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IN THE ABSENCE OF GOOD LAW

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Recently, the Supreme Court expressed its growing concern over the award of tenders being challenged in writ proceedings almost as a matter of routine. In anguish it added, “It however appears that the window has been opened too wide as almost every small or big tender is now sought to be challenged in writ proceedings almost as a matter of routine.”

The court’s observations fail to appreciate the fact that these challenges, exasperating as they may be to constitutional courts, are the unfortunate effect of inadequacies in our national public procurement laws. Therefore, one is tempted to respond to the court’s laments using the words of Portia in Shakespeare’s *The Merchant of Venice*: “Tarry a little. There is something else.”

The rude fact is that India has still to enact parliamentary legislation to comprehensively deal with public procurement. Consider this. Procurement by the government accounts for 30% of the GDP; yet notwithstanding such fiscal significance, there is no comprehensive parliamentary legislation till date to regulate such public procurement by the Central government. Instead there is a maze of regulations, guidelines and rules.

In the past, instances of charges of corruption in public procurement have brought down elected governments. It is therefore nobody’s case that existing processes are squeaky clean or enviably efficient. Given such a scenario, parliamentary legislation to regulate public procurements which provide adequate means for aggrieved parties to challenge inequities and illegalities in public procurement needs to be put in place. The government is also well aware of this inadequacy. For example, the United Progressive Alliance introduced the Public Procurement Bill in the Lok Sabha in 2012, “to regulate public procurement with the objective of ensuring transparency accountability and probity in the procurement process”. The sad fact is that it was not passed by Parliament. The National Democratic Alliance, in 2015, revamped the provisions of the earlier Bill to come up with the Public Procurement Bill, 2015; it was a significant improvement to the 2012 Bill. Unfortunately, this Bill too is floundering. The significant point is that both versions had provisions for robust internal machinery for grievance redress arising out of public procurement. Sadly, they never became reality. Against such a background, it is hardly surprising that the award of tenders is being challenged in constitutional courts.

Existing constitutional provisions are themselves no great help in this area. While Article 282 provides for financial autonomy in public spending, there are no further provisions that address any guidance on public procurement principles, policies, procedures or for grievance redress.

While this is the position with regard to public procurement by the Central government, laws to regulate State public procurement are not any better in providing effective alternate dispute resolution mechanisms. State public procurement is regulated by a State Act only in five States: Tamil Nadu, Karnataka, Rajasthan, Andhra Pradesh and Assam. The grievance redress mechanisms provided in these Acts are not confidence-inspiring as they are neither independent nor effective. They fall woefully short of the prescriptions set out by the Supreme Court in *Madras Bar Association v. Union of India*, in which the court spelt out the requirements that tribunals must possess to qualify them as being “efficacious alternative remedy” — a phrase so wisely provided in Article 226 by our founding fathers. The emphasis being on the word “efficacious”. The Madras High Court, in a judgment, while testing the efficacy of these

mechanisms, denounced them as mere “Caesar to Caesar appeals”.

Further, getting back to the issue of tenders being challenged, courts have imposed such stringent self-imposed restrictions in the area of judicial review *vis-à-vis* tenders that the power to interfere is very sparingly exercised, if at all. The procuring officer is empowered by judicial principles such as “Government must be allowed a play in the joints”. Given such a feeble legal framework which demands so little accountability, the award of tenders can become a happy hunting ground for the unscrupulous.

While such restraints imposed on courts by themselves would be admirable if alternative efficacious remedy is available, they, unfortunately, would only encourage the growth of other negative aspects of public procurement, in the absence of an alternate efficacious remedy to redress grievances. In such a depressing legal scenario, it is no surprise that public procurement tender awards are often challenged in constitutional courts. Till such time as a robust efficacious alternative remedy is provided, one would only appeal to the constitutional courts using the words of the Bard of Avon: “Upon the heat and flame of thy distemper sprinkle cool patience.”

N.L. Rajah is Senior Advocate, Madras High Court

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