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Alipak Banerjee & M S Ananth: Anti-corruption laws - It's time to think out of the box

The government could work with chambers of commerce to seek private enforcement of transparency and accountability in public procurement rather than drag its feet over allegations of corruption

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According to Global Financial Integrity, a programme of the Center for International Policy, Washington DC, India has lost nearly $425 billion since independence to illicit financial outflows. This substantially represents money gained from corruption, kickbacks and similar criminal activities. The Kroll Global Fraud Report says at least eight per cent of investors are dissuaded from investing in India on account of corruption.

The law that addresses these issues - the Public Procurement Bill of 2012 - has not yet been passed by Parliament. The enforcement of existing law is also abysmal - conviction in offences relating to cheating and fraud under the Indian Penal Code is about 25 per cent for 2012. The new government would do well to address this issue with out-of-the-box thinking rather than enacting more laws and creating enforcement agencies.

In India, important sectors such as railways, defence, health and telecommunications allocate a substantial portion of their budget to public procurement contracts. Estimates of public procurement in India vary between 20 and 30 per cent of gross domestic product and are as significant as approximately half the total budget in certain ministries. This makes the need for integrity in public procurement not merely an ethical requirement, but an economic and social one too.

Public procurement contracts have acquired considerable notoriety, bleeding the exchequer through rigged bids, inflated bills and forged documents. An important challenge in public procurement contracts is crony capitalism and collusion within a company - unknown to shareholders and directors, certain key employees are capable of engaging in illegal activities, causing irreparable harm to the company. Strangely, Section 47 of the Public Procurement Bill prosecutes the person in charge of and responsible for the conduct of the business of the company, including directors and senior officers, and not the person who has actually committed the offence.

Although there are multiple agencies such as the Central Vigilance Commission, the Comptroller and Auditor General and Central Bureau of Investigation to examine such contracts, the final act is played out by the time these agencies are involved. The existing law, Prevention of Corruption Act, 1988, addresses only demand-side corruption and has failed to secure satisfactory results.

In the absence of a law on public procurement, government departments and state-owned enterprises (SOEs) have prepared their own regulations to deal with corrupt practices in connection with procurement. The General Financial Rules (GFRs) developed by the ministry of finance establish principles and procedures for government procurement. All government purchases must follow the principles outlined in the GFRs. GFR and the regulations formulated by government departments and SOEs include powers to make inquiries and blacklisting suppliers. Although the Supreme Court of India has balanced the rights of suppliers with the power to blacklist by SOEs in its rulings, there is no deterrent effect either from the law or the power to blacklist.

In 2005, recognising the importance of anti-corruption measures in public procurement, the United Nations Convention against Corruption (UNCAC) was signed by over 13 nations and it came into effect on December 14, 2005. By April 2014, 140 countries had signed on. Under Article 9 of the UNCAC, each contracting state is obligated to take steps to establish systems of public procurement based on transparency and objective criteria to weed out corruption. India became party to the UNCAC in May 2011 and, as part of its obligation, introduced the Public Procurement Bill in Parliament.

The Bill seeks to regulate and ensure transparency in public procurement and also addresses supply-side corrupt practices. Although the Bill proposes to tackle crucial elements of corruption, there are certain flaws in it. For instance, it exempts procurements for disaster management, for security or strategic purposes, and those below Rs 50 lakh. The central government can also exempt, in public interest, any procurements or procuring entities from any of the provisions of the Bill. These exceptions defeat the object of the Bill.

Given that corrupt practices are driven by greed, a purely legal solution will be inadequate to address the problem. An economic solution is required that can alter the behaviour of individuals. Unfortunately, the law has failed to address the issue of deterrence - criminals are emboldened due to poor enforcement. Criminal behaviour has shown that people with illegal motives are not dissuaded solely by laws - the threat of incarceration is required to serve as a deterrent.

One possible solution to transparency and accountability in allocating public resources and defence contracts is to include an internal industry-based fact-finding body that is qualified and competent to ascertain allegations of corrupt practices being indulged in by a company. A reward system that incentivises competitors to share information of corrupt practices can also be used to effectively regulate illicit transactions. The deterrent effect of a corruption law is imperative. Public officials responsible for such bids should be made personally liable along with the ministers and illegal gains from such contracts should be confiscated. Additionally, proceeds from corrupt practices - in whatever form - should be seized.

The inherent flaw of anti-corrupt laws is that they enforce the law and cannot regulate economic behaviour. The government would do well to engage with chambers of commerce and seek private enforcement of strict standards of transparency and accountability rather than drag its feet over allegations of corruption.

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