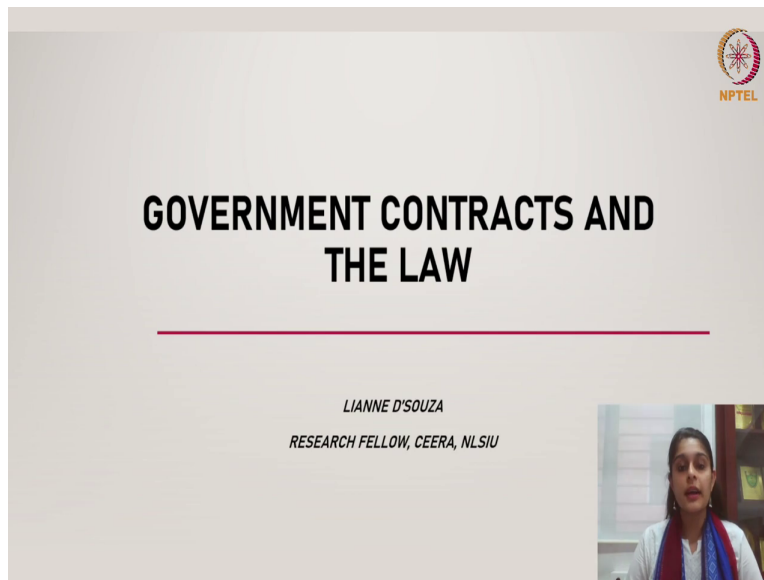


**Advanced Contracts, Tendering and Public Procurement**  
**Ms. Lianne D'Souza**  
**Research Fellow, CEERA**  
**National Law School of India University**  
**Government Contracts and the Law - 03**

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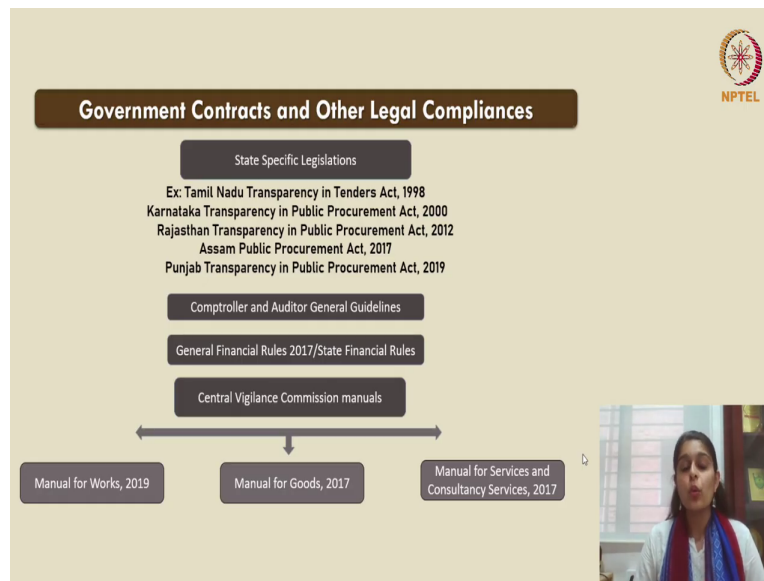


Hello, everyone. I am Lianne D'Souza and I am currently engaged as a research fellow at the Center for Environmental Law, Education, Research and Advocacy (CEERA), National Law School of India University, Bangalore. In today's segment on the course on advanced contracts, public procurement and tendering, I will be taking the discussion on government contracts forward by delving into the legal compliances on government contracts under the laws, legislations and guidelines in India. As we know, and as has been discussed in the earlier sessions, the primary legislation governing contracts in India is the Indian Contract Act of 1872.

However, in the context of government contracts, as there is an increased need for public accountability and transparency since public money is involved, there are many other legislations and guidelines that are applicable in terms of governing government contracts. So, let us have a look at the various laws applicable to government contracts in India.

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## Government Contracts and other Legal Compliances



When you look at the overarching legal framework governing government contracts in India, there is a plethora of legislation governing the same as we have state legislation in this regard. As might have been discussed earlier, and in the previous sessions, contracts are a subject matter of legislation for both the centre as well as the state.

This means that the parliament, as well as the state legislatures, has the power to make legislation or laws on government contracts as well. If we look at the constitution, entry 7 of list 3, or the concurrent list, as we call it, in schedule 7 clearly specifies that contracts are a matter of legislation for both the parliament and the state legislature.

Therefore, a couple of states have made specific legislations governing processes for public procurement, tendering or even government contracts in that given state. A few states have made legislations in this regard including Tamil Nadu, Karnataka, Rajasthan, Assam and Punjab. For instance, in the state of Tamil Nadu, the Tamil Nadu Transparency Tenders Act 1998 was formulated.

Similarly, in other states, a couple of other legislations include the Karnataka Transparency in Public Procurement Act 2000, Rajasthan Transparency in Public Procurement Act 2012, the Assam Public Procurement Act 2017 And the Punjab Transparency in Public Procurement Act

2019. As can be seen, these legislations have territorial application. In other words, they are only applied within the boundaries of that particular state and they do not apply to government procurement, or public procurement in any other state.

Besides these specific state legislations, there are other regulations, rules and guidelines formulated by certain institutions, as well as the government for the purpose of governing the processes of public procurement. For example, all public procuring entities are required to comply with the regulations of the Comptroller and Auditor General of India. As we know, the Comptroller and Auditor General is responsible for ensuring transparency, accountability and good governance in public resources.

Therefore, as this office is vested with the power of ensuring independent and credible auditing and accounting of government resources, all government contracts are subject to the regulations formulated by the Comptroller and Auditor General. Similarly, another set of rules which are applicable to government contracts is the general financial rules 2017, along with the state financial rules, or state delegation or financial power rules, which are applicable in specific states. The GFR, as it is colloquially called, has been formulated by the Department of Expenditure for ensuring the effective and efficient utilization of public resources, specifically public money. What is interesting about the GFR is that it is applicable to central government departments and central government ministries.

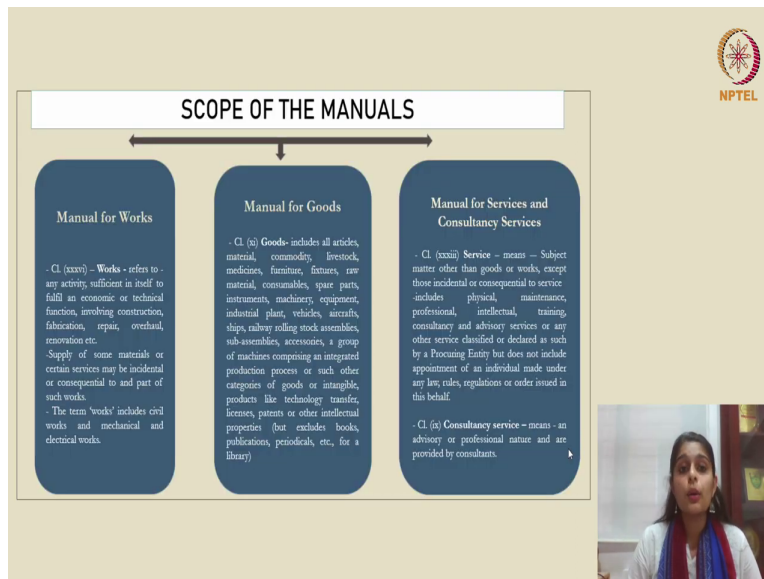
Besides this, it is also deemed to be applicable to certain autonomous bodies unless and until there are specific bylaws providing that these rules will not be applicable. An important point to note is that the terms regulation and rules imply that these rules or laws are binding on the entities who are engaged in public procurement. This means that there is a mandate to comply with the provisions of the rules and regulations specified there.

Besides this, the Central Vigilance Commission (CVC) has also formulated guidelines from time to time to ensure basic requirements which are to be followed in government contracts or processes of public procurement. To ensure transparency, promote healthy competition, and provide fair and equitable treatment to all parties and public procurement, the CVC guidelines serve as guiding documents.

As we know the central vigilance commission is an agency endorsed with the responsibility of ensuring good governance. It oversees and acts as an impartial monitoring agency of government activities. There are three manuals formulated, which serve as guidebooks for public procurement, and they serve as guiding principles or operating procedures in the processes of public procurement.

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## Scope of the Manuals



One may wonder why there are three separate manuals formulated by the Central Vigilance Commission for public procurement. As can be seen, the three manuals cover three different areas or three different subject matters of procurement. Therefore, as the scope of these manuals is different, the procedure in these manuals may differ or vary.

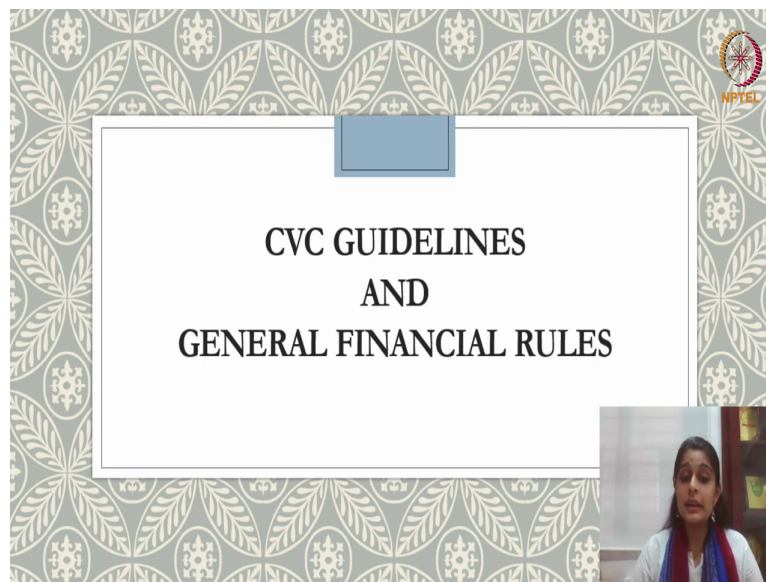
For example, in the Manual for Works, when the subject matter is any work, which can be civil or mechanical or electrical work, then the manual for works will be applied to the same and the meaning of works as given under clause 36 of the manual includes any activity which is sufficient in itself to fulfill any economic or technical function involving construction, fabrication, repair, overhaul or renovation. Interestingly, the term work includes a combination of goods as well as services.

Similarly, when we look at the Manual for Goods and the manual for services, the scope is restricted only to goods or only to services. For example, under the manual for goods, when the subject matter of procurement is any goods, in other words, in any, is any article, material, commodity livestock, medicine or any other such commodity provided in the definition, which is Clause 11 of the manual for goods, then in such instances the manual for goods will be invoked.

Similarly, when the subject matter of procurement is any service within the definition of clause 33 of the manual for services and consultancy services, then the Manual for Services and Consultancy Services will be attracted. Therefore, this clearly goes to show that the law is applicable to the procurement of goods services or works will depend on what is the subject matter of procurement.

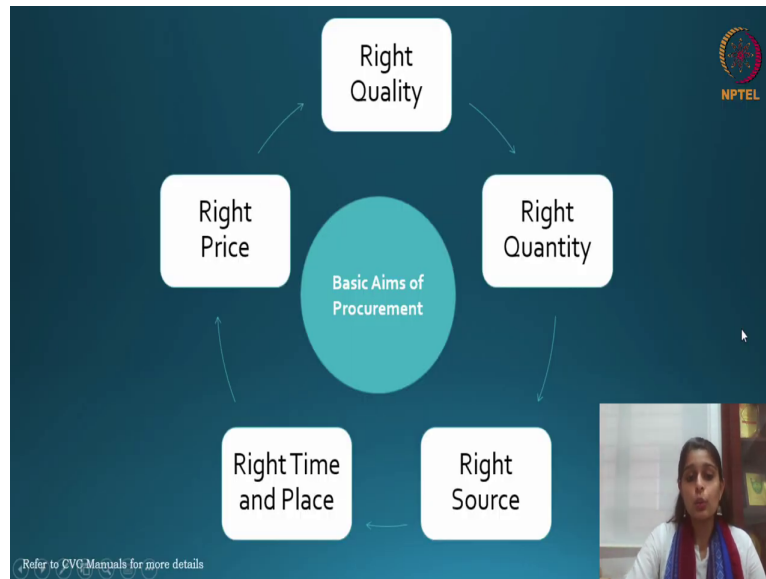
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### **CVC Guidelines and General Financial Rules**



Over the laws and guidelines that are applicable to government contracts, let us go a little bit in depth into the CVC guidelines as well as the general financial rules. As government contracts are largely financed by public money, the basic aim of any law pertaining to government contracts is to ensure that there is a right balance struck between the costs of a particular contract and the returns that may arise from public procurement.

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Therefore, when we look at the CVC manual, these manuals comprise 5 basic aims, which are colloquially referred to as the 5 R's of procurement. As we can see, these 5 R's pertain to the subject matter of the contract or procurement. These include the right quality, right quantity, right price, right source and the right time and place.

So, what do we mean by the right quality? The concept of quality in a contract or public procurement resonates with the concept of utility value or utility management for the money that has been spent in procurement. This means that the procuring entity must bear in mind what is precisely required in a particular contract and from a particular contractor.

This implies that the procuring entity must have a clear understanding of the functional value to cost, the bidder's quality system as well as particular specifications that pertain to the subject matter of procurement. So, in the event, the contract pertains to the procurement of a particular good, the procuring entity must have a clear understanding of the kind of quality of the good required, and specifications such as technical specifications, and design specifications, in that context to ensure that they get the value of money for the same.

Now, let us look at the right quantity. The notion of right quantity implies the need to accurately calculate the quantum of goods and services being procured by a procuring entity. This means that the procuring entity must bear in mind all systemic overheads and extra costs that may be

incurred in availing certain goods, services or works in a given contract. For example, in a goods contract, the number of goods being procured has a direct correlation to the amount of costs that may be incurred.

Therefore, the right quantity of goods and services being procured has to be accurately estimated to avoid any extra expenditure or costs. When we look at the right price, the right price essentially involves looking into maintenance costs, operational costs, disposal costs, and various other costs where the determination of price must take into consideration the quality and quantity of a given product or service. When we say the right price in a given contract, this means that the procuring entity must avoid any excessive expenditure.

Since public money is usually involved in a government contract or any process of public procurement, it is essential to ensure that the right price has been pre-estimated to avoid any extra costs on the government or the public exchequer. The price that is being set for a given contract may not necessarily be determined entirely before the contract is issued. However, the price cannot be excessively high or abnormally low, so as to vitiate the contract.

Now, let us look at what the right time and place stipulates. When we use the term the right time in place in a government contract, we are essentially hinting at ensuring public accountability and this means that there is a need to ensure timely completion of contracts. In government contracts, time is of the essence, this means that from the stage of auctioning or tendering to the completion or delivery of services or goods in a given contract, time must be borne in mind so, as to ensure that there is an effective conclusion of a given contract.


An unrealistic time or place of delivery of a given contract may simply reduce the contract to redundancy or futility. Hence, it is very crucial, especially in long-term contracts, that the time and place of a given contract or the source or place of delivery is very crucial in terms of executing the contract and formulating the contract. In the last limb of the aims of government contracting, we look at the right source. Now, the right source means that the contracting party who is ultimately going to be the source of delivery of either goods, services or works in a given contract must necessarily possess the financial as well as technical capacity to perform the contract.

As has been discussed earlier, since public money is involved in government contracting, it is essential to avoid any unnecessary expenditure that the financial and technical capacity of a contract must necessarily meet the demands or requirements of a given contract.

These clearly go to show that when it comes to government contracting, the aims of the government contracts must necessarily ensure that both the contracting party as well as the procuring entity, bear in mind essential requirements such as quality, quantity, time, place and price of a given contract.

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### Model of Government/Public Procurement




**MODE OF GOVERNMENT/PUBLIC PROCUREMENT**

Should All Contracts by the Government only be Granted By Public Auction/Tenders?

- *S. Selvarani v. The Commissioner, Karaikudi Municipality [2005 (1) CTC 81]*
- *Ram and Shyam Company v. State of Haryana [AIR 1985 SC 1147]*

"The law is well-settled that contracts by the State, its corporations, instrumentalities and agencies **must be normally granted through public auction/public tender by inviting tenders from eligible persons.** However, in rare and **exceptional cases**, for instance during natural calamities and emergencies declared by the Government; where the procurement is possible from a single source only; where the supplier or contractor has exclusive rights in respect of the goods or services and no reasonable alternative or substitute exists; where the auction was held on several dates but there were no bidders or the bids offered were too low, etc., this normal rule may be departed from and such contracts may be awarded through 'private negotiations'"

Refer Section 4 – KTPP Act, 2000; Section 4 – Punjab TPP Act, 2019 for exceptions



When we look at the manual in which contracts in the government sector are concluded, an important question arises with regard to the mode of public procurement of government procurement. It is important to understand how government contracts should be invited or even concluded in the first place. It is a well-settled principle of law that government contracts are typically to be concluded or even entered into first by inviting bids from eligible contractors or eligible candidates.

So, the question is, should all government contracts be granted through public auctions or public tenders by inviting bids from eligible candidates, as per the principles of law decided by the courts, as India follows a common law system where we follow principles of precedence that is a



principle of law that has been recognized by a superior court of law, government contracts are typically to be given by public auction. It was well-settled way back in the year 1985 by the Supreme Court in the case of Ram and Shyam company v. State of Haryana, which was further reiterated in a plethora of cases, and was strictly and vehemently reiterated in the case of S. Selvarani v. The Commissioner Karaikudi Municipality in 2005 by the Madras High Court, where the court stated that the law is very well settled that a state including its corporations, instrumentalities, and agencies, and as has been discussed earlier, basically any institution that is considered to be a state under Article 12 of the Constitution of India, such institution must necessarily grant its contracts through public auction or public tender by inviting tenders from eligible persons.

Why is this done, so, the award of contracts through public auctions or public tenders is essentially to ensure transparency, and public accountability to maximize economy and efficiency in government procurement, to promote healthy competition among eligible bidders, and also to provide a fair and equitable chance to all tenders and to avoid any sort of irregularities. As government contracts are unnecessarily tested on the touchstone of Part 3 of the Constitution, it is important that the process of public procurement has to abide with Article 14 of the Constitution, which provides for equality before the law.

However, this being said, there are certain exceptional situations where government contracts can be concluded by direct procurement or direct negotiation and this has been held by the court of law courts of law as well, where in this case, the court has clearly stated and has an as has been displayed on the screen in only rare and exceptional cases, such as natural calamities, emergencies declared by the government, where procurement is only from a single source or supplier, where the supplier or contractor has exclusive rights in respect of goods and services, or where there is no other better or best alternative, or even where the auction was held on several dates and there were no bidders then only in such situations can government contracts be given either through direct procurement or direct negotiation and it need not necessarily go through the process of public auctions or public tenders.

Similarly, under state legislations, you have certain exceptions which are explicitly carved out under specific provisions. For example, under the Karnataka Transparency Public Procurement

Act, Section 4 clearly provides exceptional situations where government contracts can be entered into without necessarily going through the process of auctions or tendering.

For example, in the course or in the case of any national calamity, or any emergency declared by the government, or in case the goods and services can only be procured through a single source, the process of procuring goods and services or any works through auctions or tenders, need not necessarily be abided by.

Similarly, under the Punjab Transparency and Public Procurement Act 2019 certain exceptions have been carved out and explicitly provided under Section 4 of the act. For example, in the case of certain emergency procurement for management of any disasters under the Disaster Management Act, or procurement of any goods or services for assembly or parliamentary elections, or procurement of any goods or services for any security purposes or strategic purposes of the state then in such situations, public auctions or tenders need not necessarily be resorted to. However, the well settled principle of law is that government contracts in order to ensure transparency and accountability must necessarily go through the process of public auctions and tenders.

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### Exceptions: Case Laws



**EXCEPTIONS: CASE LAWS**

◦ *Hemogenomics Private Limited vs. The State of Andhra Pradesh and Ors. [2021 (93) ALT 612]*

**Facts:** The State of AP awarded work of collecting and testing blood samples by RT-PCR after making a detailed enquiry on a Pan India basis and came to the conclusion that the equipment (Conbas S 21) manufactured exclusively by the respondent is suitable for the tests in their laboratory and that therefore, after conducting the enquiry, they have awarded the work

**Issue:** Whether the award of work is invalid and whether the State should have issued tenders?

**Ruling:** When there is a single source of supply or when the supplier has exclusive rights adopting negotiations is permissible. In the present case there is only one supplier or source who has an exclusive right in respect of the goods. An alternative was not adopted because the market survey revealed that it is not a reasonable alternative. Therefore, the Court is of the opinion that this case fits into the definition of an exceptional case



Let us look at a couple of case laws where exceptions to this process of public tendering and auctioning were invoked. The first case is Hemogenomics Private Limited v. State of Andhra Pradesh, a 2021 judgment. The factual matrix of this case is such that the state of Andhra Pradesh had awarded a contract for equipment placement to respondent number 4 in this particular case for collecting and testing blood samples by RT-PCR method and this was done so after the state had conducted a very detailed inquiry on a pan India basis of their requirements and the kind of equipment that they would want in this particular instance.

After conducting such inquiry, the State came to the conclusion that the equipment by the name Conbas S 21, which was being provided or offered by respondent 4 in this case, was actually manufactured exclusively only by this respondent, and it was the most appropriate and most suitable equipment for testing in the state's laboratory. Therefore, the state entered into a direct negotiation with respondent 4 and after conducting such an inquiry the award the contract was awarded to respondent number 4.

However, the petitioner in this case Hemogenomics had questioned or challenged this particular award of the contract on the grounds that they had not followed the mandatory requirement of public auctioning or public tendering. It was alleged that this particular action of the government was clearly violative of the constitutional principle of equality and such action was being challenged as being void arbitrary and irregular.

However, in this particular case, the court looked into the exceptional situation that was claimed by the respondents and the court stated that whether there is a single source of supply or where the supplier has exclusive rights of adopting negotiation, then in such a situation, the procedure of public auction need not necessarily be followed.

And in this particular case, since there was only one supplier of the equipment and the source who and the source being the supplier who had an exclusive right in respect of this goods being the equipment, the answer is there was no other alternative available after conducting a market survey the court was of the opinion that this case completely fits the definition of an exceptional case and therefore, the court held that such award of the contract was valid and was not an arbitrary exercise of power by the government.

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### EXCEPTIONS: CASE LAWS

• *Shankar V and Ors v. Secretary, Urban Development Authority and Ors. [2015 (5) Kar LJ 649]*

**Facts:** The GoK sanctioned a project for construction of a commercial complex in a Municipality in Kolar District, on the condition that procedure under the KTPP Act, 2000 is followed in sanctioning the same. Owing to a drought, the government thought it fit, in the interest of the public, to sanction the work to Kolar Nirmithi Kendra through a notification without calling for a tender.

**Issue:** Whether the award of work is invalid?

**Ruling:** Section 4 of the KTPP Act allows the government to notify exemptions for specific procurements. The notification passed was based on the urgency for raising such construction. The sanctioned work was therefore valid under the Act.



The second case that we are going to discuss where an exception to the process of public auctioning was invoked in the case of Shankar V and Ors. v. Secretary, Urban Development Authority and it is a case decided by the Karnataka High Court in the year 2015. Now, the factual matrix of this case was such that in 2014, the government of Karnataka sanctioned a project for the construction of a commercial complex in a small Municipality by the name of Srinivaspura in the Kolar district.

And this was sanctioned on the basic condition that procedures under the Karnataka Transparency and Public Procurement Act (20) 2000 was to be followed. However, in this particular case, owing to a drought, the municipality had passed a resolution stating that instead of going for public auction and owing to the urgency of the matter, the government ought to enter into a private negotiation and grant the construction the project for the construction of the commercial complex to the seventh respondent in this particular case.

The government of Karnataka had initially rejected such a resolution however, on the basis of recommendations given by an MLA, the government had passed an order and sanctioned such regulation, or resolution passed by the municipality, stating that the government could enter or award a contract or to the seventh respondent in this particular case.

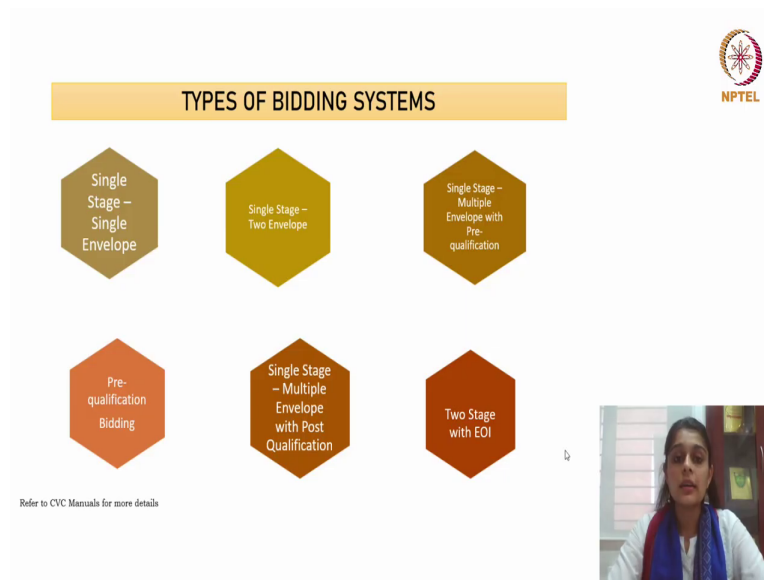
Therefore, in this situation, the government thought it fit and because of the interests of the public at large, the work was sanctioned to the seventh respondent, which is Kolar Nirmithi Kendra, through a notification, and this was done so without calling for an open tender. This action of the government of Karnataka was challenged by the petitioners on the grounds that it was valid, and arbitrary, and it was not authorized by law, specifically under the Karnataka Transparency and Public Procurement Act.

The Karnataka High Court after delving into the provisions of the act, had stated that section 4 of the Act clearly allows certain exceptional situations when public auction or public tendering need not be resorted to. So, the court allowed the government to notify exemptions for specific procurements.

In this particular case, the Court held that the notification passed by the government was based on a certain emergency or urgent situation in the interest of the public and therefore, in light of such public interest, it was imperative for the government to allow raising such construction by entering into a contract directly with the seventh respondent. Therefore, the Court held that since this was clearly an exceptional case carved under Section 4 of the Karnataka Public Transparency in Public Procurement Act, the work was sanctioned and the court upheld the move by the Karnataka government.

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## Types of Bidding Systems



Let us look at the types of bidding systems that are usually prevalent in the processes of public procurement or government contracting. There are various systems of issuing bids based on the technicalities of a particular contract or also based on the kind of procedures required to be followed in a particular procuring system.

The first type of system which is the most simple and quickest form of bidding systems is a Single Stage Single Envelope bidding system. In this kind of system, all bids are usually invited in a single envelope, where the technical requirements are very simple, they are very clear and the source of supply is not very critical.

In these kinds of contracts, the value of the contract is typically low, and they are usually small-term or short-term contracts. What happens in a single stage-single envelope bidding system is that all financial technical details are to be submitted by the contractor in a single bid or in a single envelope to the procuring entity.

This means that all their information pertaining to the technical requirements, the technical qualification and the financial quotations are to be provided in one document in one envelope to the procuring entity.

Now, this kind of system is said to be the most simple and quickest bidding system because the price is usually low and the technicalities are quite simple. In this kind of bidding system, the lowest price bidder here who meets the technical qualification or who qualifies the commercial or technical aspects or requirements of the procuring entity will usually be declared as the successful contracting party.

The other form of a bidding system is a Single Stage Double Envelope system. Now, as provided under the General Financial Rules, rule number 163 as well as the Central Vigilance Commission manuals, this kind of bidding system is usually followed, where there are specifications for technical criteria as well as financial requirements. In this kind of system, there are two envelopes that are to be submitted by the bidder or by the contracting parties.

So, the first envelope usually contains the technical qualifications or technical requirements and the second envelope contains the financial requirements. When these envelopes are submitted to the procuring entity within the given time frame, the technical bid shall be evaluated on the basis of the technical or techno-commercial qualifications of the bidder and once they qualify, the financial bids or the envelope containing the financial information will be open.

Now, this system is generally followed, where the technical criteria are a little moderate, or it can also be high, and they are usually preferred in situations where the works contracts require specialized qualifications by the bidder.

The next type of bidding system is a Pre-qualification bidding system. Now, as the name suggests, in this kind of bidding system, the bid documents are not circulated to the public or to eligible bidders in advance. Rather, there is a pre-qualification criterion list which is circulated to the public and those interested bidders may submit this form or submit the list of their qualifications to the procuring entity before the bid has been submitted.

Now, this kind of bidding system is usually adopted in complex contracts, where the procuring entity wants to filter out bidders who probably do not have the requisite qualifications or requisite capabilities to meet the requirements of the contract. This system of a pre-qualification bidding system can also be done along with a single stage multiple on the envelope system.

Now, what is the difference between a pre-qualification bidding system and a single-stage multiple-envelope bidding system with a pre-qualification stage? The difference is simply this in the latter form of the bidding system the bid document has been provided to the bidders however, the bidders are submit required to submit three envelopes.

One envelope should necessarily contain their bidding requirements or eligibility criteria to meet the bid. Once those bidders, who qualify the preliminary bidding requirements, they will be filtered out, and only those qualifying bidders will be then taken to the next stage in terms of evaluating their technical and financial bids.

So, the basic difference is that in a pre-qualification bidding system, the bid is not issued unless and until the qualified bidders have been segregated. And in a single stage multiple envelope system, the bid, and the pre-bidding qualification list has been provided along with the technical and financial bids however, the technical and financial bids will only be opened once the pre-qualification bids have been qualified.

Another type of bidding system is a Single Stage Multiple Envelope bidding system with post qualifications to be submitted by the contractors or possible bidders. Now, where the procurement is moderately complex or complex, and generally involves a lot of time, effort and money on the thought of the bidders, then the procuring entity will provide a list of criteria where a clear-cut pass or fail qualification of the bidders are to be submitted.

Now, this is usually submitted as the first envelope in a multiple-envelope system. And upon opening this particular envelope on the bidding date, the post-qualifications are evaluated and only those bidders who qualify these post-qualification requirements are then proceeded to the next stage where get technical and financial requirements are evaluated.

The last stage or the last kind of bidding system is a two-stage bidding system with an expression of interest. Now, there may be specific instances where the subject matter of procurement is very complex and is of a highly technical nature and the procuring entity itself may not have complete knowledge of the nature and extent of the technical requirements or technical solutions. So, in such situations, a two-stage system is followed.



Now, in these stages, the first stage generally involves an invitation to expression of interest by bidders all over. Now, these bidders are required to comply with certain objectives, and technical and financial requirements and only those bidders who qualify these preliminary requirements will qualify for the next stage.

So, what happens in the intermediate stage between the first stage and second stage of expression of interest? Interestingly, in this kind of bidding system, all those bidders who have qualified for the first stage in providing their expression of interest will be shortlisted and invited for a technical discussion with the procuring entity and other stakeholders and preceding this discussion the procuring entity can modify the terms of the bid documents or modify the terms of the tender and reissue the same, the same tender or revised terms of procurement will be further issued or an invitation for expression of interest will be further issued to all those bidders who are not rejected in the first stage of bidding.

Such qualified bidders will then in the second stage be required to again submit their expression of interest based on the modified terms of the procuring document and those bidders who qualify, the financial and technical requirements will then be granted the contract or awarded the contract. So, the advantage of a two-stage bidding system is to eliminate all those kinds of bidders who probably will not be able to handle the technical capabilities required of complex contracts or even long-term contracts.