

## Background

There is no single comprehensive legislation governing public procurements in India. The legal framework surrounding public procurements is instead governed by a series of sector specific legislations as well as rules, orders and manuals, issued by the Ministry of Finance, relevant Nodal Ministries as well as State governments within whose ambit such procurement takes place.

In particular, the General Financial Rules, 2017 empower the Central Government to provide for mandatory procurement of any goods or services from any category of bidders, or to provide for preference to bidders on the grounds of promotion of locally manufactured goods or locally provided services.

The Government of India has recently [amended](#) the General Financial Rules 2017, so as to enable the Department of Expenditure, Ministry of Finance to make rules restricting participation in public procurement of bidders from countries that share a land border with India. Such restrictions may be made on the grounds of “*defence of India or matters directly or indirectly related thereto including national security*”.

In furtherance of this amendment, the Department Expenditure has, on July 23, 2020, issued the [Order \(Public Procurement No.1\) \(Order\)](#) outlining the framework of such restrictions as follows:

## Key Features

### ▪ Applicability

The Order applies to all Central Government Ministries/Departments and their attached and subordinate bodies. It is also applicable to:

- All autonomous bodies;
- Public sector banks and public sector financial institutions;
- All central public sector enterprises; and
- To procurement in public private partnership projects receiving financial support from the Government or public sector enterprises/undertakings.
- Union Territories, National Capital Territory of Delhi and all agencies/undertakings thereof

Additionally, the Government of India has written to the Chief Secretaries of the State Governments invoking the provisions of Article 257(1) of the Constitution of India (empowering the Union to issue directions to the States) for the implementation of this Order in procurement by State Governments and state undertakings etc.

### ▪ Bidders

Bidders have been defined broadly to include both entities incorporated in such countries (i.e. countries which share a land border with India) as well as entities whose beneficial ownership lies in such countries.

### ▪ Registration Requirement

Any bidder from a country which shares a land border with India will be eligible to bid in any procurement whether of goods, services (including consultancy services and non-consultancy services) or works (including turnkey projects) only if the bidder is registered with the “Competent Authority”.

### ▪ Registration Authority and Procedure

The Competent Authority is the Registration Committee to be instituted by the Department for Promotion of Industry and Internal Trade (DPIIT) with the following members:

- An officer, not below the rank of Joint Secretary, designated for this purpose by DPIIT, who shall be the Chairman;
- Officers (ordinarily not below the rank of Joint Secretary) representing the Ministry of Home Affairs, Ministry of External Affairs, and of those Departments whose sectors are covered by applications under consideration;
- Any other officer whose presence is deemed necessary by the Chairman of the Committee.

Upon receipt of an application, the Committee shall first seek political and security clearances from the Ministry of External Affairs and Ministry of Home Affairs, as per guidelines issued from time to time. Registration shall not be given unless political and security clearance have both been received. The Committee may further reject or cancel registrations *without giving any reasons*, on the *ground of national security*. Further, the Government E-Marketplace (GeM) will also require all vendors to furnish certificates regarding compliance with the Order. The date for compliance is to be fixed by the GeM.

### ▪ Relaxations

Relaxation has been provided in certain limited cases, including:

- Procurement of medical supplies for containment of Covid-19 global pandemic till December 31, 2020;
- Bona fide procurement on the GeM without knowledge of the origin of the bidder;
- Procurement for projects which receive international funding with the approval of the Department of Economic Affairs (DEA);
- Procurement by Indian missions and by offices of government agencies/undertakings located outside India.

Separately, the Government issued a [clarification](#) stating that the Order would not apply to countries where the Indian Government has extended lines of credit or in which the Government of India is engaged in development projects.

### ▪ Impact on Existing Tenders

The new provisions will apply to all new tenders. In respect of tenders already invited, if the first stage of evaluation of qualifications has not been completed, bidders who are not registered under the new Order will be treated as not qualified. If this stage has been crossed, ordinarily the tenders will be cancelled and the process will start a fresh.

## ELP Comments

The Order has been purportedly issued on grounds of defence of India or matters directly or indirectly related thereto including national security. The Order, which excludes countries to which India has extended lines of credit or where India is engaged in any developmental project, seems to be targeted at China. Therefore, the possibility that China raises objections at the World Trade Organization (WTO) cannot be completely ruled out more so given the series of decisions that India has taken in the recent past. While India has not acceded to the WTO Agreement on Government Procurement which sets out disciplines relating to government procurement, India must still conform to the principles laid down in the covered agreements to which it is a party and to the extent these covered agreements apply to government procurement.

### *Most Favoured Nation Treatment*

For instance, the General Agreement on Trade in Services (GATS) sets out rules governing the supply of services between nations and may be relevant in the case of bidders/service providers in other countries that wish to participate in tenders in India. The GATS requires that Members accord immediately and unconditionally to services and service suppliers of any other Member *treatment no less favourable* than that provided to like services and service suppliers of any other country. This is known as the principle of most favoured nation treatment and is laid down in Article II of the GATS. As a general rule, government procurement is excluded from this principle as long as services purchased are for governmental purposes and not with a view of commercial resale or with a view to use in the supply of services for commercial sale. Given that procuring entities under the Order include public sector enterprises as well as banks and financial institutions, the potential supply of services for commercial purposes cannot be ruled out and may open up India to challenges on this account.

### *National Security*

Furthermore, with respect to national security, Article XIV of the GATS contains the “national security” exception which allows certain actions which may *prima facie* be violative of the GATS if they fulfil certain requirements.

By way of background, Article XIV 1(b) stipulates that,

“[n]othing in this Agreement shall be construed [...] to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

- relating to fissionable materials or the materials from which they are derived;
- relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- taken in time of war or other emergency in international relations [...].”

The requirements of Article XIV may be further informed by recent WTO panel decisions concerning Article XX of the GATT and Article 73 of the TRIPS (the national security equivalent provisions in those agreements). Recent panels have found that an

"emergency in international relations" is a "situation of armed conflict, or of a latent armed conflict, or of heightened tension or crisis, or of general instability engulfing or surrounding a State".<sup>1</sup>

In addition, panels have found that the following criteria must be satisfied in order for the national security exception to be invoked<sup>2</sup>:

- Whether a "war or other emergency in international relations" exists;
- Whether the relevant actions were "taken in time of" that war or other emergency in international relations;
- Whether the invoking Member has *articulated* its relevant "essential security interests" *sufficiently* to enable an assessment of whether there is any *link* between those actions and the protection of its essential security interests; and
- Whether the relevant actions are so *remote* from, or unrelated to, the "emergency in international relations" as to make it *implausible* that the invoking Member considers those actions to be necessary for the protection of its essential security interests arising out of the emergency.

Therefore, any measure that is purportedly adopted in time of war or other emergency on the ground of national security must satisfy the above elements and in particular must be articulated sufficiently to demonstrate a causal link to the emergency in question. Further, the existence of the emergency itself must be an objectively determined fact.

## Conclusion

In the past, India has seen significant interest and investments from China in public private partnerships related to the Real Estate and Renewable Energy sectors. The Order may therefore impact future participation from Chinese companies in these projects, such as the upcoming Solar Energy Corporation of India's selection process for setting up 7.5 GW of grid connected solar projects in Leh and Kargil.

While it remains to be seen how China reacts to some of the measures adopted by India in the recent past, the friction between the two countries emanating primarily from border disputes and other geo-political issues and its consequent impact on trade relations is far from over. Therefore, businesses both in India and China will be well advised to take into account these considerations while dealing with each other in near future.

We trust you will find this an interesting read. For any queries or comments on this update, please feel free to contact us at [insights@elp-in.com](mailto:insights@elp-in.com).

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<sup>1</sup> Panel Report, *Russia – Traffic in Transit*, para. 7.76.

<sup>2</sup> Panel Report, *Saudi Arabia – Intellectual Property Rights*, 7.242.