Orissa* addressed the scope of judicial review in procurement, holding that the courts should give due weight to the expertise of procurement authorities and should interfere only in cases of illegality, irrationality, or procedural impropriety not merely because the court might have reached a different conclusion on the merits. This deferential approach which reflects a legitimate concern about judicial capacity to second-guess complex procurement decisions nevertheless reduces the practical scope of judicial review as a remedy for private limited companies challenging procurement decisions.<sup>14</sup>

## **B. Arbitration and Alternatives Dispute Resolution**

Arbitration is often a part of government contracts that contain a clause that states that contractual disputes will be resolved by arbitration. While arbitration provides a faster and more expert-driven alternative to litigation for post-award contractual disputes, it does not provide an adequate remedy for pre-award procurement challenges a private limited company that is unlawfully disqualified before a contract is awarded has no contractual relationship with the government and therefore no access to contractual arbitration.

The legal framework of arbitration of commercial disputes in India, including government contract disputes, is found in the amended, most recently in 2021, version of the Arbitration and Conciliation Act, 1996. The 2021 Amendment Act added specifics on how arbitrators may be qualified and the creation of the Arbitration Council of India to enhance the quality and efficiency of arbitration processes. However, arbitration of government contract disputes continues to face significant challenges in practice including the reluctance of government-appointed arbitrators to make awards against the

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<sup>14</sup> *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517, at ¶¶ 35–42.

government, delays in the appointment of arbitrators, and the government's propensity to challenge adverse arbitration awards.<sup>15</sup>

### **C. Lack of a Special Procurement Review Process.**

The most significant structural gap in India's procurement remedy framework is the absence of a dedicated independent procurement review mechanism analogous to the Public Contracts Regulations regime in the United Kingdom, the Office of Federal Procurement Policy in the United States, or the procurement review bodies established in EU member states that provides rapid, expert, and independent review of procurement decisions without the cost, delay, and formality of judicial proceedings.

Without such a mechanism, the private limited companies who would like to appeal against the procurement decisions have a two-fold option; either to accept the decision without appealing or to petition a writ which can take months or years to be resolved and which is very expensive in litigation costs. This binary choice between acceptance and expensive, slow litigation effectively deters many legitimate challenges by private limited companies with limited resources, allowing unlawful procurement decisions to stand unchallenged and undermining the integrity of the procurement system.

The Competition Commission of India (CCI) has jurisdiction over anti-competitive practices in procurement including bid-rigging, collusive tendering, and market division among competing bidders and has taken enforcement action in several procurement-related cases. Nevertheless, the CCI has a narrow scope of jurisdiction that only covers competition law infractions but not the consideration of individual procurement decisions as to whether they were procedurally or substantively unlawful.<sup>16</sup>

### **D. Opposing Argument, The Procurement Discretion Case**

A counterargument to the thesis of excessive legal burden on private limited companies might contend that the procurement framework's eligibility requirements, evaluation discretion, and limited remedies reflect legitimate policy choices designed to protect the

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<sup>15</sup> The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India), as amended by the Arbitration and Conciliation (Amendment) Act, 2021; *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818.

<sup>16</sup> Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India), §§ 3, 4; Competition Commission of India, *Bid Rigging in Public Procurement*, at 22–35 (CCI 2020).

public interest ensuring that government contracts are awarded to financially capable, experienced, and reliable suppliers rather than to companies that may fail to perform. This argument would refer to the great public interest in the efficient and effective administration of government-procured goods, services, and works, and the validity of the need to have procurement officials exercise discretion in choosing among competing bidders.

Although this is a valid policy consideration, in the end, this counterargument does not prove to be enough to justify the legal challenges that were identified. Proper concern in procurement efficiency by legitimate people is no reason to have disproportionate financial thresholds, experience requirements that arbitrarily bar new entrants with or without ability, or evaluation procedures that lack procedural protections. The correct balance between procurement discretion and private company rights is not the elimination of all qualification requirements but the calibration of requirements to objective, contract-specific criteria a requirement that the GFR itself articulates but that practice frequently fails to implement.<sup>17</sup>

## **6. COMPARATIVE ANALYSIS**

### **A. United Kingdom Public Contracts Regulations Framework.**

The United Kingdom's Public Contracts Regulations 2015 which implemented EU Procurement Directives and have been retained in amended form following Brexit through the Procurement Act 2023 provide the most directly instructive comparative model for Indian procurement reform. The UK framework provides: clear, proportionality-tested, eligibility requirements; mandatory standstill periods following award decisions to enable unsuccessful bidders to seek review before contracts are awarded; a special High Court procurement challenge process that offers swift and expert review; and specific remedies such as the setting aside of procurement decisions and financial compensation of unlawful procurement.

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<sup>17</sup> OECD, *Recommendation of the Council on Public Procurement*, at 12–18 (OECD 2015); Srivastava & Verma, *supra* note 5, at 60–65.

The standstill period – a mandatory period of ten days between the notification of the award decision and the execution of the contract, during which unsuccessful bidders can challenge the decision – is the UK framework's most significant innovation for private company protection. It directly targets the delay issue of judicial review by providing a period within which an appeal may be taken prior to the execution of the contract, maintaining the practical efficiency of the remedy.

The UK Procurement Act 2023 – which replaced the 2015 Regulations for procurements commenced after its entry into force – further strengthened transparency requirements by mandating the disclosure of evaluation scores and detailed reasons for procurement decisions, enabling unsuccessful bidders to assess the lawfulness of the evaluation and make informed decisions about whether to challenge.<sup>18</sup>

### **B. Singapore: GeBIZ and Government Procurement Act.**

Singapore's government procurement framework – governed by the Government Procurement Act, Cap. 120, which implements Singapore's obligations under the WTO Agreement on Government Procurement – provides a useful comparator as an Asian jurisdiction with a highly regulated and transparent procurement system. The Act provides the principles of non-discrimination, transparency, and competitive procurement, which are complemented by the GeBIZ e-procurement portal, which is the main interface of government procurement operations.

Singapore's framework is notable for its clear and proportionate eligibility requirements – the GeBIZ system includes a registered supplier database with tiered qualification levels that are explicitly calibrated to the scale and complexity of different procurement categories – and for its transparent tender evaluation processes, which require procurement authorities to disclose evaluation criteria and their relative weights in advance.

The dispute resolution mechanism under Singapore's framework – which provides for complaints to the Government Procurement Adjudication Tribunal – offers a model for India's proposed procurement review mechanism, providing accessible, expert, and

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<sup>18</sup> Public Contracts Regulations 2015, SI 2015/102, regs. 87–91 (UK); Procurement Act 2023, c. 54, ss. 50–65 (UK).

relatively rapid review of procurement decisions by an independent body with specific procurement expertise.

### **C. Major Lessons of Indian Reform.**

The comparative study indicates three main lessons to Indian procurement reform. First, the introduction of mandatory standstill periods between procurement award decisions and contract execution would significantly improve the practical effectiveness of procurement remedies by preserving the commercial utility of successful challenges. Second, the development of a dedicated independent procurement review mechanism drawing on the UK and Singapore models would provide private limited companies with accessible, expert, and rapid review without the cost and delay of judicial proceedings. Third, the development of standardized, proportionality-tested eligibility requirements calibrated to objective, contract-specific criteria would reduce the arbitrary exclusion of capable private limited companies from procurement competition.<sup>19</sup>

## **7. CONCLUSION**

### **A. Overview of the main arguments.**

This paper has determined and discussed three types of interconnected legal issues that affect the private limited companies in the government tender compliance system in India.

The first category eligibility and qualification barriers encompasses financial threshold requirements, prior experience criteria, and bid security norms that are frequently calibrated without objective justification to contract requirements, systematically disadvantaging smaller private limited companies relative to larger, more established bidders. Although the requirement of these capabilities has a proper ground in the capability of contractors, the disproportionate calibration of the requirement breaches the proportionality requirement of the GFR as well as the constitutional bar against arbitrariness in state action.

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<sup>19</sup> Arrowsmith, Linarelli & Wallace, *supra* note 5, at 78–95; OECD, *supra* note 17, at 15–22.

The second category procedural compliance challenges encompasses the complexity and inconsistency of tender documentation, the subjectivity and opacity of technical evaluation processes, the distinctive compliance challenges of the GeM portal, and the procedural deficiencies in blacklisting processes. These issues not only cost the private limited firms a lot of compliance, but also pose legal uncertainty that discourages their effective participation in the government procurement process.

The third category remedy and enforcement gaps encompasses the practical limitations of judicial review as a procurement remedy, the inaccessibility of arbitration for pre-award disputes, and the critical structural gap constituted by the absence of a dedicated independent procurement review mechanism. These loopholes imply that illegal procurement decisions are often not challenged and the procurement system is undermined, and the private limited companies are not able to have their procurement rights properly safeguarded by law.

## **B. Thesis Restated**

India's government procurement framework imposes systematically disproportionate legal burdens on private limited companies through a combination of excessive eligibility barriers, procedurally complex and inconsistently applied tender processes, and inadequate remedies that together undermine the constitutional guarantee of non-arbitrariness in state action and the policy objective of promoting competitive private sector participation in public procurement. These are not the single gaps but the structural characteristics of the procurement system which need to be reformed in legislation and institutions.

## **C. Reform Recommendations**

To begin with, the GFR must be revised to include the fact that all financial and experience eligibility requirements in tender documents must be supported by documented reasons that show that they are proportional to the particular requirements of the procurement. The regulation should set a maximum ratio of two times the estimated contract value of turnover requirements with deviations needing certain ministerial approval.

Second, an independent statutory body should be created, which is called Central Public Procurement Authority and has the following responsibilities: standardizing procurement documentation across central government; monitoring procurement compliance; reviewing complaints by unsuccessful bidders using an expedited administrative process that provides a decision within thirty days; and publishing annual reports on procurement compliance and outcomes.

Third, a period of ten days between the announcement of award decisions and performance of government contracts should be made mandatory, in which unsuccessful bidders have the right to file an administrative complaint with the Central Public Procurement Authority or challenge the contract before it is performed, without the risk that the contract will be performed before the case is heard.

Fourth, the legal framework of the GeM portal must be put on a statutory basis by specific legislative provision, to clarify the legal position of GeM terms and conditions, to provide a statutory mechanism of dispute resolution in GeM transactions, and to provide the rights and remedies of registered suppliers who have suffered unfavorable decisions of the GeM portal.

Fifth, a uniform national framework for blacklisting of government contractors should be enacted, specifying minimum procedural requirements including notice, opportunity to be heard, reasoned decisions, and proportionality assessment that must be observed by all procurement authorities, and establishing a right of appeal to the Central Public Procurement Authority against blacklisting decisions.<sup>20</sup>

#### **D. final observations and future research.**

The legal challenges facing private limited companies in government procurement are not merely technical regulatory matters they are questions of constitutional law and democratic governance, concerning the fairness and integrity of processes through which a significant proportion of public resources are allocated. A procurement system that effectively locks out or dis-favors capable private enterprises when they compete to provide government contracts, is not only inefficient economically, but a failure of the rule of law.

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<sup>20</sup> GFR, supra note 2, r. 151; Gorkha Security Services, supra note 13, at ¶¶ 22–28.

Future research should examine the specific impact of the GST framework on procurement compliance costs for private limited companies; the particular challenges facing women-led and SC/ST-owned private limited companies in government procurement; and the implications of India's commitments under bilateral trade agreements several of which include government procurement chapters for the reform of domestic procurement law.

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