E Procurement-Legal Issues

By

Naavi

Nalsar, 22/2/2019

Types of Procurement

Off the Shelf Buying

- Powers of buying officials
  - Authorization document
  - Limits of authority
    - Financial
    - Goods and services authorized, specifications etc
    - Payment modes
    - Time period
  - Documentation
  - Auditing
  - TDS/GST
- Otherwise, similar to E Commerce buying
- Warranties and Terms as declared by the seller

Tender Based Buying

- Powers to float
- RFP or Offer with specifications
  - News paper Advertisement/Website
  - Clarifications
    - Letters/E mail
- Time, procedure for bid submission, collection of bids, security deposit, opening of bids, approval or rejection
- Multiple levels of approval
  - Technical bid and Financial Bid
- Open Auctions
- Execution, Evaluation, Payment settlement

Evolution

- Communication channels changed from paper based to electronics
  - Letters to E Mails
  - News Papers to Websites
- Process
  - Electronic submission
  - Real time bids
- Dispute resolution
  - Yet to move from traditional Courts to ADR and ODR

Objectives of e-Procurement

- Provide opportunity for a larger section of business to participate
- Bring greater transparency to the procurement process for better confidence of the citizens
- Prevention of corruption
- Reducing Cost
- Simplification of procedures and better administration

Issues to be addressed

- Technical uncertainties
  - System failures, Network failures, Software Bugs
- Education of the bidders
  - Digital Divide
- Legal Enablement
- Frauds
- Dispute Resolution

Technical Issues

- If decisions are not led by the vendors, finding the right technology at the right price is easily achieved.
- Connectivity issues, occasional failures are part of the process and can be taken care of with back up measures

Education of the bidders

- Every bidding process involving technology needs to be properly documented and conveyed to the prospective bidders
- Adequate field level training, demos, mock operations would be required to ensure that the complexity of the usage of the system itself does not become a hurdle and create a digital divide.
- ITA 2000 took adequate care of this with Section 9 but at present the business is exposed to GST, Digital India initiatives etc and hence are better prepared.
  - The effort however needs to be continued to avoid the emergence of middlemen

Legal Enablement

- Section 4 of ITA 2000/8-Legal Recognition of electronic document in general
- Section 5 of ITA 2000/8-Legal Recognition of electronic signature
- Section 6, 6A, 7 and 8 –Legal Enablement in E Governance
- Section 7A-Mandatory Audit
- Section 9-Flexibility

Section 4: Legal Recognition of Electronic Records

- Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is
  - (a) rendered or made available in an electronic form; and
  - (b) accessible so as to be usable for a subsequent reference

Sec 1(4)-Schedule I

- 1(4)Nothing in this Act shall apply to documents or transactions specified in the First Schedule by way of addition or deletion of entries thereto.
  - A Negotiable Instrument (Other than a cheque) as defined in Section 13 of the Negotiable Instruments Act 1881 (26 of 1881)
  - A Power of Attorney as defined in section 1A of the Power of Attorney Act 1882 (7 of 1882)
  - A trust as defined in section 3 of the Indian Trusts Act, 1882 (2 of 1882)
  - A will as defined in clause (h) of section 2 of the Indian Succession Act, 1925 (39 of 1925) including any testamentary deposition whatever name called
  - Any contract for the sale or conveyance of immovable property or any interest in such property

Section 5: Legal recognition of Electronic Signature

- Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document should be signed or bear the signature of any person then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signature affixed in such manner as may be prescribed by the Central Government.
  - **Explanation** - For the purposes of this section, "Signed", with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression "Signature" shall be construed accordingly.

Section 6: Use of Electronic Records and Electronic Signature in Government and its agencies

- (1) Where any law provides for
  - (a) the filing of any form, application or any other document with any office, authority, body or agency owned or controlled by the appropriate Government in a particular manner;
  - (b)the issue or grant of any license, permit, sanction or approval by whatever name called in a particular manner;
  - (c)the receipt or payment of money in a particular manner

Sec 6..contd,

- then, notwithstanding anything contained in any other law for the time being in force,
  - such requirement shall be deemed to have been satisfied
  - if such filing, issue, grant, receipt or payment, as the case may be, is effected by means of
  - such electronic form as may be prescribed by the appropriate Government.
- (2)The appropriate Government may, for the purposes of sub-section (1), by rules, prescribe –
  - (a)the manner and format in which such electronic records shall be filed, created or issued;
  - (b)the manner or method of payment of any fee or charges for filing, creation or issue any electronic record under clause (a).

GOI Notification dt 6th Sept, 2004

- Any form, application or any other document referred to in clause (a) of sub-section (1) of section 6 of the Act
  - may be filed with any office, authority, body or agency owned or controlled by the appropriate Government
  - **using the software** specified by it

Notification dt 6th Sept, 2004..sec 6

- such office, authority, body or agency shall, while generating such software, take into account the following features of the electronic record, namely:-
  - Life time
  - preservability
  - accessibility
  - readability
  - comprehensibility in respect of linked information
  - evidentiary value in terms of authenticity and integrity
  - controlled destructibility and
  - augmentability

Notification dt 6th Sept, 2004..sec 6

- Any licence, permit, sanction or approval whatever name called referred to in clause (b) of sub-section (1) of section 6 of the Act may be issued or granted by using the software specified under rule 3.
- The payment of receipt of any fee or charges for filing, creation or issue of any electronic record under clause (a) of sub-section (2) of section 6 of the Act may be made in a cheque in the electronic form.
  - Explanation :-
    - For the purposes of this rule, "a cheque in the electronic form" has the meaning assigned to it in clause (a) of Explanation 1 to section 6 of the Negotiable Instrument Act, 1881 (26 of 1881).

Section 7 Retention of Electronic Records

- (1) Where any law provides that documents, records or information shall be retained for any specific period, then,
  - that requirement shall be deemed to have been satisfied if such documents, records or information are retained in the electronic form, -

Section 7..contd

- (a)the information contained therein remains accessible so as to be usable for a subsequent reference;
- (b)the electronic record is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received;
- (c)the details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record are available in the electronic record:
  - **Provided** that this clause does not apply to any information which is automatically generated solely for the purpose of enabling an electronic record to be dispatched or received.
- (2)Nothing in this section shall apply to any law that expressly provides for the retention of documents, records or information in the form of electronic records.

Section 6A Delivery of Services by Service Provider

- (1) The appropriate Government may, for the purposes of this Chapter and for efficient delivery of services to the public through electronic means authorize, by order, any service provider to set up, maintain and upgrade the computerized facilities and perform such other services as it may specify, by notification in the Official Gazette
  - .Explanation: For the purposes of this section, service provider so authorized includes any individual, private agency, private company, partnership firm, sole proprietor form or any such other body or agency which has been granted permission by the appropriate Government to offer services through electronic means in accordance with the policy governing such service sector.
- (2) The appropriate Government may also authorize any service provider authorized under sub-section (1) to collect, retain and appropriate service charges, as may be prescribed by the appropriate Government for the purpose of providing such services, from the person availing such service.

Sec 6A..contd

- (3) Subject to the provisions of sub-section (2), the appropriate Government may authorize the service providers to collect, retain and appropriate service charges under this section
  - notwithstanding the fact that there is no express provision under the Act, rule, regulation or notification under which the service is provided to collect, retain and appropriate e-service charges by the service providers.
- (4) The appropriate Government shall, by notification in the Official Gazette, specify the scale of service charges which may be charged and collected by the service providers under this section:
  - Provided that the appropriate Government may specify different scale of service charges for different types of services.

Rules under Sec 6A

Notified on April 11, 2011

System of Electronic Service Delivery.-

- (1) The appropriate Government may on its own or **through an agency authorised by it, deliver public services through electronically- enabled kiosks*** or any other electronic service delivery mechanism.
- (2)The appropriate Government or its agencies may specify the form and the manner of Electronic Service Delivery.
- (3)The appropriate Government may determine the manner of encrypting sensitive electronic records requiring confidentiality, white they are electronically signed.

*"Electronically enabled kiosk" means the cyber cafe

"Cyber cafe" means any facility from where access to the internet is offered by any person in the ordinary course of business to the members of the public.

System of Electronic Service Delivery…contd

- (4)The appropriate Government shall **notify the service providers and their agents authorised** for Electronic Service Delivery.
- (5) The appropriate Government may allow **receipt of payments** made by adopting the Electronic Service Delivery System to be a deemed receipt of payment effected in compliance with the financial code and treasury code of such Government.
- (6)The appropriate Government may authorise service providers or their authorised agents to collect, retain and appropriate such **service charges** as may be specified by the appropriate Government for the purpose of providing such services from the person availing such services:
  - Provided that the apportioned service charges shall be clearly indicated on the receipt to be given to the person availing the services.

System of Electronic Service Delivery.-.contd

- (7) The appropriate Government shall by notification specify the scale of service charges which may be charged and collected by the service providers and their authorised agents for various kinds of services.
- (8) The appropriate Government may also determine the norms on service levels to be complied with by the Service Provider and the authorised agents.

Notification of Electronic Service Delivery.-

- (1) The appropriate Government may **notify the services** that shall be delivered electronically from time to time.
- (2) The appropriate Government may identify and notify, from time to time, the list or signing authorities in respect of different classes of licenses, permits, certificates, sanctions, payment receipt approvals and local limits of their respective jurisdictions.
- (3) The notification shall specify the nature of certificate, the names of the signing authorities, as approved by the appropriate Government, the period of effectiveness of the authority and the extent of their jurisdiction.
- (4) The appropriate Government may notify changes to the list of signing authorities from time to time, taking into consideration the terms and conditions of the services of employees holding positions of signing authorities.

Creation of repository of electronically signed electronic records by Government Authorities.-

- (1) All authorities that issue any license, permit, certificate, sanction or approval electronically, **shall create, archive and maintain a repository of electronically signed electronic records** of such licenses, permits, certificates, sanctions or approvals, as the case may be, online with due timestamps of creation of these individual electronic records.
- (2) The appropriate Government may specify the manner of creating, establishing, archiving and maintaining the repository of electronically signed electronic records referred to in sub-rule (1).

Creation of repository of electronically signed electronic records by Government Authorities.-..contd

- (3) The authorities may electronically sign the electronic records of such licenses, permits, certificates, sanctions or approvals for each record or as a whole for a specific duration and shall be responsible in administering them online.
- (4) The **appropriate Government may specify the security procedures** in respect of the electronic data, information, applications, repository of digitally signed electronic records and information technology assets under their respective control and that security procedures shall be followed by the Head of the Department and the signing authorities.
  - Explanation.- The expression "security procedures" referred to in sub-rule (4) shall include requirements for the storage and management of cryptographic keys, restrictions for downloading the certificates on to browsers, and of complying with the requirements of certifying authorities.

Procedure for making changes in a repository of electronically signed electronic records.-

- (1) The appropriate Government may either suo moto or after receiving an application from an interested party, make or order to make an appropriate change in a repository of electronically signed electronic records along with recording the reasons for making such a change.
- (2) Any change effected to any record in a repository of electronically signed electronic records and any addition or deletion of a record from such repository shall be electronically signed by the person who is authorised to make such changes along with the time stamps of original creation and modification times.
- (3) The appropriate Government may determine the manner of electronically signing the event of deletion of a record from the repository of electronically signed electronic records.
- (4) The appropriate Government may also determine the manner of provisioning secure access to the repository of digitally signed electronic records.
- (5) The appropriate Government may also determine the requirements for maintaining audit trails of all changes made to repository of digitally signed electronic records.

Responsibility of service provider and authorised agents for financial management and accounting.-

- The appropriate Government may direct every service provider and authorised agent
  - to keep an updated and accurate account of the transactions, receipts, vouchers and
  - specify the formats for maintaining accounts of transactions and receipt of payment
  - in respect of the electronic services delivered and
  - the said records shall be produced for inspection and audit before an agency or person nominated by the appropriate Government.

Audit of the Information System and Accounts of service provider and authorised agents.-

- (1)The appropriate Government may cause an audit to be conducted of the affairs of the service providers and authorised agents in the State at such intervals as deemed necessary by nominating such audit agencies.
- (2) The audit may cover aspects such as the security, confidentiality and the privacy of information, the functionality and performance of any software application used in the electronic service delivery and the accuracy of accounts kept by the service providers and authorised agents.
- (3) The service providers and the authorised agents shall provide such information and assistance to the audit agencies nominated by the appropriate authority, to comply, with the directions given by the audit agencies and to rectify the defects and deficiencies pointed out by the audit agencies within the time limit specified by the audit agency.
- (4) All service providers and the authorised agents shall submit a due declaration **for protecting the data of every individual transaction and citizen** and any unauthorised disclosure to anyone without the written consent of either the individual or the appropriate Government shall be debarred from providing such a service any further and the provisions of section 45 of the Act shall be applicable in such cases.

Use of special stationery in electronic service delivery.-

- The appropriate Government may specify different types of
  - special stationery, with accompanying security features for forms, applications, licenses, permits, certificates, receipts of payment and such other documents
  - as part of Electronic Service Delivery.

Section7A Audit of Documents etc in Electronic form

- Where in any law for the time being in force, there is a provision for audit of documents, records or information,
  - that provision shall also be applicable for audit of documents, records or information processed and maintained in electronic form

What does Sec 7A mean

- According to Sec 7A, if “Audit” of documents in paper form in any organization is presently considered as mandatory under any law
  - Such a requirement needs to be complied with even when the documents are in electronic form.
- Audit of “Documents” means
  - Whether the document has been modified during a certain period of time.
    - Different from the transaction audit where an auditor checks if a financial transaction is approved or not

When the document required to be audited is in e-form..

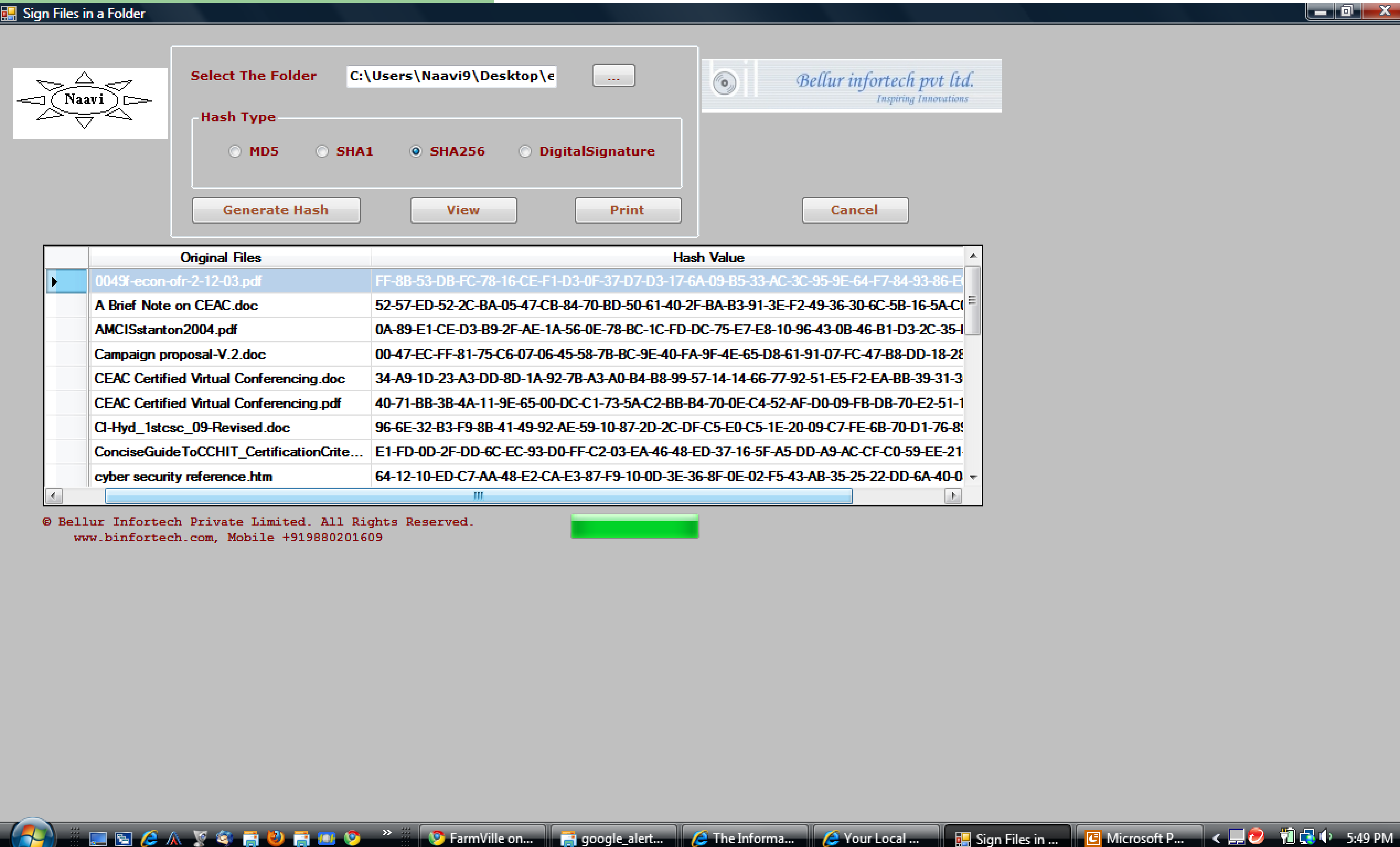
- How do we receive them as authenticated?
- How do we check if it is not altered since the last time you audited it?
  - There are hundreds and thousands of files in a computer which represent the transactions and a proper audit needs to certify that all documents seen and verified by me during the last audit stand verified even at the time of the current audit
    - How do we fulfill our audit responsibilities?

How to Comply?

- Compliance of Sec 7A requires an ability to check if document X at a point of time T1 and document X at a point of time T2 are same
  - This requires a data integrity verification and certification at T2
- If data is in electronic form held in a computer, it is a huge task to certify that the files are not changed over a period of time.
- This requires an appropriate tool

E-Audit Tool

Screen Shots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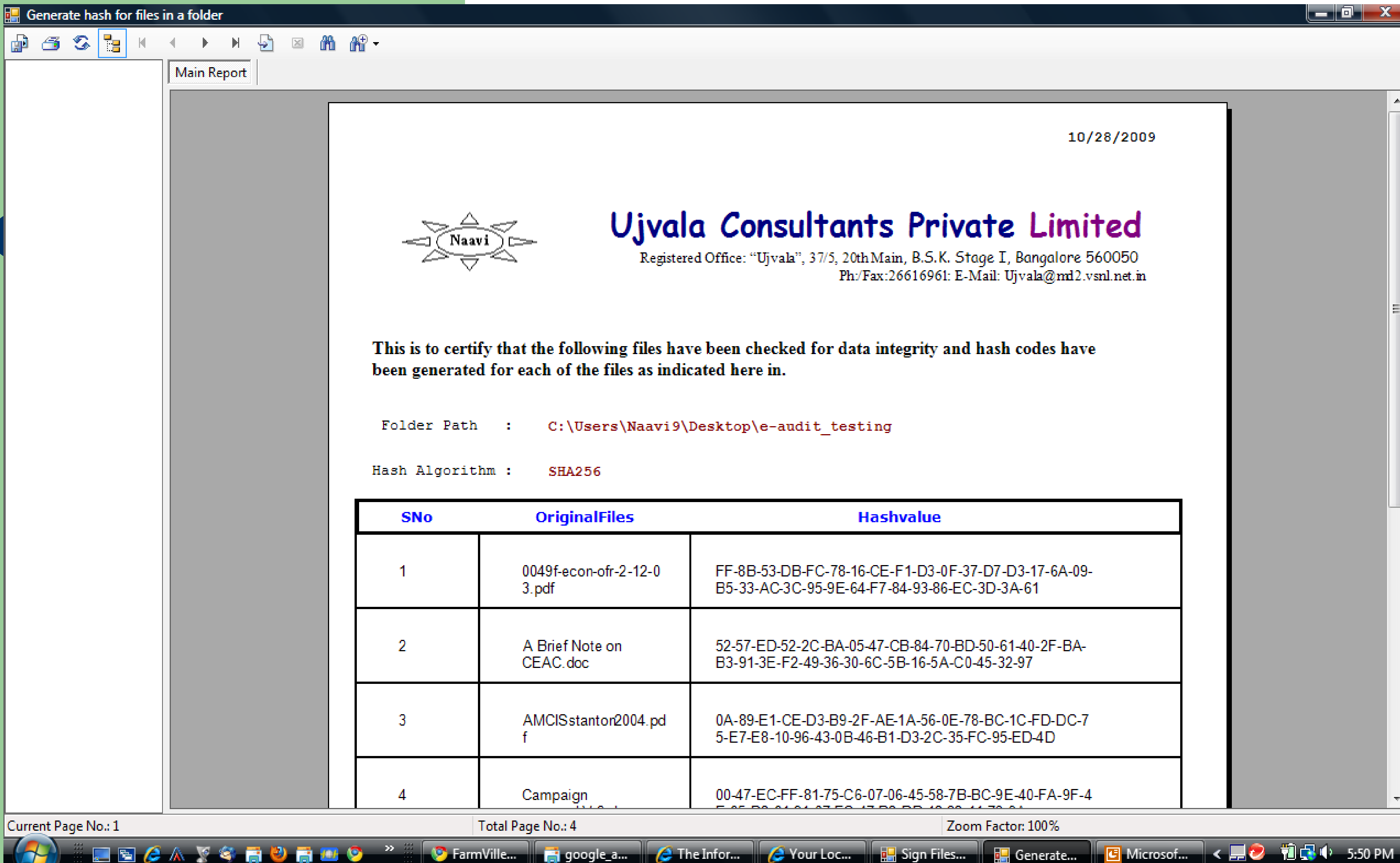

10/28/2009

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Ph:/Fax:26616961: E-Mail: Ujvala@md2.vsnl.net.in

This is to certify that the following files have been checked for data integrity and hash codes have been generated for each of the files as indicated here in.

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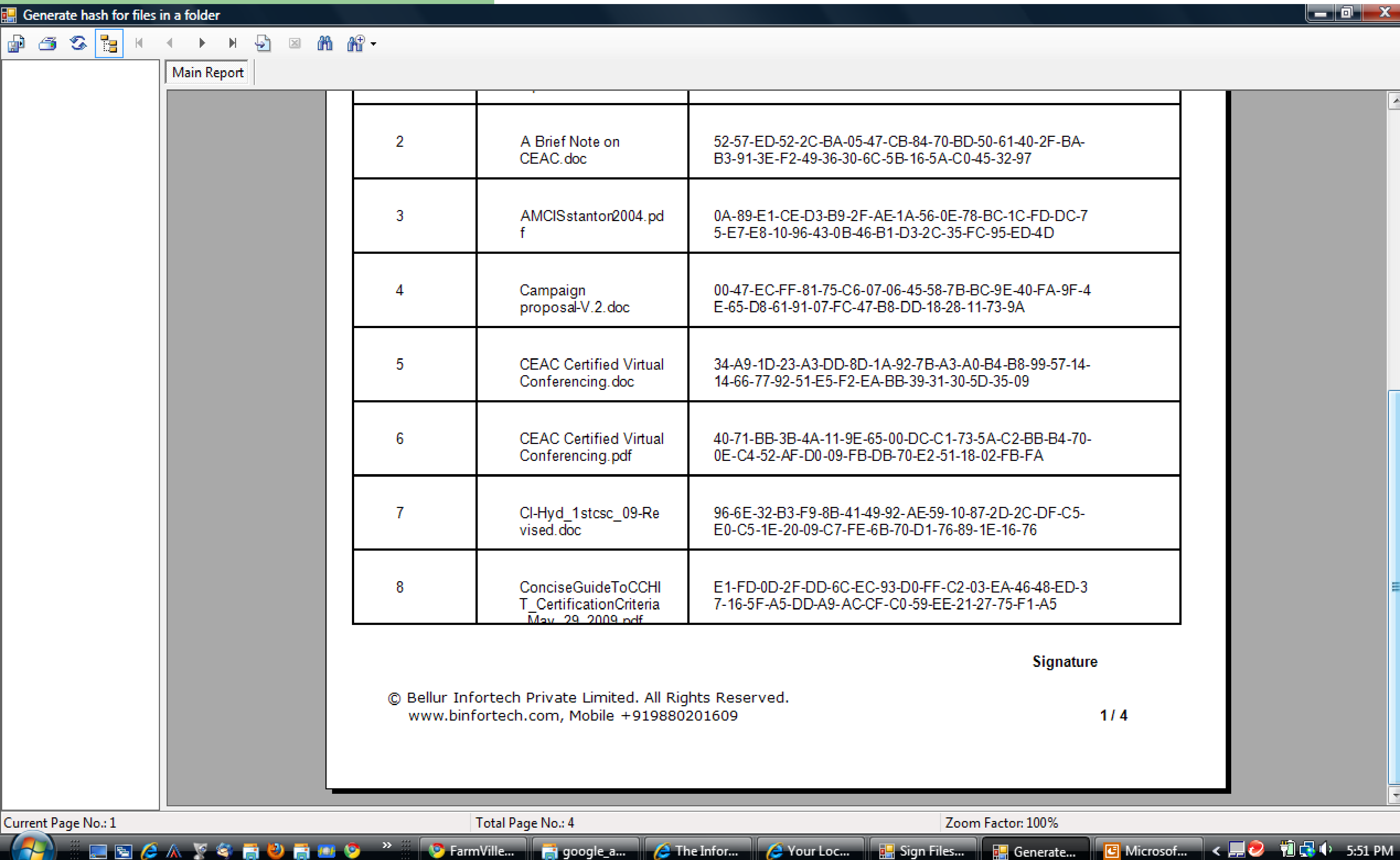

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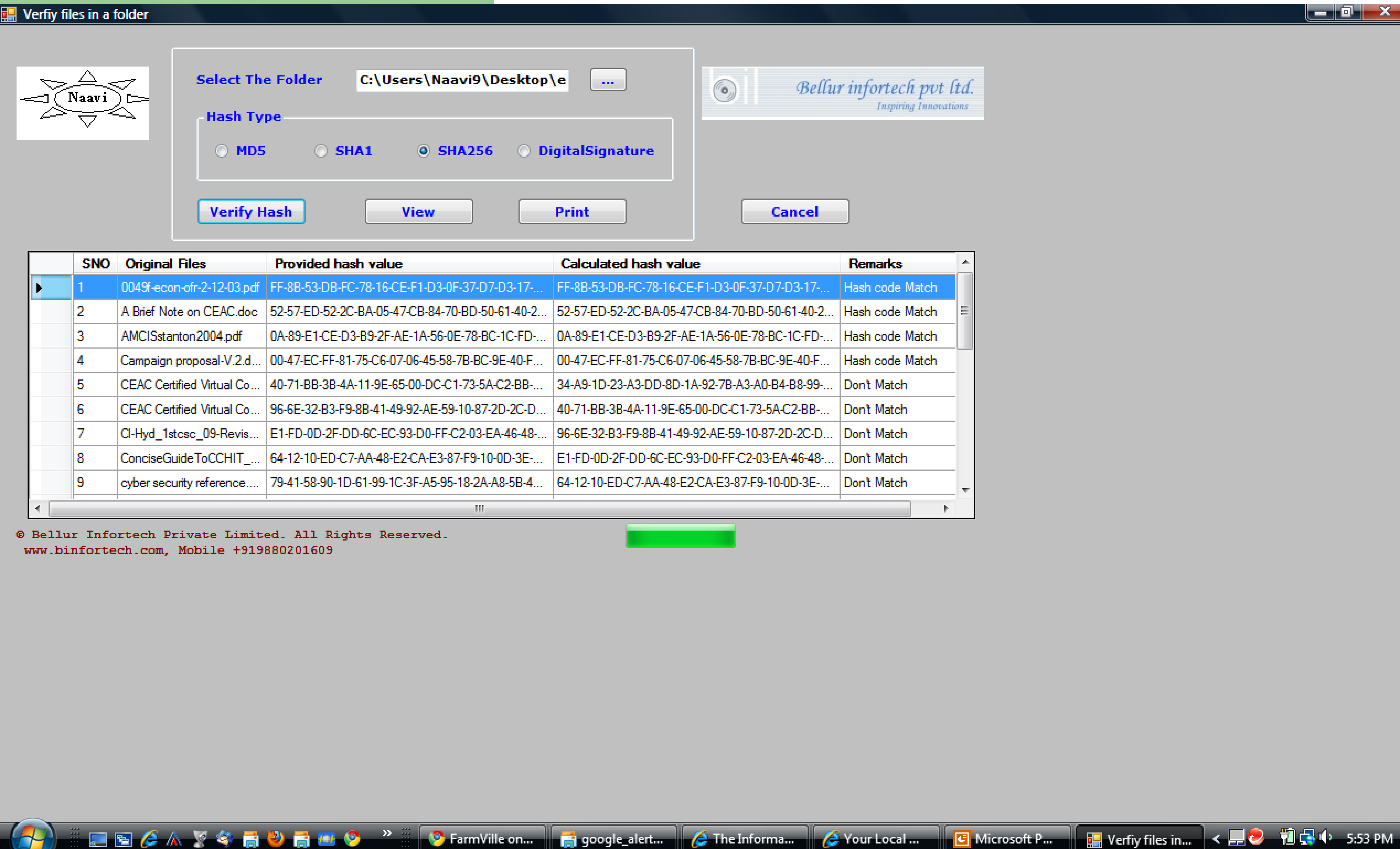
Signature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FarmVille on...
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The Informa...
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Microsoft P...
Verfiy files in...
5:53 PM

Verfiy hash for files in a folder

Main Report

10/28/2009

Ujvala Consultants Private Limited

Registered Office: "Ujvala", 37/5, 20th Main, B.S.K. Stage I, Bangalore 560050
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This is to certify that the following files have been verified for data integrity and hash codes have been generated, compared and verified for each of the files as indicated here in.

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1	0049f-econ-ofr-2-12-03.pdf	FF-8B-53-DB-FC-78-16-CE-F1-D3-0F-37-D7-D3-17-6A-09-B5-33-AC-3C-95-9F-64-F7-84-93-86-FC	FF-8B-53-DB-FC-78-16-CE-F1-D3-0F-37-D7-D3-17-6A-09-B5-33-AC-3C-95-9F-64-F7-84-93-86-FC	Hash code Match
2	A Brief Note on CEAC.doc	52-57-ED-52-2C-BA-05-47-CB-84-70-BD-50-61-40-2F-BA-B3-91-3F-F2-49-36-30-6C-5B-16-5A-C0-	52-57-ED-52-2C-BA-05-47-CB-84-70-BD-50-61-40-2F-BA-B3-91-3F-F2-49-36-30-6C-5B-16-5A-C0-	Hash code Match
3	AMCISstanton2004.pdf	0A-89-E1-CE-D3-B9-2F-AE-1A-56-0E-78-BC-1C-FD-DC-75-E7-E8-10-96-43-0B-46-B1-D3-2C-35-F	0A-89-E1-CE-D3-B9-2F-AE-1A-56-0E-78-BC-1C-FD-DC-75-E7-E8-10-96-43-0B-46-B1-D3-2C-35-F	Hash code Match
4	Campaign proposal-V.2.doc	00-47-EC-FF-81-75-C6-07-06-45-58-7B-BC-9E-40-FA-9F-4E-65-D8-61-91-07-FC-47-B8-DD-18-28-	00-47-EC-FF-81-75-C6-07-06-45-58-7B-BC-9E-40-FA-9F-4E-65-D8-61-91-07-FC-47-B8-DD-18-28-	Hash code Match
5	CEAC Certified	40-71-BB-3B-4A-11-9E-65-00-DC	34-A9-1D-23-A3-DD-8D-1A-92-7	Don't Match

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Section 8 Publication of rules, regulation, etc, in Electronic Gazette

- Where any law provides that any rule, regulation, order, bye-law, notification or any other matter shall be published in the Official Gazette,
  - then, such requirement shall be deemed to have been satisfied if such rule, regulation, order, bye-law, notification or any other matter is published in the Official Gazette or Electronic Gazette:
  - **Provided** that where any rule, regulation, order, bye-law, notification or any other matters published in the Official Gazette or Electronic Gazette, the date of publication shall be deemed to be the date of the Gazette which was first published in any form

Sec 9: Sections 6, 7 and 8 Not to Confer Right to insist document should be accepted in electronic form

- Nothing contained in sections 6, 7 and 8 shall confer a right upon any person to insist that any Ministry or Department of the Central Government or the State Government or any authority or body established by or under any law or controlled or funded by the Central or State Government should accept, issue, create, retain and preserve any document in the form of electronic records or effect any monetary transaction in the electronic form.
  - *P.S: We may move shortly to repealing of this section and making e-delivery of Government services mandatory*

Fraud possibilities

- Tender document manipulation
  - Specification document alteration to change specifications
  - Bid documents alteration after submission
    - Data integrity and Authentication issues
- Bid process manipulation
  - Denial of Service attack
  - Authentication issues
- Impersonation, Defamation hacking/unauthorized access etc
- IPR related Issues
  - Copyright, Patent, Trademark
- Privacy Related issues

Fraud possibilities

- Financial Frauds
  - Non Integration with financial system
    - Eg: PNB fraud
  - Fake bidders
  - Forgery in bidding
  - Fake deposit/withdrawal
  - Fake Execution
  - Duplicate billing
    - Eg: Salem Hospital

Shapoorji Pallonji Case

Mumbai High Court

September 28, 2017

E Tender case In High Court of Bombay

- Shapoorji Pallonji and Company (SPC) was one of the bidders for a housing project in a tender floated by the Maharashtra Housing Development Authority
  - The tender was made using the e-tender process.
  - SPC uploaded the documents but did not complete the tender process by omitting to press the final confirmation button.
  - Tender application was rejected

E Tender case In High Court of Bombay

- SPC challenged the rejection on the grounds
  - The tender process failed to display the page requiring confirmation and it was the failure of the tender authority or its technology provider (NIC)
- SPC said that by uploading the documents it had submitted the tender documents to the authority and the final confirmation was not relevant to the completion of the process.

E Tender case In High Court of Bombay

- The bid documents were available from 3rd April 2017 to 17th May 2017 and the last day for submission ws scheduled first for 17th May 2017 and later extended to 27th July 2017, 13.00 hours
- SPC uploaded the technical and financial bid on 27th July 2017 at 12.16 hours on the e-procurement system
- The contention of SPC was that "Freeze Bid" button was not logged or recorded in the respondent's system as a result of which they could not get the acknowledgement

E Tender case In High Court of Bombay

- The tender was opened and SPC bid was not considered… SPC challenged the rejection
- NIC submitted to the Court
  - "if acknowledgement is not generated through the system, then the process of submitting bid is not complete"
  - It was intimated that the bidder did not click the freeze button and therefore, the bid is invalid and data uploaded by the bidder is not retrievable through web application
  - The tender details and bidder's logging details on server were also supplied which showed the bid status of the petitioners as "Invalid bid".

Petitioner’s Grounds

- Even if the clicking/effect of the freeze bid button is not recorded by the system, the uploaded bid document will be encrypted and stored on NIC’s server
- Files uploaded are available on the server of the e-tender portal and with the help of the technical staff, it is possible for MHADA to retrive the submitted documents

Court’s Judgement

- Allowing one more bidder to participate in the tender is in “Public interest”.
- Court did not go into the issue of whether the clicking of the freeze button was essential or not.
- Court quoted Albert Eienstein
  - “Human spirit must prevail over technology”
  - And considered that what happened was a technical glitch which needed to be over ridden by manual intervention..bidders are not shunted out of the procedure only on account of any technical glitch…
    - Allowed the bid to be considered
      - Judges Smt Barati H Dangre, and Anoop V Mohta (28/9/2017)

Authentication

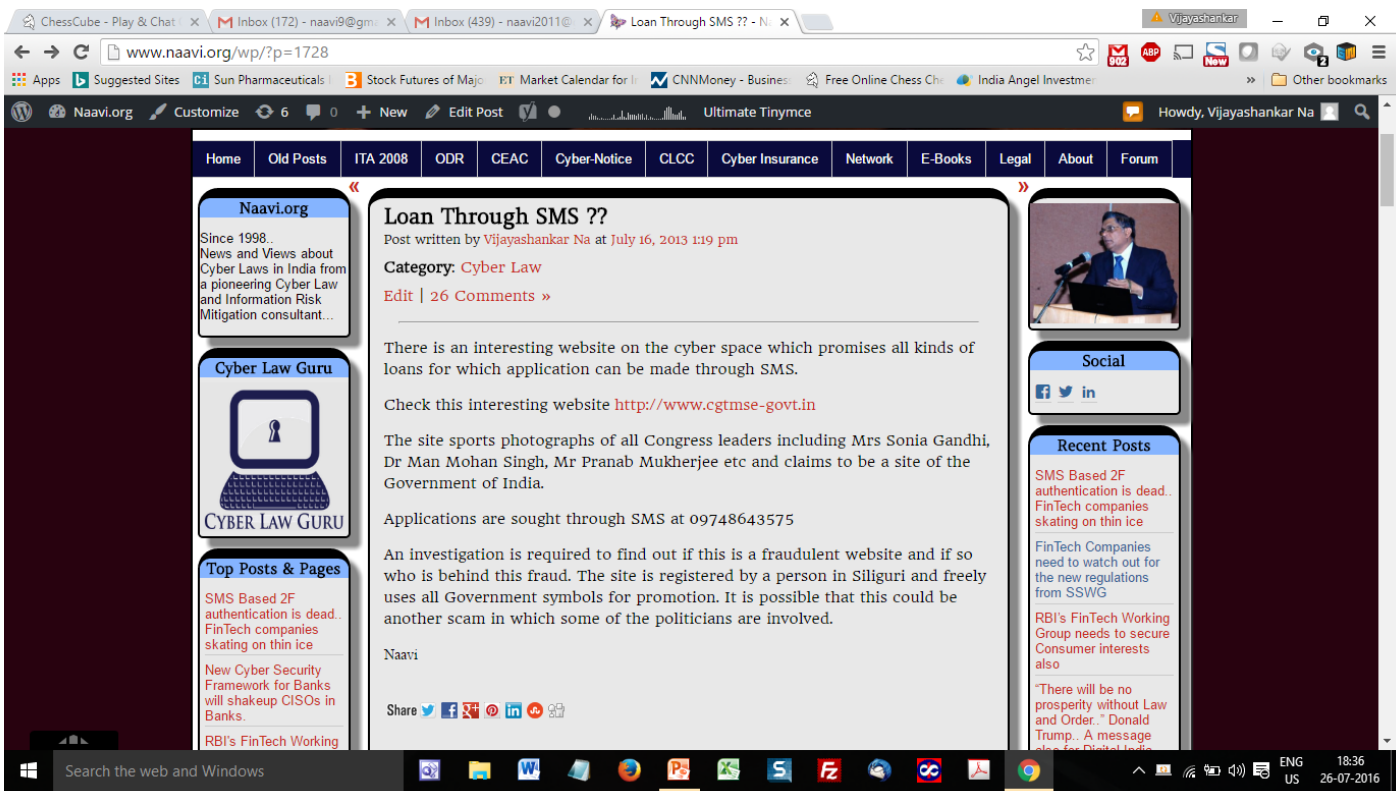
Section 5: Legal recognition of Electronic Signature

- Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document should be signed or bear the signature of any person then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signature affixed in such manner as may be prescribed by the Central Government.
  - **Explanation** - For the purposes of this section, "Signed", with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression "Signature" shall be construed accordingly.

Digital Signature

- System should incorporate digital signature in the entire workflow
  - Every document should be digitally signed by an authorized official
  - Authority should be verifiable
  - Every time the document is used, digital signature should be verified automatically
  - Practice of intermediaries using digital signature of customers should be identified and stopped

Fake Government Website- http://www.cgtmse.in and http://www.cgtmse-govt.in



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Madhya Pradesh E Procurement Scam?.. September 2018

- Madhya Pradesh Jal Nigam (MPJNL)
  - encrypted e-document contents modified by backend players with connivance of private companies and the top bureaucracy after the price bids were opened for three of its contracts in March this year.
- An internal inquiry and found out that the bid processes of three contracts for multi-village rural water supply schemes in Rajgarh and Satna districts were altered to make two Hyderabad-based and one Mumbai based companies the lowest bidders, documents with ET have revealed.
- It was done with insiders' help
- The contract amount for the three projects was more than Rs 2,322 cr.
- six other contracts of the public works department, water resources department, MP Road Development Corporation and project implementation unit were also exposed to similar insider rigging of e-bids,
  - ET Report:
  - Dataquest Report

Cloud Storage

- Risks in cloud storage of sensitive documents should be assessed and mitigated.
- Every e-procurement agency should be open to audits from time to time to the best industry standards

Evidence Management

- Section 65B of IEA
  - Essential for admissibility of any electronic evidence
- Section 67C of ITA 2008
  - Relevant for retention of documents
- Section 65 of ITA 2008
  - Relevant for contravention of Sec 67C and other data retention requirements

Privacy Protection

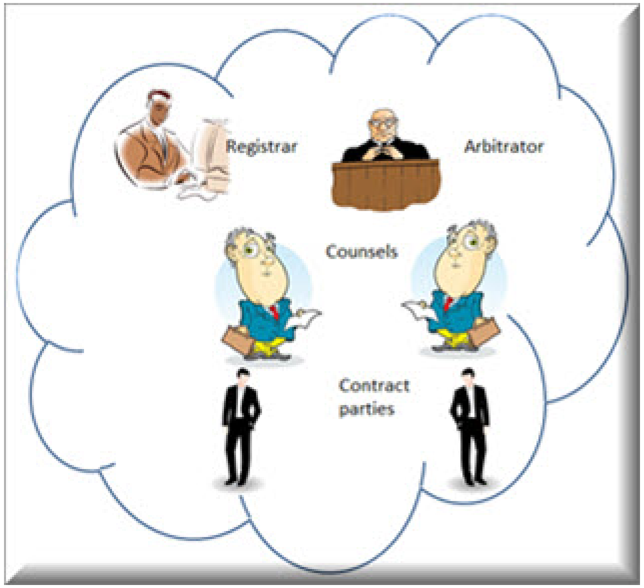
- PDPA 2018 (Proposed) is applicable for Government agencies
  - Requires protection of data principals' rights
  - Requires compliance of information security best practices
    - Should serve Fraud possibility mitigation also
  - Requires documentation

Dispute Resolution

- Dispute Resolution is part of any contract
- Preferred mode is Alternative Dispute Resolution mechanism
  - Ombudsman, Mediation, Conciliation, Arbitration
  - Courts are the last resort
  - Jurisdiction needs to be defined to avoid controversies
  - Arbitration can be final and binding if properly conducted
- Indian Arbitration Act enables use of electronic documents and hence ADR can be used as ODR

Dispute Resolution

- ODR can go beyond e-mails sent and received
- Check www.odrglobal.in for a comprehensive ODR process which is in compliance to the US model law for ODR under consideration.
- Uses the Virtual Room concept fortified with Section 65B of IEA



Summary

- E Procurement involves communication and bidding process to be conducted online
  - Could add ODR in future
- Has the legal backing of ITA 2000/8
- Frauds are to be expected and needs to be countered with robust information security management