BAR ON GLOBAL TENDERS: ISSUES & PERSPECTIVES

ELP

Background

As part of the recently announced "Atmanirbhar Bharat package" by the Central Government, an amendment has been made to General Financial Rules, 2017 (**GFR**) to ensure that henceforth, global tenders up to INR 200 crore, will be disallowed in government procurement of goods and services. Announced as part of the package to support the MSME Industries with the intent of "Self-reliant India" & "Make in India", *in reality,* the bar has wide ramifications for all businesses who regularly bid for government projects.

GFRs and its Applicability

Tendering being a matter of public finance, the foundation of government tendering in India is based on equity, non-discrimination, and transparency. GFRs 2017 is mandatorily applicable to all Central Government Ministries/Departments, attached and subordinate bodies as well as to the Autonomous Bodies *except* if the bye-laws of such Autonomous Bodies, provide for separate financial rules *qua* procurement/tendering then these bye-laws will take precedence over GFRs.

It is interesting to note that, State Governments and their Ministries/ Departments are not bound by GFRs. The State Governments are free to either adopt the GFRs 2017 or formulate their own rules/regulations.

Rule 161 of GFRs 2017 provides that for procurement of goods of value of INR 25 lakhs and above, invitation to tenders should be by way of advertisement. Rule 161(iv) allows the Ministries to invite global tender enquiry/foreign bidders for procurement of goods.

The said sub-rule(iv) has been amended to provide that for procurements up to INR 200 crores, Global Tender Enquiries shall not be undertaken, and preference must be given to domestic suppliers. Although, in "*exceptional cases*" (which includes procurements up to INR 200 crores), for special reasons, the Central Government Ministries/Departments are allowed to invite Global Tender Enquiries with the prior approval of the competent authority *viz.* Cabinet Secretary of India.

Preference to Local suppliers – PPP MII Order 2017

Pursuant to powers under Rule 153(iii) of the GFRs, Department for Promotion of Industry and Internal Trade (**DPIIT**) has notified the Public Procurement (Preference to Make in India), Order 2017 dated June 15, 2017. In June 2020, the public procurement norms specified in the said Order have introduced a new concept of Class-I local supplier, Class-II local supplier and Non-local supplier. This categorization shall determine the order of preference in tenders floated by the Government & is entirely dependent on the value of "local content" which means the value addition made by the suppliers in India.

- **Class-I local supplier** - Local content equal to or more than 50%
- **Class-II local supplier** - Local content more than 20% but less than 50%
- **Non-local supplier** - Local content less than or equal to 20%

The DPIIT empowers various Nodal Ministries/Departments to prescribe a methodology for computation of 'local content' for a particular product or a group of products. The bidder has to mandatorily comply with the methodology of computing local content prescribed by the concerned Nodal Ministry.

There is no hard and fast rule adopted by the Nodal Ministry for issuance of such methodology. It is often seen that the concerned Nodal Ministry issues a methodology for computation for a product/or a group of products after taking into account factors such as local capacity, local competition, technological superiority etc. Typically, most of the Orders issued by various Nodal Ministries, consider proportion of '**domestic cost'** to '**total cost**' to arrive at percentage of 'local content'.

With respect to procurement for value exceeding INR 10 crores, the percentage of local content shall be required to be certified from the statutory auditor or the cost auditor.

Discretionary Powers with the Nodal Ministry

Nodal Ministry has been given certain discretionary powers under PPP MII Order including the following:

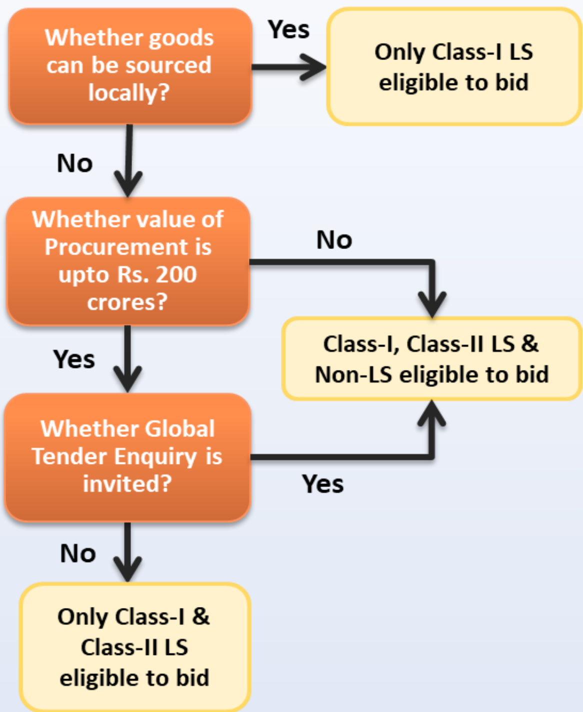
- List down goods for which there is sufficient local capacity and local competition;
- Exempt (wholly/partially) suppliers from meeting the stipulated 'local content' requirement where manufacturing is undertaken in India in the presence of technology collaboration

agreement/transfer of technology agreement with a plan for phased indigenization;

- Restrict or exclude bidders from a specific country (who have barred Indian suppliers from participating and/or competing in their country) from participating in the bids.

Tender Bidding and Allotment process

The PPP MII Order sets out the eligibility criteria of Class-I local supplier, Class-II local supplier and Non-local supplier for different types of procurement. It provides that irrespective of purchase value, in presence of sufficient local capacity and local competition, only Class-I local supplier shall be eligible to bid. For procurement up to the value of INR 200 crores, where no Global Tender Enquiry is invited, a specific restriction has been introduced for all such tenders to provide that only Class-I local supplier and Class-II local supplier shall be eligible to bid.



Once the bids are invited in accordance with the above eligibility criteria, the mechanism has been prescribed to allot the tender **depending upon divisible and indivisible contracts.** Class-I local supplier is also given an option to match the price, in cases where the lowest bidders are Class-II local supplier a or Non-local supplier.

Restriction of procurement from border countries

Recently, the Government inserted sub-rule (xi) to Rule 144 of the GFRs 2017 to enable imposition of restriction on procurement from bidders from countries or class of countries on grounds of defence and national security.

In this regard, the Order issued by the Department of Expenditure provides that **any bidder from a country which shares a land border with India** will be eligible to bid in any procurement **only if the bidder is registered with the Competent Authority *viz.* Registration Committee constituted by the DPIIT**. The Order takes into its ambit all Autonomous Bodies, public sector banks and financial institutions, Central Public Sector Enterprises, Public Private Partnership projects receiving financial support from the Government or its undertaking, Union Territories, NCT of Delhi and all agencies/undertakings thereof.

Also, the Order specifies the requirement to take certificate from the bidder regarding its compliance with the said Order.

Relaxation has been provided in certain limited cases, including for procurement of medical supplies for containment of COVID-19 global pandemic till December 31, 2020. By a separate Order, countries (*viz.* Bangladesh, Myanmar and Nepal) to which Government of India extends lines of credit or provides development assistance have been exempted from the requirement of prior registration.