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A Comparative Study of Global Quests for COVID-19 Vaccines in Some States in India

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State Procurement (Capacity) In (A) Crisis: A Comparative Study of Global Quests for COVID-19 Vaccines in Some States in India

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I. Introduction

A few weeks back, the Central Government – led by perhaps one of the most visionary Prime Ministers that India has even seen² – made an important policy announcement in relation to COVID-19 vaccine procurement: the Liberalised and Accelerated Phase 3 Strategy of COVID-19 Vaccination³ that came into effect from 01 May 2021. From public policy perspectives, there are two important and essential principles that seem to have gone into the making of the new strategy: Firstly, it gives greater control and responsibility to state governments for pursuing their respective vaccination priorities in line with their constitutional responsibility for "public health" under the "State List" - a *federal* tenet that the PM cherishes deeply and always upholds. Secondly, the GoI plan provides an entry point to private sector immunisation services' providers in addition to public vaccination by state governments - something that has been increasingly demanded by stakeholders in implicit recognition of a looming reality that relatively-more efficient supply chains from India's vigorous private sector must now find a strong foothold within India's national COVID-19 vaccination strategy. This new Vaccination Strategy now also increasingly allows the use of imported, fully *ready-to-use* vaccines in "other-than-Government of India" channel, i.e., by state governments and the open market (including private immunisation service providers and others)⁴, with important implications for rapid rollout of India's unfolding COVID vaccination programme.

⁴ CDSCO Notice (15 Apr 2021), available online

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² See, e.g.; Prime Minister Receives Praise from unexpected corner, The Free Press Journal (04 Feb 2021), available online https://www.freepressjournal.in/bhopal/prime-minister-receives-praise-fromunexpected-corner; see, also; "I appreciate him for...": Ghulam Nabi Azad goes all praise for Modi, Hindustan Times (28 Feb 2021), available online https://www.hindustantimes.com/india-news/iappreciate-that-ghulam-nabi-azad-praises-pm-modi-101614516507494.html. ³ PIB Press Release (19 Apr 2021), available online

https://pib.gov.in/PressReleseDetailm.aspx?PRID=1712710.

https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file _division.jsp?num_id=NzE0Mw==. *See, also,* CDSCO Guidance Note (04 May 2021), *available online* https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file _division.jsp?num_id=NzE3Nw==; *read with* CDSCO Notice (01 Jun 2021), *available online* https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file

https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file _division.jsp?num_id=NzI4Mg==.

What has baffled observers, however, is how sharply some states have reacted to the GoI's new Vaccination Strategy: states that were asking for increased decentralisation all along⁵ suddenly turned turtle and began asking for greater takeover by the Central Government⁶ – all this, when medical procurement by states has itself been somewhat divergent, ranging from "calculated steps" to seemingly "ad-hoc". For instance, Government of Maharashtra has set up a high-level group chaired by its Chief Secretary consisting of Secretaries-in-charge of Finance, Public Health, Medical Education and Industries Departments: a group of domain specialists for proper planning of its procurement, production and import strategy⁷; and Rajasthan has included in its committee a number of relatively much-junior officers⁸, by name, who seem to have little or zero experience in complex procurement of this nature. The latter orders make no mention of the rules under which they have been issued⁹, in the process apparently superseding empowered committees already functioning under Rajasthan State Health Society (RSHS)¹⁰ and Rajasthan Medical Services *Corporation* (RMSC)¹¹ – autonomous bodies setup up under Central law where directional authority of the State Government is otherwise extremely limited.

A number of state governments and other public agencies in India have recently issued "global" RFPs for COVID-Vaccines starting early May this year – *Government of Uttar Pradesh* issued a global tender on 07 May 2021, followed by *Brihanmumbai Municipal Corporation* (BMC)'s global tender (under authorisation by *Government of Maharashtra*) for Greater Mumbai on 12 May. The most recent procurement process analysed in this brief is an EoI issued by the Directorate of Health Services (DHS) for the *Government of NCT of Delhi* on 27 May, which appears to be a virtual *copy-paste*

⁸ GoR Orders (30 Apr 2021), available online

⁵ See, e.g.; Allow us to purchase vaccines directly with state funds, Indian Express (18 Apr 2021), available online https://indianexpress.com/article/india/mamata-writes-to-pm-modi-about-covid-vaccines-7279057/; see, also; Clamour to Buy Vaccines, Fail, Play Blame-Game?, Republic World (27 May 2021), available online https://www.republicworld.com/india-news/politics/clamour-to-buy-vaccines-fail-play-blame-game-read-3-cms-and-rahul-gandhis-letters-to-pm.html; and Serious vaccine mismanagement or pandemic politics on vaccination?, India Today (28 May 2021), available online https://www.indiatoday.in/coronavirus-outbreak/story/serious-vaccine-mismanagement-or-pandemic-politics-on-vaccination-1807880-2021-05-28.

⁶ See, e.g.; What is the role of Center if states have to procure COVID vaccine from global market?, ANI (11 May 2021), available online https://www.aninews.in/news/national/general-news/what-is-role-of-centre-if-states-have-to-procure-covid-vaccine-from-global-market-asks-sisodia20210511202830/; see, also, No from vaccine makers: states urge Center to procure for all, Indian Express (25 May 2021), available online https://indianexpress.com/article/india/no-from-corona-vaccine-makers-states-urge-centre-to-procure-for-all-7328833/.

⁷ Maharashtra government to float tender to procure COVID vaccine, Remdesivir from international market, Hindustan Times (25 Apr 2021), available online https://www.hindustantimes.com/cities/punenews/maharashtra-govt-to-float-tendre-to-procure-covid-vaccine-remdesivir-from-internationalmarket-ajit-pawar-101619347566235.html.

http://rajswasthya.nic.in/PDF/High%20Level%20Committee%20order%2030-04-2021.pdf. 9 GoR rules require such "inter-departmental" committees to be constituted upon orders of its *Administrative Reforms Department*.

¹⁰ Rajasthan State Health Society, *website* http://nrhmrajasthan.nic.in/State_Health_Society.htm. ¹¹ RMSC, *Procurement of Equipments, available online*

http://rmsc.health.rajasthan.gov.in/content/raj/medical/rajasthan-medical-services-corporationltd-/en/services/Equipments.html#; *see, also,* RMSC, *Procurement of Drugs, available online* http://rmsc.health.rajasthan.gov.in/content/raj/medical/rajasthan-medical-services-corporationltd-/en/services/Procurement.html#.

version of a previous EoI issued by RSHS, right down to MS-Word formatting and fonts used. While there are some similarities amongst other states' global tenders because of similar bid document templates; it is possible to identify *two broad groups* based on differences in their global tenders on aspects such as: (i) nationality of bidders eligible to participate (both domestic and international manufacturers *versus* only non-Indian manufacturers); (ii) procurement of vaccines on WHO list approved post-award *versus* procurement of vaccines approved pre-award by India's national regulatory authority for drug approval; (iii) degree of clarity on advance payments and performance guarantees; (iv) ability of "authorised agents" to participate in government tenders; and (v) imposition of liquidated damages for delayed deliveries *versus* no penalties at all.

All these contractual aspects, if not properly addressed by states, could critically impinge on competition and efficiency in vaccine procurement in one way or another – for instance, limiting participation to allow only *non-Indian* manufacturers of DCGI-only approved vaccines would severely and unnecessarily limit competition, particularly in light of GoI's unprecedented efforts for fostering vaccine production in India of a large number of WHO-listed candidates¹². Similarly, while there may be some genuine need to go easy on suppliers for delayed deliveries in a supply-starved market¹³, a full waiver of *earnest money deposit* to signal interest in participating in such tenders, or *non-imposition of any penalties whatsoever* or a *complete* absence of "risk and cost" clauses even for significant delays and non-delivery creates just the wrong set of incentives for speculators and non-serious bidders to enter and exit state public procurement processes at will, and to even collude willfully amongst themselves or force competitors out using unfair methods. Again, unchecked participation of "agents" creates unique situations as in the case of the BMC tender, where no manufacturer seems to have participated directly so far; where some bidders have withdrawn on close scrutiny of their credentials¹⁴; and where a good number of current bidders could be "commission-basis" agents¹⁵ or even speculators may have filed bids to first emerge as successful in the BMC tender, only to negotiate supplies and authorisation from vaccine manufacturers *later on the "strength"* of having been so declared as "successful".

Given the need for efficient vaccine procurement for quickly containing the pandemic while simultaneously avoiding any serious integrity pitfalls or ending up buying "overpriced" vaccines; it is important that that some of these contractual aspects are examined and compared so as to inform proper contract design in future against a constantly evolving scenario. Within this background, this short law and public policy brief attempts a quick analysis of *Rajasthan State Health Society*'s (RSHS)

¹² PIB Press Release (27 May 2021), available online

https://pib.gov.in/PressReleasePage.aspx?PRID=1722078.

¹³ UP eases conditions in global tender for COVID vaccines; opens doors for Pfizer & Moderna to join bid process, Financial Express (18 May 2021), available online

https://www.financialexpress.com/lifestyle/health/up-eases-conditions-in-global-tender-for-covid-vaccines-opens-doors-for-pfizer-moderna-to-join-bid-process/2253689/.

¹⁴ Firm claiming to supply AstraZeneca, Pfizer vaccines to Mumbai withdraws bid, Indian Express (27 May 2021), available online https://indianexpress.com/article/cities/mumbai/firm-claiming-to-supply-pfizer-astrazeneca-vaccines-withdraws-bid-7333110/.

¹⁵ *Firms line up to bid but vaccine makers say have no agents,* Indian Express (28 May 2021), *available online* https://indianexpress.com/article/india/firms-line-up-to-bid-but-vaccine-makers-say-have-no-agents-7333352/.

ongoing "global" tender for COVID-19 vaccines¹⁶ and compares the same with similar attempts in Tamil Nadu¹⁷, Delhi¹⁸, Karnataka¹⁹, Haryana²⁰, Odisha²¹ and Andhra Pradesh²², with brief mention of the position in Uttar Pradesh²³ and in BMC. The total value of vaccine contracts under bidding at present in various states in India is estimated at about (INR) ₹20,000 Crores (USD 2.5 Billion approximately)²⁴; and comparative examination of this nature may better guide procurement practitioners in India and elsewhere in procurement planning, tender design and contract implementation, as well as help in identifying some changes/ adjustments that could be witnessed in India's outcome focused COVID vaccination programme.

As far as state administrations go, it is notable that Secretaries-in-Charge of department(s) handling public health and/ or vaccination efforts in a number of Indian states hold deep insights and expertise in public procurement *and* public services' delivery²⁵; and if most states in India indeed perform well on vaccine procurement, their successes may largely be attributable to such bright and

http://kdlws.kar.nic.in/docs/Global%20Tender%20for%20Vaccine%20KSMSCL_14052021.pdf. ²⁰ Haryana Medical Services Corporation Limited (HMSC), *Notice Inviting Tender dated 26 May 2021, available online* http://hmscl.org.in/NoticePdf/182tender.pdf.

¹⁶ Rajasthan State Health Society (RSHS), *Global EoI dated 14 May 2021, available online*

http://rajswasthya.nic.in/PDF/EOI%20Global%203846%20dt.%2014.05.2021.pdf.

¹⁷ Tamilnadu Medical Services Corporation Limited (TMSC), *Invitation For Bidders (IFB) dated 05 May* 2021, *available online* https://tnmsc.tn.gov.in/linkfiles/tender_documents/tender210004.pdf.

¹⁸ Directorate of Health Services (Government of NCT of Delhi), *Global EoI dated 27 May 2021, available online*

http://health.delhigovt.nic.in/wps/wcm/connect/ad36b60042d1777b9f179f28c2355f02/NIT.pdf?M OD=AJPERES&Imod=-382194844.

¹⁹ Karnataka State Medical Supplies Corporation Limited (KSMSC), *Open International Tender dated* 14 *May* 2021, *available online*

²¹ Odisha State Medical Corporation Limited (OSMC), *Notice Inviting Tender dated 14 May 2021, available online* http://osmcl.nic.in/sites/default/files/FINALDOC%20%282%29.pdf.

²² Andhra Pradesh Medical Services & Infrastructure Development Corporation Limited (APMSIDC), *Invitation for e-Bids dated 13 May 2021, available online*

https://msidc.ap.nic.in/ftp/drugs/T105+COVID+VACCINE+GLOBAL+TENDER.pdf.

 ²³ Uttar Pradesh Medical Supplies Corporation Limited (UPMSC), *Global e-Tender dated 07 May 2021, available online* http://136.232.14.250:8080/UPMSCL/TenderFiles/TenderCovidvaccine.pdf.
²⁴ See, e.g., *Global Bids for Over 21 Cr Vaccine Doses Floated by States, But Do Not Get Your Hopes Too High,* News 18 (20 May 2021), *available online* https://www.news18.com/news/india/global-bids-for-over-21-crore-vaccine-doses-floated-by-states-but-do-not-get-your-hopes-too-high-3757397.html.
²⁵ See, e.g., Another low-profile performer Akhil Arora gets additional charge of Health Dept, First India (30 Apr 2021), *available online* https://firstindia.co.in/news/rajasthan/another-low-profile-performer-akhil-arora-gets-addl-charge-of-health-dept; see, also; Top Delhi IAS Officer Vikram Dev Dutt assumes charge as principal secretary, health, Economic Times (08 Jun 2020), *available online*

https://government.economictimes.indiatimes.com/news/governance/top-delhi-ias-officer-vikramdev-dutt-assumes-charge-as-principal-secretary-health/76261741; and 7,000 cases/day to 2,000-how this IAS officer turned it around for Chennai in a fortnight, The Print (04 Jun 2021), available online https://theprint.in/india/governance/7000-cases-day-to-2600-how-this-ias-officer-turned-it-aroundfor-chennai-in-a-fortnight/671091/. Senior officers handling COVID vaccination/ management efforts in many states, e.g. Rajasthan (Akhil Arora), Andhra Pradesh (Anil Singhal), Karnataka (Anjum Parvez), Delhi (Vikram Dev Dutt), Greater Chennai Corporation (Gagandeep Singh Bedi) and Uttar Pradesh (Alok Kumar), hold deep expertise in twin areas of procurement and public services' delivery.

committed officers²⁶ and public leaders at work, battling the COVID pandemic with all their combined expertise and experience in public administration.

II. Rajasthan's Public Procurement Framework in Brief

Rajasthan has been the first state in India to enact *detailed* and UNCITRAL-*inspired* public procurement legislation in 2012; but as previously analysed in a number of papers on the subject²⁷, this rather hastily-enacted legislation has made procurement even more complex and self-contradictory in the State, serving some optical objectives at best instead of any practical or meaningful ones. It is therefore not really surprising that when faced with the need for complex and fast-paced procurement for handling the COVID-19 pandemic, the State Government has quickly suspended *in its entirely* the operation of the *Rajasthan Transparency in Public Procurement Act*²⁸, even to the point of *doing away with important transparency and oversight/ appeal mechanisms* that were in-built into this legislation by the State Assembly in 2012.

Be that as it may, and thankfully so, certain *pre-existing executive rules* such as *General Financial & Accounting Rules* (GF&AR) and *Public Works Financial & Accounting Rules* (PWF&AR) survive this suspension of the RTPP Act, to the extent that many of GF&AR provisions in its Part II (such as advance payments, liquidated damages, risk and cost procurement etc.)²⁹ and almost all of Part III (dealing with delegation of procurement and decision-making authority)³⁰ were *never in contradiction* to the RTPP Act; and have therefore *always co-existed* with the RTPP Act and rules framed thereunder – the latter largely being focussed on *contract award* rather than *post-award contract administration*, even to the extent of defining a "procurement process" under the Act as one that ends with *issuance* of a work/ supply order. It is, however, quite interesting that RSHS's ongoing global tender makes a number of departures from the GF&AR and other procurement norms as analysed in the next section of this brief.

III. RSHS's "Global Tender" for COVID Vaccines

COVID vaccine procurement in Rajasthan is being undertaken by the Rajasthan State Health Society (RSHS), a registered society³¹ under the Societies Registration Act, 1958: one that is legally an entity completely distinct from the Government of Rajasthan or any of its attached/ subordinate offices. The detailed EoI document for COVID-19 Vaccine procurement floated by RSHS on 14 May 2021 is available on

²⁶ *COVID-19: Indian bureaucrats rise to the occasion,* (The Hindu) Business Line (23 Apr 2021), *available online* https://www.thehindubusinessline.com/specials/people-at-work/covid-19-indian-bureaucrats-rise-to-the-occasion/article31408918.ece.

²⁷ See, e.g.; Verma, S. (2017), Caught between the Devil and the Deep Blue Sea, SSRN, available online https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3085185.

²⁸ GoR Notification (18 Apr 2021), *available online* http://finance.rajasthan.gov.in/PDFDOCS/GT/F-GT-9398-18042021.pdf.

²⁹ GoR, General Financial & Accounts Rules (Stores) Part II: as amended upto 31 Jan 2021, available online http://finance.rajasthan.gov.in/docs/rules/gfar/GFR-II.pdf.

³⁰ GoR, General Financial & Accounts Rules (Delegation of Financial Powers) Part III: as amended upto 31 Jan 2021, available online http://finance.rajasthan.gov.in/docs/rules/gfar/GFR-III.pdf. ³¹ http://nrhmrajasthan.nic.in/State Health Society.htm.

websites both of its Finance Department as well as its Medical & Health Department³²; and key features of this global EoI are analysed as follows.

A. Open, Limited and Single Source Procurement

The *Preamble* to RSHS EoI (*read with* Para 2 thereof) allows for participation only from *international manufacturers from outside India* – a unique departure from a "truly global" tender where typically both domestic and international manufacturers can participate³³; particularly when domestic manufacturers are clearly eligible for states' procurement under GoI's new Vaccination Strategy. This unique RSHS restriction then implies that perhaps as many as six vaccine candidates³⁴ (comprising Covishield, Covaxin, AstraZeneca, Sputnik-V and perhaps two/ three others appearing in the WHO EUL/PQ List that are being manufactured (or are likely to start getting manufactured in the near future) for exports by vaccine manufacturers in India could be simply ineligible for participation in the RSHS's "global" EoI. This position gets further complicated by another EoI stipulation (Para 1(a)1) that vaccines being offered by bidders must be (pre)approved by Drugs Controller General of India (DCGI) as on the last date of bidding – which has so far approved only Covishield, Covaxin³⁵, Sputnik-V³⁶ and AstraZeneca³⁷ for emergency use in India (as on the last date of filing of bids under the RSHS EoI). In that sense, the RSHS EoI runs contradictory to the new liberalised regime for fast-track approval³⁸ that GoI has brought into effect from 15 April 2021, one that permits use of a large number of WHO-listed and other approved vaccines in India as was being demanded by a number of state governments and other important stakeholders.

Severe curtailment of competition thus occurs in the RSHS EoI via a "double whammy" route – firstly be *excluding all domestically manufactured vaccines* that appears to be contrary to usual ICB procedures and also contrary to GoI's new *Vaccination Strategy* for fostering domestic production; and secondly by *excluding many WHO-listed vaccines while insisting on DCGI's prior approval* as on the last date of

https://pib.gov.in/PressReleasePage.aspx?PRID=1711342.

³² RSHS, supra n.16.

³³ For example, India's Ministry of Defence allows equal participation of *both* domestic and nondomestic manufacturers under its "Buy (Global)" category of defence capital acquisitions. Most global procurement processes for COVID-19 vaccines that have been analysed in this brief – Uttar Pradesh, Haryana, Karnataka and Tamil Nadu – allow for participation of manufacturers *irrespective of their nationality*.

³⁴ See, e.g., Slide #3 of Expression of Interest on supply of COVID-19 vaccines on behalf of the COVAX Facility, UNICEF (31 Aug 2020), available online

https://www.unicef.org/supply/media/5036/file/COVID19-EOI-Procurement-Public%20Briefing-31082020.pdf.

³⁵ PIB Press Release (03 Jan 2021), available online

https://www.icmr.gov.in/pdf/press_realease_files/HFW_DCGI_energency_use_authorisation_0301 2021_2.pdf.

³⁶ PIB Press Release (13 Apr 2021), available online

³⁷ While the WHO EUL/PQ List does not mention AstraZeneca as having been approved by India's national regulatory agency

⁽https://extranet.who.int/pqweb/sites/default/files/documents/Status_COVID_VAX_18May2021. pdf); an authoritative website *covid19.trackvaccines.org* mentions that AstraZeneca is approved by and also manufactured in India (for exports); https://covid19.trackvaccines.org/vaccines/4/. ³⁸ CDSCO, *supra* n.4.

bidding: a requirement that is again contrary to GOI's policy for fast-track approval of vaccines already approved by WHO and other regulators. In this process, the RSHS EoI also ignores a *key in-house* stakeholder demand³⁹ that procurement of a bouquet of multiple vaccines should be undertaken by state governments for fast-tracking COVID vaccination in India.

Given that three out of four DCGI-approved vaccines as on the last date of bidding are manufactured in India, the RSHS EoI thus leaves only Sputnik-V vaccine as a possible candidate in the fray, converting a "global" procurement process into "single source" procurement, rather than a case of international competitive bidding as claimed. Further, RSHS states upfront that it is unlikely to invest in creation of any "special" storage facilities (Para 2(c)), without stating upfront what "usual" storage facilities would be available/ required for vaccine storage. What this statement perhaps means is that RSHS would not accommodate at its own cost any vaccines that require specialised facilities, such as those for the more commonly available "frozen liquid" version⁴⁰ of Sputnik-V – and it therefore appears that the only vaccine stocks that could perhaps successfully participate in the RSHS EoI are the less commonly available "freeze-dried powder" version of Sputnik-V that was actually developed for remote and hard-to-reach regions of Russia. To add confusion to the situation, the EoI is equally unclear as to what would happen once Sputnik-V (presently being imported in small batches in India) starts getting manufactured in the country: more specifically the question that since those Sputnik-V batches will no longer be from an "international manufacturer outside of India" as required by RSHS, whether such supplies would still be eligible thereunder? This is important, since Sputnik-V manufacturers have announced as recently as on 24 May during the currency of the RSHS procurement process that Panacea Biotech has started domestic production in India⁴¹, making even Sputnik-V perhaps ineligible to participate in the RSHS EoI, leading to a situation where all manufacturers-bidders are perhaps ineligible on one ground or another.

It may be important to note that in sharp contrast to the RSHS EoI, many other state procurement efforts (such as those by Uttar Pradesh, Tamil Nadu, Haryana, Karnataka, Andhra Pradesh and BMC) appear to allow for participation by WHO-approved and USFDA/ other NRA-approved vaccine candidates, instead of limiting competition to only *international manufacturers of Sputnik-V* as apparently being undertaken *de facto* by RSHS in Rajasthan. Also, almost all state tenders allow for participation by all vaccine manufacturers⁴², *both domestic and international*, instead of restricting competition to "non-Indian" manufacturers alone. For instance, a global tender for COVID vaccines floated by the *Haryana Medical Services Corporation Ltd.* (HMSC's *Notice Inviting Tender* – NIT – issued on 26 May 2021) allows for

³⁹ Republic World, *supra* n.5.

⁴⁰ Wikipedia, Sputnik-V Covid-19 Vaccine, available online

https://en.wikipedia.org/wiki/Sputnik_V_COVID-19_vaccine.

⁴¹ *India's Panacea Biotech begins producing Russia's Sputnik-V Vaccine: RDIF,* Economic Times (24 mAY 20221), *available online* https://health.economictimes.indiatimes.com/news/pharma/indias-panacea-biotec-begins-producing-russias-sputnik-v-vaccine-rdif/82907118.

⁴² See, e.g., BMC to issue global tender to procure 50 lakh vaccine doses, Indian Express (11 May 2021), available online https://indianexpress.com/article/cities/mumbai/bmc-to-issue-global-tender-to-procure-50-lakh-vaccine-doses-7311147/.

participation by manufacturers who have applied for approval to DCGI43 under GoI's new liberalised vaccine approval framework, and it also allows for participation of both Indian and international manufacturers, including Indian firms holding a repacking license, thus permitting participation of a larger number of vaccine manufacturers. Another Invitation for Bidders (IFB) issued by the Tamilnadu Medical Services Corporation Ltd. (TMSC; IFB issued 15 May 2021) for the State of Tamil Nadu⁴⁴ allows for all WHO-listed vaccine manufacturers to apply, instead of limiting participation only to DCGI-approved candidates, and this IFB also does not insist on manufacturing necessarily outside of India. Uttar Pradesh originally started with a limited eligibility criterion but was quick enough to expand it later to WHOapproved vaccines requiring special temperatures for storage⁴⁵, in the process aligning itself with GoI's new liberalised vaccine approval mechanism. A global Notice Inviting Tender issued by Odisha State Medical Corporation Limited (OSMC) issued on 14 May allows both domestic and international manufacturers to participate thus ensuring parity. Although OSMC's global procurement was initially limited to DCGI-approved only vaccines, they quickly expanded the list of eligible vaccine candidates by issuing a corrigendum allowing WHO-listed and other vaccines⁴⁶ along the lines of GoI's fast-track policy for vaccine approval.

As stated earlier, another "global" EoI has been issued by the Directorate of Health Services (DHS) recently for Delhi; but on this issue, there is some lack of clarity: on the one hand, this EoI allows only *non-Indian* manufacturers to participate (reasons not stated as in RSHS case)⁴⁷, thus clearly going GoI's domestic vaccine manufacturing efforts. On the other hand, the DHS EoI goes even far beyond GoI's liberalised vaccine approval framework, and allows for participation by *any vaccine manufacturer* (not just USFDA/WHO listed as required by DCGI at present) *whose vaccines are yet to be approved by DCGI* (Para 1(a)iii); making it seem completely "open-ended" as if vaccines under development that have not even been approved by any national regulator anywhere in the world can still participate in this EoI.

To sum up discussion on this point, a "nuanced" strategy for state governments perhaps would perhaps be to avoid imposing any unduly restrictive and/ or anti-GoI framework restrictions. Proper tender design may therefore require allowing participation by *both* domestic and international manufacturers instead of *excluding Indian manufacturers* as in some cases at present; as also allowing participation by all vaccine candidates eligible under GoI's liberalised DCGI-approval framework. Doing so will enhance *both* competition and available vaccine supplies, allowing procuring entities to scoop up as much supply as possible at the earliest and at the most reasonable prices.

⁴³ HMSC, supra n.20.

⁴⁴ TMSC, supra n.17.

⁴⁵ UP Govt expands global vaccine tender, makes way for Moderna, Pfizer, Cadila to place bids, India Today (17 May 2011), available online https://www.indiatoday.in/coronavirus-outbreak/vaccine-updates/story/up-govt-expands-global-vaccine-tender-moderna-pfizer-cadila-to-place-bids-1803385-2021-05-17. See, also, UPMSC, Corrigendum 1 (undated), available online

http://136.232.14.250:8080/UPMSCL/CorrigendumFiles/corrigendumglobalF.pdf. ⁴⁶ OSMC, *Corrigendum dated 01 Jun 2021, available online*

http://osmcl.nic.in/sites/default/files/notification/5276%20-%20Corrigendum.pdf. ⁴⁷ DHS, *supra* n.18.

B. Use of Authorised Agents

The RSHS EoI is equally confusing while allowing participation by "third-party providers" of vaccines. Its preamble allows "authorised agents" or "direct importers" (of foreign manufactured but DGCI-approved vaccines, i.e., Sputnik-V only as on the last date of bidding) to participate in the tender process, but para 2(a) thereof uses a different phrase, namely, "authorised distributors/ importers". Be that as it may, both these phrases are left undefined in the RSHS EoI, even as Rule 48 (vii) of Rajasthan GF&AR uses an entirely different term – "authorised dealer" – instead of an "agent" or "distributor": a "dealer" being someone who generally supplies to more than one buyer instead of being just a "commission agent or a "contract-specific" supplier. Use of such non-standard phrases by RSHS in its EoI could perhaps be the reason for the current stalemate where verification of "credentials" of agents (non-manufacturer third-party suppliers) appears to have become a bit of a problem⁴⁸. The DHS EoI similarly permits "agents" to file bids on behalf of manufacturers, but much like the evolving BMC scenario, one may also witness undesirable participation of potential "commission-basis" agents and other non-serious bidders49.

Further, while RSHS is approaching Indian embassies and high commissions for verification of "authorised" status of some bidders, it remains unclear how such offices of the Central Government are now expected to verify "credentials" of such third-party agents, given that usually it is the manufacturer alone who "authorises", and who is perhaps in the best position to initially certify as to who is "worthy" of being authorised and who is not. Of course, crucial aspects such as criminal antecedents, bidder responsibility, tax compliance etc. would need examination by procuring agencies acting either on their own or using resources available with states/ Central Government/ third parties.

By way of comparison, HMSC NIT for Haryana does not allow participation by distributors, suppliers or agents, permitting only manufacturers or their direct import license holders to participate, much in line with the normal GoI position on the subject. This is perhaps so, since in general, participation of agents of foreign suppliers has been held to be highly prone to integrity abuses; and it is for this reason that the Central Government has an extremely detailed framework for verification of antecedents of such agents before they can be permitted to bid in public contracts; typical examples of regulatory guidance being GoI's recent inclusion of a new Rule 152⁵⁰ on *Enlistment of Indian Agents* in its General Financial Rules 2017, as well as *Forms for registration of Indian Authorised Representatives/ Agents*

⁴⁸ Vaccine rates in bids received for global tender much higher than Indian market prices: Rajasthan Minister, Indian Express (26 May 2021), available online https://indianexpress.com/article/cities/jaipur/bidsin-response-to-global-tender-for-covid-vaccine-much-higher-than-market-rates-in-india-rajasthanminister-7329973/.

⁴⁹ See, e.g., Maharashtra, Mumbai global call: Firms line up to bid, but vaccine makers say have no agents, Indian Express (28 May 2021), available online

https://indianexpress.com/article/cities/mumbai/maharashtra-mumbai-covid-vaccine-firms-bid-vaccine-makers-7333486/.

⁵⁰ Ministry of Finance (GoI), *Office Memorandum dated* 25 July 2017, available online https://doe.gov.in/sites/default/files/Amendments%20to%20Rule%20152%20of%20General%20Fin ancial%20Rules%20-GFR%202017.pdf.

*published by India's Ministry of Defence*⁵¹. These detailed integrity requirements are routinely incorporated in GoI's global tenders⁵², but do not find mention in the "global" EoI documents published by RSHS.

There could be other issues with states allowing authorised agents to participate in their global tenders: for instance, use of "agents" exposes international manufacturers to potential liability under specialised *anti-foreign bribery* legislation such as the US's *Foreign Corrupt Practices Act* and the UK's *Anti Bribery Act*; and that may partly explain why some international manufacturers may want to engage directly and with the Central Government alone. One development to watch out for that may pan out in the near future, perhaps around the middle of June this year when most state procurements are expected to close one way or another, and once a better picture emerges with regard to bidder details in multiple state procurements, is that some of these "agents" would have bid in multiple global tenders across India's states, only to "wait and watch" which supply orders they are able to secure first; and then they may simply choose to walk away from other state tenders that they may have participated in without incurring too much costs, especially in cases where bid security is waived off as with the RSHS EoI.

C. Unambiguous Delivery Timelines

From procurement perspectives relevant to both suppliers and well as buyers, it is important that unambiguous timelines be specified in tender documents for supply, particularly when delivery of goods (vaccines) is required to deal with a pandemic/ disaster within a short time (e.g., thirty days in the case of RSHS EoI). In contrast to these *fundamental* tender design principles, the RSHS EoI leaves delivery timelines as *completely unspecified*, and simply states (*without committing to/ indicating any date by which a supply order would be issued by RSHS*) that ten million doses would need to be supplied *within thirty days of the date of the supply order* (Para 1(b)). As such, it would be completely unclear to a genuine bidder as to whether vaccines are required by RSHS in the month of July or even in October 2021 – clarity that is essential and necessary to genuine bidders for ensuring proper contract performance given fastmoving vaccine demand across the world.

This ambiguity is multiplied manifold by transfer of *unnecessarily high risk* to potential bidders – amidst high market volatility – through RSHS EoI requirements such as: (a) *bids are required to be valid for a period of ninety days from the date of opening of bids* while the date of bid opening has once again been *left unspecified* (Para 1(c)(9)); and (b) *price approved under the EoI shall remain valid for 180 days from the date of issue of supply order* (Para 1(c)(10)) far beyond the thirty-day period for actual vaccine supplies. Thus, under this EoI, a bidder is required to stay *firm on quantity and prices for anywhere between six to nine months from the date of initiation of the procurement process*, even when deliveries are *only required within one month* of the supply order – truly a case of "contractual overreach" with immense potential to transfer unnecessary risks to potential bidders, and thus limit competition while raising bid

⁵¹ Ministry of Defence (GoI), Forms and Process for Registration of Indian Agents of Foreign Manufactureres, available online

https://www.mod.gov.in/dod/sites/default/files/AuthorisedRep.pdf.

⁵² See, e.g., Ministry of Home Affairs (GoI), *Global Tender Enquiry dated 29 Nov 2017, available online* https://www.mha.gov.in/sites/default/files/Tenderdocument_01122017.pdf.

prices. The DHS EoI sets equally ambiguous timelines for delivery, since all ten million doses are required to be supplied within forty-five days of the date of supply order, without mentioning any tentative date of supply order or a tentative period of supply order *at all*. In comparison to RSHS's one-month period of supply as mentioned in its EoI, both HMSC NIT in Haryana as well as TMSC IFB in Tamil Nadu envisage longer-term "rate contract"-based procurement processes, where supplies are to be made over 1-year and 6-month periods respectively; and as such, the bid validity period stipulations in the latter two situations appear to be comparatively reasonable.

D. Penalties & Damages for Non-Performance

Standard GF&AR Guidance of the Government of Rajasthan requires imposition of liquidated damages for delayed deliveries (Rule 58 *read with* Clause 35 of *Conditions of Tender & Contract*), including recoveries at the risk and cost of a failed contractor should a new procurement process be required for covering any shortfalls in delivery (Rule 72 *read with* Clause 19 of *Standardised Code for Suppliers*). In contrast, the RSHS EoI does not impose any penalty for failure to deliver in whole or in part, even when mandating that *promised delivery period would be a fundamental basis for award of contract* (Para 1(c)12), thus opening up the way for participation of amateur or speculative bidders in addition to those more seriously committed to timely delivery. The DHS EoI is less unclear on the issue of penalties/ liquidated damages, to the extent that it mentions that "penalties will be applicable in case of non-supply, delayed supply, or supply not being of standard quality", although *no further details thereof* such as the quantum of penalties are available, potentially leaving penalties to guesswork on part of both bidders and procuring officials. The DHS EoI also does not make any mention of "risk and cost" procurement in case of contract default.

Absence of a "risk and cost" clause in the RSHS EoI, even though mandated by Rajasthan's own GF&AR, serves only further compound the problem, as a bidder could "promise the moon" just to emerge as a successful bidder knowing fully well that such promises would be an important factor in contract award decisions, even though they may not really have the capacity to eventually live up to their promises. Such speculative bidders could either simply walk away before contract award in the absence of any security/ earnest money deposit, or very easily default in whole or in part at the time of supply, not face any liquidated damages for such failures, and also not be liable to RSHS for higher costs of procurement should a new procurement process need to be run by RSHS solely to cover up such a shortfall.

By way of comparison to the RSHS EoI, the HMSC NIT (in Haryana), the UPMSC global tender (for Uttar Pradesh), the KSMSC OIT (in Karnataka), the APMSIDC IFB (in Andhra Pradesh) as well as the TMSC IFB (for Tamil Nadu) require not only the imposition of liquidated damages for delayed deliveries but they (except KSMSC OIT) also mandate adjustment of buyer losses against performance security, including procurement at "risk and cost" / "risk purchase" in the event of default by a successful bidder / rate contract holder.

E. Advance Payments & Details of Agreement

Under Rajasthan's standard GF&AR framework, advance payments can be made only against *proof of dispatch* and *prior inspection* (Rule 67 *read with* Clause 34 of *Conditions of Tender & Contract*); need to normally be *backed by advance payment security such as bank guarantees* (e.g., Clause 10 of *Appendix V*); and are recoverable in lump sum or in instalments at an interest rate that is pre-specified in tender documents. GF&AR also prescribes standard terms and conditions of contract, indicating the *detailed agreement (contract)* to be signed by a successful bidder on important issues such as *impact of force majeure or change of law* – events that happen frequently in international procurement particularly as country regulations on raw materials, final products, and transportation vis-à-vis COVID vaccines are still evolving and constantly changing.

In comparison to this standard GF&AR guidance, the RSHS EoI does not mention any documentary requirements (such as proof of dispatch) before release of advance payments; does not mention the *type or format* of bank guarantees (BGs) that may be acceptable (such as conditional/ unconditional; BGs from foreign/ domestic banks etc.); does not mention the amount permissible as advance (either as %age of contract value or as an absolute number); makes no mention of any recovery (phasewise or lumpsum); and does not mention whether any interest would be chargeable or not. While the EoI states that an agreement would have to signed by a successful bidder (Para 4); detailed terms and conditions thereof are not available. The DHS EoI also does not contain any details of the permissible quantum or manner of recovery of advances payments, or the nature of BGs required against such advances.

As a matter of prudent procurement practise, such detailing of advance payments in the EoI significantly avoids/ mitigates post-award disputes and the need for any contract modifications/ clarifications; and also helps potential bidders: (a) better assess their own willingness to participate (leading to greater competition); as well as (b) offer better (lower) bid prices since they are able to incorporate permitted quantum of advances, schedule of recoveries and detailed terms and conditions into their respective bid pricing strategies. For instance, the HMSC NIT for Haryana, the UPMSC global tender for Uttar Pradesh, the KSMSC OIT for Karnataka, the APMSIDC IFB (in Andhra Pradesh) as well as TMSC IFB for Tamil Nadu – all outline in considerable detail the complete contract agreement that is required to be signed by a successful bidder/ rate contract holder. In fact, OSMC's NIT for Odisha contains very transparent and clear provisions regarding the quantum of advance payments, as well as the nature of bank guarantees required against such advances (an unconditional BG with an Indian bank in case of TMSC IFB).

F. Exchange Rate Variations & Treatment of Foreign-Currency Bids

Tender clauses in these "global" efforts on *inter-se* comparison of bids (and prices to be used at the time of actual payment) coming in from different countries, including bidders from India if permitted, varies from state to state. The RSHS EoI (including the OSMC NIT and DHS EoI) perhaps contains the clearest and strictest formulations in this regard — rates quoted are required to be in Indian Rupees (₹/INR), inclusive of all taxes, duties, license fees, logistics and transportation charges etc. upto the designated point of supply in Jaipur (Delhi for DHS EoI). These

EOIs do not use any of the standard INCOTERMS for bid prices that are generally used in international procurement: RSHS/ DHS EoIs instead use the phrase "F.O.R." (Free On Road/ Rail; but the phrase itself may be subject to some differing interpretations. Interestingly, in all these three NIT/ EoIs, insistence on INR-based bidding removes any confusion regarding bid comparison amongst competing bidders from different countries if they were to be allowed to use different currencies while bidding. Such insistence also implies *de facto* that exchange rate variations subsequent to bidding *would not affect the rates* at which payments would be made at time of actual supply, leading to clarity at the time of payment as well.

Of these three, the OSMC NIT contains (but the two other EoIs do not contain) a "change of law" and "force majeure" clause, even though use of such clauses is a standard industry practice in international procurement; while there is some potential for confusion in the RSHS/ DHS EoIs because of certain (unclear) EoI requirements contained therein such as "...*due compliance with all travel advices by WHO guidelines shall be ensured*...". This contractual requirement (regarding WHO travel advise/ guidelines) is inherently unclear *both* in its wording (*which* WHO guidelines/ travel advice specifically?) and purpose (*how or why* is a *travel* advise related to *transportation of goods*?), but could also lead to added costs of compliance by bidders and post-award disputes, especially given the long periods during which prices are required to stay firm under contract.

In comparison, the TMSC IFB/ HMSC NIT allow for bids to be placed either in INR or in USD or in EURO currencies. For the purposes of bid comparison and tender evaluation, bids are to be converted into INR at the selling exchange rate of RBI/ SBI (RBI only for HMSC NIT) applicable on the date of opening of technical bids; and the TMSC IFB categorically states (while the HMSC NIT leaves it unaddressed) that payment is to be made in the currency (INR/ USD/ EURO) quoted in the bid – thus indicating *an automatic and full adjustment for any exchange rate variations*, if any, during the period from the last date of bidding to the time of actual payment against any particular lot of vaccines delivered, making the issue irrelevant whether price to be paid needs any adjustment as per exchange rates prevailing on the date of delivery or on the date of invoicing. The TMSC IFB contains a "force majeure" clause; however, a plain reading thereof shows that it is rather open ended (*inclusive*) and could therefore be interpreted widely by a supplier for its own benefit.

Para 16 of *Karnataka State Medical Supplies Corporation* (KSMSC) Ltd.'s *Open International Tender* (OIT) is somewhat different in this regard, as prices indicated by bidders on the price schedule are to include freight, insurance and delivery to the *nearest port of the procuring entity*, without any further guidance on insurance and freight costs to be incurred from such a port to buyer-designated warehouses/ locations. However, part C of the *Technical Data Sheet* (TDS) attached thereto states in one part that DDP prices ("Delivered Duty Paid" – an INCOTERM finally!) are to include *all costs including taxes, insurance, freight and delivery at KSMSC Bengaluru* – a minor difference compared to earlier para 16 stipulation on *prices at port*, even as the *Delivery Schedule* under Section VI expects for prices to be quoted "CIF, Bengaluru" (at port? at KSMSC warehouse?). Para 17 thereof allows for submission of bids in *any freely convertible currency* or a combination of currencies not exceeding three; para 31 requires the conversion of all bid prices into INR for the purposes of bid comparison at RBI rate prevailing on the last date of tender submission; and para 16 states that payment would be made in the currency in which payment has been so requested by the seller – once again indicating the *possibility of a full and automatic exchange rate adjustment* in Karnataka as with the TMSC IFB. At one level, the KSMSC OIT appears to treat Indian and foreign bidders *at par* given provisions for *currency conversion* and *automatic exchange risk variation;* although there appear to be some *inherent payment-based asymmetries,* since foreign bidders are entitled to 70% *payment on shipment,* while Indian bidders may need to wait for 90 *days after making supplies.* The "force majeure" clause in KSMSC OIT is also one as expansive/ inclusive as in the TMSC IFB and could therefore be subject to differing interpretations as well.

G. Differential Pricing Concerns

Under Rajasthan's standard GF&AR framework, total quantity on tender can be split amongst various bidders based on their individual production capacities, if one bidder is unable to supply the entire quantity demanded. This has also been explicitly stated to the RSHS EoI at Para 1(c)(12). However, standard GF&AR requirements (Rule 55, Part II) simultaneously make it necessary for purchasing entities to ensure that quantities so split amongst various bidders are all *finally offered* at identical price, i.e., at the lowest price offered by any eligible and participating bidder. As such, should the need to divide procurement into lots arise, and given Rajasthan's GF&AR read with the RSHS EoI, the only option before RSHS as a procuring entity appears to be to negotiate with bidders for different vaccines to match L1 prices. As a matter of practicality, such negotiations could prove to be extremely challenging, when vaccines on offer and supply schedules being promised could be very different for different bidders participating in such emergent tenders. Against this practical situation, procuring officials may however be unable to approve differential pricing for different bidders under the RSHS EoI if they are to comply with Rajasthan's GF&AR procurement framework at the same time.

A second complication in the RSHS EoI could arise because of high variations in prices of some "GOI channel" vaccines being offered at rates significantly higher than those set by respective manufacturers themselves⁵³. This, in turn, implies that some of such bidders could simply be speculators or even "hoarders" of foreign-manufactured vaccines perhaps attracted by the lack of any earnest money deposit requirements (Para1(c)(2) of RSHS EoI), raising additional concerns on integrity of the procurement process. In addition, such bidders could potentially be in violation of *public pricing announcements* made by *vaccine manufacturers themselves*, making it difficult for procuring entities to reconcile as to *how and whether* a manufacturer can "authorise" an agent to violate *its own legal commitments* on vaccine pricing in India.

In contrast, the HMSC IFB in Haryana, the OSMC NIT for Odisha and TMSC NIT for Tamil Nadu transparently state that differential pricing may be allowed for different vaccine lots (the phrase "negotiated rates for different lots" has been used in OSMC's NIT⁵⁴), making it easier for interested bidders to participate therein leaving no scope for procurement disputes on this account on a subsequent date.

⁵³ Indian Express, *supra* n.48.

⁵⁴ Differential pricing has been made even more "explicit" and "upfront" by OSMC by way of an amendment clarifying that "...all bidders would be treated independently for the purposes of price bid comparison..."; *see, e.g., Odisha cabinet amends global tender to attract bidders,* The New Indian

An important issue therefore with allowing multiple price points within the same EoI/ procurement process as being attempted by RSHS is its inherent nonconformity with GF&AR on the subject. Addressing this issue "head-on" in a global tender of this nature is relevant, especially since when GoI permitted multichannel, simultaneous procurement for COVID procurement in April last year, the Ministry of Finance seems to have consciously avoided use of *multiple price points within the same procurement process* while *permitting price variations amongst simultaneous procurement processes* for the same good or equipment, all through an extremely well-crafted and path-breaking circular on the subject⁵⁵.

IV. Factoring Procurement Capacity in Some States

A comparative evaluation of contractual terms and conditions adopted by RSHS and others underlines the importance and need for proper design of tender documents by all states in India, rather than leaving such important matters to amateur officials as seems to have happened in a few cases. Detailed analysis as highlighted in the previous section shows how some EoIs limit competition to DGCI-approved, non-Indian manufactured vaccines only, leaving Sputnik-V as the only eligible candidate, while still claiming to be "global" tenders. For some reason, RSHS's global quest also seems to be the only tender out of the many cases analysed in this brief, where refrigeration temperature requirements for vaccines to be eventually supplied have not been mentioned at all - an otherwise important criterion for RSHS to ensure further distribution/ storage down to the last-mile to vaccination venters; and therefore also an important determinant of which vaccine manufacturer should consider bidding in the first place against such an EoI. Some newspaper reports analysing bidder backgrounds as in the case of BMC tender, as is likely with RSHS and DHS EoIs as well at some stage of evaluation prior to contract award, indicate that a large number of bidders in their tenders could be "commission-based" agents disguising themselves as "authorised" agents, fishing for supply orders perhaps only to first emerge successful and then negotiate supplies with manufacturers later. Lack of earnest money deposit requirements, or non-levy of penalties/ liquidated damages for delayed/ non-delivery as well as absence of risk and cost clauses could further reinforce such problematic behaviour on part of such speculative bidders.

Some of these global efforts may need some further finetuning, for instance, despite being a much more detailed document outlining important aspects such as bidding in *and* bid comparison for multiple currency bids, the HMSC NIT fails to mention anything therein about admissibility of exchange rate variations, or what exchange rates, if any, could be used at the time of making payments. Again, advance payments without ensuring *unconditional and enforceable* bank guarantees to back them up can create peculiar situations, as in the case of some supply orders recently issued by *Rajasthan Medical Services Corporation* (RMSC) Ltd., where 100% advance payments without bank guarantees have been made to a few agent-suppliers for supply of oxygen concentrators: a decision that may eventually force

Express (22 May 2021), available online

https://www.newindianexpress.com/cities/bhubaneswar/2021/may/22/odisha-cabinet-amends-global-tender-to-attract-bidders-2305995.html.

⁵⁵ Verma, S., COVID-19 in India: A Review of Recent Measures on Public Procurement (2020) 29 PPLR 238, 245-246.

RMSC to rely on comparatively ineffective provisions of the *Rajasthan Public Demands Recovery* Act⁵⁶ (as compared to *unconditional and local* bank guarantees), should any recoveries, even in part, be required at some point of time.

Clearly, there is a need for greater harmonisation and adoption of international best practices by states, and they could even take inspiration from GoI's rather extensive documentation on international procurement. However, to be fair, it is still perhaps too early to predict as to which state/ public entity procurement process will "succeed" or "fail", since the processes themselves are all still continuing at the time of writing this brief, and since "success" and "failure" are really "qualified" terms for public policy practitioners. In fact, at this stage of progress with states' procurement actions amidst a global shortage of vaccines, it is entirely possible that *well-designed* global tenders being run by states *committed to transparency*, accountability and price-reasonability may "fail" in attracting workable offers from genuine suppliers, as seems to be the case presently with at least the KSMSC OIT⁵⁷ in Karnataka, APMSIDC IFB58 in Andhra Pradesh, HMSC IFB59 in Harvana, the Telangana State Medical Services & Infrastructure Development Corporation Limited in Telangana⁶⁰, BMC⁶¹ in Mumbai and TMSC in Tamil Nadu⁶², if not also with UPMSC⁶³ in Uttar Pradesh. On the other hand, *poorly-designed* global tenders containing ambiguous terms run with poor oversight may actually "succeed" in finalising supply orders, even if at inflated prices from vaccine speculators and international hoarders. Given the "agent/ agency" problem with vaccines, if some state governments were to start running full "due diligence" or "credibility checks" of bidder-agents as is indeed being done by the Governments of Rajasthan and

⁵⁶ Even RPDR Act may prove difficult to be relied upon, should a need for recovery arise, given that both MoU and supply order placed by RMSC mention an incorrect abbreviation – "PDR Act". ⁵⁷ No interest in tender, Karnataka to approach vaccine firms directly, Indian Express (01 Jun 2021), available online https://indianexpress.com/article/india/no-interest-in-tender-karnataka-to-approachvaccine-firms-directly-7338799/.

⁵⁸ *AP CM writes to other CMs on urging Center to take charge of vaccination drive*, Outlook India (03 Jun 2021), available online https://www.outlookindia.com/newsscroll/ap-cm-writes-to-other-cms-on-urging-centre-to-take-charge-of-vaccination-drive/2095529.

⁵⁹ No bids for Haryana's global tender for 1 Cr Covid-19 vaccines, Indian Express (05 Jun 2021), available online https://indianexpress.com/article/cities/chandigarh/no-bids-for-haryanas-global-tender-for-1-cr-covid-19-vaccines-7344687/.

⁶⁰ No bids for Telangana's global tender for COVID-19 vaccine supply, Outlook India (04 Jun 2021), available online https://www.outlookindia.com/newsscroll/no-bids-for-telangana-s-global-tender-for-covid19-vaccine-supply/2096264.

⁶¹ BMC rejects all bids from facilitator firms, Indian Express (05 Jun 2021), available online https://indianexpress.com/article/cities/mumbai/bmc-rejects-all-nine-bids-from-facilitator-firms-7344890/.

⁶² No takers for Tamil Nadu's global tender for Covid vaccine, The Times of India (05 Jun 2021), available online https://timesofindia.indiatimes.com/city/chennai/no-takers-for-tamil-nadus-global-tender-for-covid-vaccine/articleshow/83260106.cms.

⁶³ *Procurement of Covid vaccine: No bids, UP extends global tender deadline again,* Indian Express (02 Jun 2021), *available online* https://indianexpress.com/article/india/procurement-of-covid-vaccine-no-bids-up-extends-global-tender-deadline-again-7340250/.

Maharashtra⁶⁴, they could actually have a problem on their hands in the shape of "no qualified" vaccine suppliers instead of much-needed COVID-vaccines⁶⁵.

Of course, the issue of *prior and proper* "authorisation" of agents by vaccine manufacturers is *fundamental* to proper tender design for vaccine procurement, if at all such agents are indeed permitted to participate as in some states. Other than manufacturers themselves, it is only *properly authorised* suppliers that can be relied upon by state governments for delivery of *unadulterated* vaccines, for ensuring manufacturer-mandated refrigeration compliance during transit, and for ensuring clarity in civil or criminal liability for any negligence or adverse events following immunisation. However, such "prior authorisation by manufactures" tender requirements pose some unique "chicken-and-egg" challenges in "one-off procurements" of this nature, namely that: while prior authorisation may be a necessary requirement for a procuring entity before it allows bidder participation; a manufacturer on the other hand could be reluctant to "authorise", without sufficient due diligence, an agent who may not have a *confirmed supply order* in hand, and who may *not have set aside* requisite resources for proper transportation logistics at the time of closing of bids. At the end of the day, the only reliable option that states may therefore be left with would perhaps be to interact directly with vaccine manufacturers alone, negotiate vaccine prices and other logistical/ contractual arrangements with each vaccine manufacturer, and allow manufacturers to then nominate authorised agents or importers; rather than pursuing vaccine suppliers the other way round.

V. Wither States' Demand for Decentralised Procurement?

In addition to problems with tender design as highlighted above, some states are perhaps aware that their public procurement systems has been going steadily south through the adoption of a strong and heady mix of biased technical and financial requirements intended to decimate competition; faulty technical and financial evaluations aimed to favour some bidders over others; ad-hoc withholding of payment due to genuine contractors against concluded contracts and executed work in order to discourage them from future participation in public contracts; and ineffective if not dysfunctional fora for redressal of genuine grievances and complaints by bidders and contractors all designed to deny any meaningful oversight of their procurement processes and decisions⁶⁶. What is even more interesting is the fact that this steady deterioration of some state government procurement systems has happened in the face of so-called "modernisation" of their public finance systems that were perhaps aimed largely at catching some eye-balls instead of undertaking fundamental, meaningful reform⁶⁷.

⁶⁴ Indian Express, *supra* n.14; n.15; n.42; n.48; n.49.

⁶⁵ See, e.g., BMC, govt end global tenders, little hope for vaccine despite bidders, The Time of India (02 Jun 2021), available online https://timesofindia.indiatimes.com/city/mumbai/mumbai-bmc-govt-end-global-tenders-little-hope-of-vaccine-despite-bidders/articleshow/83156462.cms.

⁶⁶ See, e.g., Public Projects: why States should go beyond "Heads I Win, Tails You Lose", Financial Express (26 May 2020), available online https://www.financialexpress.com/opinion/public-projects-why-states-should-go-beyond-heads-i-win-tails-you-lose/1970417/.

⁶⁷ See, e.g., Procurement Reform: Jugaad Legislation in India, Financial Express (24 March 2020), available online https://www.financialexpress.com/opinion/procurement-reform-jugaad-legislation-in-india/1907196/; see, also, Verma, supra n.26.

Some state governments could therefore be fully aware, at least *internally*, of their relative procurement incapacities amidst a seller-dominated market for vaccines as highlighted in this brief analysing the RSHS EoI and other global tenders; and that awareness could perhaps explain hesitation so clearly visible on part of some of these states. It is precisely such procurement incapacities that some states apparently may not want to concede with regard to GoI's new Vaccination Strategy: after all, it is always easier to criticise and blame the Central Government for "failed" or "problematic" procurement rather than for any state to accept that its own procurement systems are badly broken and are in need of urgent fixes and upgrades. Interestingly, the Central Government, displaying eminent maturity and not wishing to be drawn in into this (non-productive) blame-game initiated by some states, has thus far only responded by stating that those states that have entered into constructive arrangements with vaccine-makers have also started securing vaccine supplies successfully – a suggested strategy for vaccine procurement by states that has started yielding positive outcomes once some states have begun heeding to GoI's advise.

VI. Drivers for Change

Given how broken-down state public procurement systems are in some states; given how difficult it would be for such a state to resurrect its public procurement systems in the midst of a raging pandemic; given how reluctant some of these state governments are going to be in acknowledging this formally and publicly; and given how procurement capacity varies across state governments; it is perhaps only a matter of time that the Central Government steps in and lends states a strong helping hand even for state-run tenders, for the latter to successfully vaccinate their priority groups. One important driver for foreseeable changes and adjustments therefore will arise on account of state procurement incapacities as highlighted in this brief using the RSHS EoI and other case studies. In addition, a few state procurement actions could fail, probably by design rather than otherwise, just so that those states can continue to engage in unnecessary finger-pointing at GoI's new *Vaccination Strategy*.

Now that higher courts in India are also getting interested in legal aspects of vaccine procurement – primarily arising out of equity and equality requirements set forth under India's Constitution⁶⁸; any differences in vaccine availability across segments/ regions are likely to make the higher courts rather anxious, even though the problem is actually one of state government incapacity and even though GoI's new *Vaccination Strategy* is both robust and iconic. In addition, higher courts in India in particular, and the public policy landscape in general, could get burdened with more and more public interest disputes and litigation necessitating greater judicial oversight of some "out-of-the-box" decision-making in a few states that heighten *rural/urban* and *rich/poor* inequities, for instance, cases where vaccine supplies meant for the general public have apparently been diverted with "marked up" pricing to

⁶⁸ interim orders dated 30 April 2021 *and* dated 31 May 2021 of the Supreme Court of India in Suo Motu Writ Petition (Civil) No. 3 of 2021.

private parties without GoI authorisation and have had to be reversed later⁶⁹. The vaccination challenge is indeed throwing up many more interesting disparities; for instance, while *college students studying in India* are still not a "priority group" for COVID vaccination, some states/ municipal bodies (Telangana, Kerala, Karnataka and BMC) seem to be offering priority vaccination to *students planning to study abroad*⁷⁰. It is therefore perhaps only a matter of time that the Supreme Court will expand the range of equity issues that it is examining in a PIL before it – some important differences already under "The Court's Watch" include *inter-state variations* in vaccine availability as well as *intra-state variations* amongst rural/ urban populations, age groups and internet-savvy/ internet "have-not" groups. Resolving some of these concerns may require GoI to step in for mitigating this "notified" national disaster⁷¹, even when "public health" is clearly a state subject under India's Constitution.

Some other drivers for changes and adjustments could be the high degree of reluctance on part of some international vaccine providers to engage with multiple state governments⁷² or with private providers, either because of civil liability for adverse events following immunisation, or concerns on criminal liability under specialised anti-foreign bribery legislation mentioned earlier, or simply because of relatively strained state financial/ procurement incapacities. These are issues that GoI has constantly been engaged with since the start of the pandemic, many of which are witnessing outstanding resolutions favouring the Government of India in its international negotiations⁷³. On GoI's part also, some degree of centralisation in procurement (with concomitant supply order confirmation as opposed to inherent unpredictability with participating in individual state government tenders) may

⁶⁹ See, e.g., Sale of Covaxin at Rs 1050 a dose by Punjab: Union minister accuses state of profiteering, Indian Express (04 Jun 2021), available online https://indianexpress.com/article/cities/chandigarh/punjab-covaxin-sale-vikas-garg-anurag-thakur-7343372/. See, also, "Artificial Shortage": SAD alleges vaccine scam in Punjab, alleges diversion to private hospitals at hefty margins, Financial Express (04 Jun 2021), available online https://www.financialexpress.com/india-news/artificial-shortage-sad-alleges-vaccine-scam-in-punjab-alleges-diversion-to-private-hospitals-at-hefty-margins/2264906/. See, also, Punjab govt withdraws decision to sell Covid vaccines to private hospitals, India Today (04 Jun 2021), available online https://www.indiatoday.in/coronavirus-outbreak/vaccine-updates/story/punjab-govt-withdraws-decision-sell-covid-vaccines-private-hospitals-1810969-2021-06-04; and also; Of 42,000 vaccines sold to Punjab private hospitals, 30,000 bought by one, Indian Express (06 Jun 2021), available online https://indianexpress.com/article/cities/chandigarh/of-42000-vaccines-sold-to-punjab-private-hospitals-30000-bought-by-one-7345971/.

 ⁷⁰ From Mumbai to Telangana: States offering Priority Vaccine to Students planning to Study Abroad, News
18 (03 Jun 2021), available online https://www.news18.com/news/education-career/from-mumbai-to-telangana-states-offering-priority-vaccine-to-students-planning-to-study-abroad-3802871.html.
⁷¹ National Disaster Management Authority, Order dated 24 March 2020, available online

http://ndma.gov.in/sites/default/files/PDF/covid/ndmaorder240320.pdf. See, also; Ministry of Home Affairs, Order dated 11 March 2020, available online

https://www.mohfw.gov.in/pdf/disastermanagmentact.pdf.

⁷² *Pfizer says it will supply Covid vaccine only to central govt, not states,* Business Standard (24 May 2021), *available online* https://www.business-standard.com/article/current-affairs/pfizer-says-it-will-supply-coronavirus-vaccine-only-to-central-govts-121052400950_1.html.

⁷³ External Affairs Minister Jaishankar in US, India Today (24 May 2021), available online https://www.indiatoday.in/coronavirus-outbreak/vaccine-updates/story/external-affairs-ministerjaishankar-us-covid-vaccines-for-india-neighbours-on-agenda-1806101-2021-05-24.

become necessary just to attract foreign vaccine providers to invest in establishing or enhancing their production facilities in India as part of GoI's *Atmanirbhar* vision⁷⁴.

VII. Conclusions & Future Outlook

Issues with the RSHS "global" EoI, particularly when contrasted with more "open" approaches followed by BMC, TMSC, HMSC and others (the latter being better aligned with GoI's new liberalised vaccine approval processes), may hold valuable lessons for stakeholders desirous of conducting similar international procurement for COVID vaccines. It is perhaps time for state governments to begin exchanging notes with one another on a more formal basis, even *pooling their requirements through* joint procurement actions, if need be, and to use well-crafted and rigorous tender documents that can attract competitive bids while steering clear of avoidable disputes/ confusion in their tender processes. To this end, it will certainly help the states to conduct a prior review of some of GoI agencies" global RFPs and EOIs for similar international procurements, particularly with a view to draft detailed terms and conditions of contract that are unique to international procurement and are known to "work better" - areas where state expertise and experience are relatively but certainly lacking. While some relaxation of norms may be necessary in view of a sellers-dominated market for COVID vaccines, better crafting of EOIs and/ or voluntary pooling of procurement by a few states should result in better outcomes in terms of both timely delivery and lower prices.

For proper tender design, states could consider going beyond their own (internal) tender design capabilities that may prove to be insufficient for designing complex procurements of this nature, particularly since India now has thriving pool of talent in terms of professionals advising or handling complex public and private procurement, working either individually or with law/ accountancy/ consultancy firms that regularly engage with state governments and central government departments as *transaction advisors* or *consultancy services providers*. For this purpose, states could also access institutions with dedicated procurement research/ advisory units and faculties such as those at IIM Ahmedabad, IIM Bengaluru and IIM Lucknow; the Arun Jaitley NIFM at Faridabad or IICA Gurugram; or approach even more informal networks such as "Procurement Knowledge" set up by the *All India Management Association* or the *Public Procurement Professional Association of India*.

Should states continue to consider a global tender route as a viable procurement option, it seems very likely that they may need help and support from GoI in undertaking proper background checks and due diligence for "non-manufacturer" bidders: HMSC in Haryana for instance, has now evoked interest from a company⁷⁵ that does not seem to satisfy either of its eligibility criterion (manufacturer/ import license holder) as on the last date of bidding – a bid that has been received one day *after* the company's global NIT had failed to evoke any interest from eligible bidders and *after* the HMSC's procurement process had therefore been closed.

⁷⁵ Haryana gets response on global tender from Malta-based pharma company for Sputnik-V vaccines, Hindustan Times (05 Jun 2021), available online https://www.hindustantimes.com/india-

⁷⁴ PIB Press Release (02 Mar 2021), available online

https://pib.gov.in/PressReleseDetailm.aspx?PRID=1701881.

news/hary an a-gets-response-on-global-tender-from-malta-based-pharma-company-for-sputnik-v-vaccines-101622914089353.html.

On GoI side, one variation that we may see unfolding in the near future could be the Central Government unleashing its own procurement expertise through publication of standardised templates for global tenders for vaccines/ equipment by state governments, just as NITI issues model concession agreements for use by state governments for infrastructure projects⁷⁶ or MeITY publishes model RFP templates for IT-related procurement in states⁷⁷. GoI has a large number of departments and agencies with immense expertise and insights in international procurement, trade and regulatory issues that states simply can't hope to match – central agencies such as State Trading Corporation under GoI's Ministry of Commerce & Industry⁷⁸, the Acquisition Wing in the Ministry of Defence⁷⁹, and the Public Procurement Division under the Department of Expenditure⁸⁰. After all, it was the Ministry of Finance in the Government of India that broke the glass ceiling last year by opening up multichannel procurement of PPE and testing kits – perhaps the biggest success story anywhere in the world where production and procurement were ramped up at historically unheard-of pace ever given India's hitherto traditionally conservative procurement history⁸¹.

This "arms-length" approach outlined above – where GoI helps states with model contract documents while leaving them to individually pursue their own specific procurement actions – could be supplemented with a "GeM-like" model of state-central co-operation and partnership in vaccine procurement, where some (or all) state governments could formally entrust GoI with the responsibility to organise vaccine procurement on their behalf, along the lines of centralised procurement by GoI on behalf of state governments as was mooted by the *National Expert Group on Vaccine Administration for COVID-19* in August last year⁸². In such a scenario, states can be enabled to piggy-back on GoI's expertise and insights with complex and/ or international procurement – both in its depth and in their range – as also happens frequently in the EU with joint procurement amongst regional authorities and even at the level of national governments⁸³.

A third variation that could simultaneously be pursued is the inclusion of a larger number of vaccine candidates in the "GoI Channel" – preferably *domestically-manufactured* – something that is already being rapidly accommodated by GoI for

⁸⁰ Procurement Policy Division, Department of Expenditure (GoI), website

⁷⁶ See, e.g., NITI, *Model Agreements, available online* http://niti.gov.in/documents/model-agreements. ⁷⁷ See, e.g., MeITY (GoI), *Model RFP template and Guidance Notes for e-Gov Projects, available online*

https://www.meity.gov.in/model-rfp-template-and-guidance-notes-e-gov-projects.

⁷⁸ The State Trading Corporation of India Limited, *website* http://www.stclimited.co.in.

⁷⁹ Defence Procurement Organisation, Ministry of Defence (GoI), website

https://www.mod.gov.in/dod/sites/default/files/DEFENCE_PROCUREMENT_ORGANISATION.pdf.

https://www.finmin.nic.in/relatedlinks/procurement-policy-division. ⁸¹ Verma, *supra* n.55.

⁸² PIB Press Release (12 Aug 2021), available online

https://pib.gov.in/PressReleasePage.aspx?PRID=1645363.

⁸³ See, e.g., 5 Procurement Strategies for Navigating the COVID-19 Crisis from Around the World, Open Contracting Partnership (08 Apr 2020), available online https://www.open-

contracting.org/2020/04/08/5-procurement-strategies-for-navigating-the-covid-19-crisis-from-around-the-world/.

boosting indigenous development and production of COVID vaccines⁸⁴. As far as inclusion of some "international" vaccine candidates in the GoI channel is concerned, the same could be considered where manufacturers are unwilling to engage with state governments⁸⁵, provided of course: (i) that such manufacturers undertake to be regulated by India' legal framework on important aspects such as vaccine safety and pricing; and (ii) that there is some agreement on *reciprocal recognition of Indian-origin vaccines* in the (foreign) country-of-origin of such vaccines.

Another area that will require some attention in its detailing is procurement of COVID vaccines by private parties, where measures may need to be evolved to exclude hoarding and speculation while still giving small and medium hospitals some equity with larger hospital chains in proving medical services⁸⁶. Here again, an option may be needed for desirous private parties to request Central/ state governments to conduct procurement of COVID vaccines on their behalf, to be eventually distributed based on slotting through GoI's online- and offline platforms - similar to centralised procurement by GoI on behalf of state governments. In its most aggressive form, this could take the shape of a complete takeover of vaccine procurement by the Government of India, including on behalf of states and private sector: a model where vaccines are allocated periodically to state and private vaccination centers based on site-specific registrations. Private hospitals – whether small or large – could then be assured of vaccine availability while still competing with each other and with government vaccination centers by offering better or value-added vaccination services: a service-based PPP model where private providers are freed from complex dynamics of complex/international procurement & negotiations and are able to focus instead on providing their best possible services while levying fees that they set themselves for providing such value-added vaccination services. In such a situation, state residents can then partake of a truly "(co)win" situation, for they can then freely choose between *free vaccination at government sites versus fee-based* vaccination at private sites, with the freedom to make economically rational choices based on respective vaccine portfolios, specific vaccine(s) available, desired time of vaccination, proximity and ease of access, relative costs of vaccination, and the bouquet of value-added services provided by competing public and private providers of COVID vaccination services.

One outcome is however certain, irrespective of the form in which vaccine procurement eventually unrolls in Indian states, and without scope for any further doubts: that whether some states or stakeholders like it or not; and whether they give the GoI its due credit or not; it will eventually fall on GoI's broad shoulders alone to come to their aid. It is equally certain that the GoI shall handhold India's states in their efforts for achieving early successes once again, by pulling in all of its

⁸⁶ See, e.g., Nine private hospitals corner 50% doses, raise questions of vaccine equity and access, Indian Express (05 Jun 2021), available online https://indianexpress.com/article/india/covid-vaccine-doses-private-hospitals-coronavirus-cases-7344769/. See, also, Jabs opened to private hospitals to speed up drive, but number of giving shots down to 1/3rd, The Times of India (05 Jun 2021), available online https://timesofindia.indiatimes.com/india/jabs-opened-to-private-hospitals-to-speed-up-drive-but-number-of-giving-shots-down-to-1/3rd/articleshow/83246808.cms.

⁸⁴ After Biological-E, Here is a List of India-Made Vaccines that May Be Rolled out Soon, News 18 (03 Jun 2021), available online https://www.news18.com/news/india/after-biological-e-here-is-a-list-of-india-made-vaccines-that-may-be-rolled-out-soon-3805022.html.

⁸⁵ India Today, supra n.72.

procurement expertise, trade & regulatory authority and might, as also its diplomatic acumen and weight—all in tandem taking India forward on the path of successful and rapid COVID vaccination and mitigation, just as GoI had achieved spectacular results with ensuring timely manufacturing and availability of COVID testing kits and PPEs in India last year.

Notes	