

Advanced Contracts, Tendering and Public Procurement
Prof. (Dr.) Sairam Bhat
Professor of Law
National Law School of India University
Lecture 45
Public-Private Partnerships: Law and Policy in India – Part 02

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Swiss Challenge or unsolicited proposals

- Ravi Development vs Shree Krishna Prathistan 1 2009 SC
- Ravi Developers presented a suo motu proposal to the Maharashtra Housing and Area Development Authority (MHADA) to develop certain plots of land in the Mira Road area in Thane, Maharashtra. The MHADA decided to use the Swiss Challenge method on a pilot basis with respect to this project. The project details circulated by the MHADA clearly stated that a suo motu proposal had been received from a developer and that such developer would have a right of first refusal with respect to the project, which would require the developer to match the highest bid received by the MHADA. It also made it amply clear that the project would only go to the highest bidder in the normal bidding process if the original proposer (Ravi Development) turned down the project. The project, in this case, was awarded to Ravi Development which decided to exercise its right of first refusal and match the winning bid
- IBC 2006



In this session, understanding the public-private partnerships is very important. One of the interesting ways of awarding government contracts, though, something that is not very common, but yes has been accepted practice is the Swiss Challenge method, or the method of unsolicited proposals that the government can actually undertake to award contract.

Now, usually we have two methods of awarding government contracts. First is the top down approach, which is the tendering process. The tendering process is a process where the government comes up with the tender, with the proposal, it requests the bidder to actually submit those proposals to the idea or requirements that the government had already finalized with. So the government will bring in the proposal for example for a road project we want a road project, port to be built, with a willingness to tie up with the project structure. Sometimes they would want the private player himself to design the project, build the project, and operate the project as well. Or they may have some kind of parameters of saying this is the kind of growth that we are expecting to which the bidders will submit the proposal.

So this is generally the top down approach of government contracting. There is this very interesting approach of what is known as the bottom up approach, which is probably the citizen-centric approach to government contracts, where the citizen actually comes up with an idea of the proposal and he places before the government saying that “why do not you actually take this proposal forward.” The bottom up approach is called the Swiss Challenge approach. And this is where to notice that the government does not come up with a tender, it comes to the tender at a later stage when it has given principal approval to the project. But the idea of the project, the proposal of designing the project comes from the citizen or the corporate citizens as the case may be.

So in this kind of an approach, the first question is whether this approach is valid in India, or whether it is something that cannot actually operate upon. Now, obviously are looking for some kind of a legal framework to allow Swiss Challenge method, it can randomly, probably, be misused or abused at times. Secondly ought to know how the process of Swiss Challenge has to be implemented or operationalized. And hence, whether the law actually permits Swiss Challenge or not, is something that we will have to be tested under law

Now in this case could Ravi Development versus Shree Krishna (2009 Supreme Court judgement) Ravi developers, real estate company obviously presented a suo motu proposal to the Maharashtra Housing and Development Authority. They wanted to develop certain plots of land in the Mira road area in Thane, Maharashtra. And the Maharashtra Housing Area Development Authority, obviously, this was a proposal that is coming from Ravi developers, so that this will accept this under the Swiss Challenge method.

Now, looking at the Swiss Challenge methods, understand that suo motu proposal, that is self-initiated, proposals or ideas of government contracting can be welcomed. However, the process of ensuring transparency and accountability of the project is something that is inevitable in government contracts. And hence, the project details were circulated by the Maharashtra Authority, they gave in principle approval to this idea presented by repeated members. And they said it is a suo motu proposal, it is not the government idea. Very interestingly, the right of the first refusal clause in such projects, very critical.

Now, the right of first refusal very clearly means that when to open this proposal submitted by Ravi developers for the challenge. Is there any other person, who will put an advertisement, will put it for public in a scrutiny, will probably have a public hearing if necessary, public consultation if necessary, have an expert committee that will decide if

necessary, all this will be relevant and important for this Swiss Challenge method to be acceptable?

Now, the first thing first is that, the one who proposes always have the right of first refusal, which means if there is a proposal that is received, which is in challenge to the existing original proposal made by the citizen, then Ravi developers who has submitted this idea will have the right of first refusal. So they will have the right to match the bid submitted by any other person. So it is like open competitive bidding process. Ravi Development will have the first right to refuse. If they match to the winning bid, then they will have the first try to implement the project. That is how Swiss Challenge works.

The word challenge is competitiveness in government contracting cannot be compromised. Transparency and accountability of government contract can never be taken away. It is a primary rule and arbitrariness, unfairness and unreasonableness of such contracts cannot be compromised, and it will be held in violation of Article 14 of the Constitution of India. So tendering is followed in a process after giving in principle approval to the suo motu proposal. And there is public scrutiny, there is public consultation that will have to come into process. And then, once they open it up for bidding process, Ravi Developers was the first original person who was given the idea will have the right to match up to that winning bid. If he refuses, that is, Ravi Developers refuses, then the project can be awarded to the winning bidder.

This is the ordinary way in which Swiss Challenge is permitted. This is how it has been followed and practiced. And the Supreme Court in 2009 said, this is also a very good method, and the government can definitely adopt such methods. However, the Supreme Court laid down a few principles that they thought should be important in the Swiss Challenge method, so that it is legal, it is permissible, and it is wide.

The first thing that the Supreme Court said in this Ravi Development case was that it is important that the authority publishes the proposal of Swiss Challenge quite well in advance, it should not be done in a hurried manner. So people must have time to read, evaluate, scrutinize and give comments on Swiss Challenge method. So, it must not be something that should be done in an urgent manner in which citizens participation is rolled up. So advance publication of the proposal and the idea of the contract and project must be something that has to be done quite well in advance, so that citizens can participate, and that can be a

competitive proposal. So, that is the first ground, which the Supreme Court has laid down in the Ravi Development case.

Second, the nature of the project is quite critical. So the nature of the project should be such that it is something that has come to the Swiss Challenge method. Now, it cannot be an ordinary project, which the government has already tended upon, or in the past, the government tendering was the process through which such projects or contracts were awarded. So this must be something very unique, something not really thought about something on which the government had no previous idea project tender, or any kind of experience in executing the same. So it has to be unique in terms of the project requirements as well. Third, what is important is that the private person who wishes to make the proposal on Swiss Challenge should not have been approached before by the government, that is very clear, right?

So the private player, who comes for the Swiss Challenge method is someone who has not worked with the government on the similar project before. And this has to substantially say that he has not had any previous allegiance or kind of idea with the government. So this is also very important in terms of the Swiss Challenge method. Also the nature of the project at the feet of the project, or the categorization must be notified before. And this would probably help potential bidders who are coming to the challenge prepare to match up to the proposals submitted by someone like Ravi Development. So that is also something very important. And ample opportunity must be provided to everyone to participate in the competitive bidding process. And the rules should be very clearly framed, is also something that has been laid down from time to time.

So these are some of the precautions that have to be followed. And the Supreme Court said, if these precautions have been followed, then the Swiss Challenge method is also something that the government can definitely adopt. And the courts have said that that is also a wonderful way or idea in which government contracting can be approach, especially if, even though if it is in the PPP mode.

Now, one of the interesting aspects of Swiss Challenge has always been something that you see under the insolvency and bankruptcy code. Now, in the insolvency and bankruptcy code there is the opportunity to take over bankrupt and insolvent companies. Usually, the proposals to take over these bankrupt and insolvent companies are unsolicited. They come by their own. And they come up with a resolution plan as well and place it before the NCLT,

that is, the National Company Law Tribunal. Based on that, that it is taken forward So, even under the IBC code, an unsolicited proposals are generally entertained, that is, the process in which taking over of companies under the insolvency and bankruptcy code is entertained, it is valid, it is enforceable.

The future of Swiss Challenge is here to stay. The only thing is that the development authority that the government must be very clear. The basis on which Swiss Challenge method is going to be awarded for. Ensure transparency, competitiveness and accountability of the project and such kinds of contracts are something that can always be taken forward with.

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Legal framework for PPP

- No Central Law, few State have framed Regulations. e.g. Punjab
- UK Local Government Contract Act 1997: Allows Local governments to enter into PPP
- NITI Aayog, PPP Appraisal Committee



Moving on to understanding whether there is a legal framework for Public-Private Partnership in India. Very often the law tribunal tries to evaluate legal frameworks for contracts. And hence the discussion all through has been the Indian Contract Act at 1872, the Sale of Goods Act 1930, the Specific Relief Act of 1963 and so many other legislations, including the competition law.

Now, the public-private partnership is very important framework, it is quite a sizable amount of contracting that happens in this country. There are so many numerous projects, both Centre and state. The public private-partnership projects in India would actually be more than 100 such projects that have entered into from time to time. So it in terms of the space of the sector

in which public-private partnerships exist, in terms of the quantum of economic activity that these projects have impacted in the country, one would have thought that a legal framework for this project would be passed in this country.

However, in India, we have allowed contract law or the basic contractual provision to dominate. We have not created a special framework, at least, there is no central law that looks at a framework on PPP. There have been some guidelines issued, say, by agencies like the NITI Aayog, the government has established the PPP Appraisal Committee so, as to evaluate the proposals both at the state and the central level.

There have been ministries and departments that have designed model, PPP concession agreements, like in the highway sector. This is to allow a model contract to be entered into so that there is no disparity, changes, amendments and variations and uncertainties in these contracts. So, lot of this activity has already done but no legal framework was brought in.

However, if you compare India to the United Kingdom, in UK in 1997, they enacted legislation called the Local Government Contract Act. This does allow local government to enter into PPP. It is a facilitating legislative provision to allow local governments. That in India, local governments play a very critical role and they can actually raise a lot of infrastructure through the public-private partnership mode.

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Relevant State Actions to PPP Framework

State actions in creating a framework for PPP in India	
State	Framework for PPP
Andhra Pradesh	The Andhra Pradesh Infrastructure Development Enabling Act, 2001 is to facilitate greater private sector participation in infrastructure projects.
Assam	The Assam Policy on Public Private Partnership in Infrastructure development proposes to bring in private sector investment with the PPP mode as the preferred approach for infrastructure projects.
Bihar	The Bihar Infrastructure Development Enabling Act, 2006 is for the rapid Development of Physical and Social infrastructure in the State and to attract private sector participation in the designing, financing, construction, operation and maintenance of infrastructure projects in the State and provide a comprehensive legislation for reducing administrative and procedural delays, identifying generic project risks.
Goa	The Goa Policy on Public Private Partnership applies to all PPP projects sponsored by the Government or PSUs or Statutory Authorities.
Gujarat	Gujarat Infrastructure Development Act (1999) amended in 2006 to facilitate greater private sector participation in financing, construction, maintenance and operation of infrastructure projects.
Karnataka	The Karnataka Infrastructure Policy, 2007 has been evolved with a view to augment and expedite infrastructure development through active private sector participation.
Orissa	The Orissa PPP Policy, 2007 is to create a conducive environment to utilize the efficiencies, innovativeness and flexibility of the private sector to provide better infrastructure and service at an optimal cost.
Punjab	The Punjab Infrastructure Development and Regulation Act, 2002 provides for the partnership of private sector and public sector, in the development, operation and maintenance of infrastructure facilities and development and maintenance of infrastructure facilities through financial sources other than those provided by the State budget.
Rajasthan	Has set up the Rajasthan Infrastructure Development Fund with an initial corpus of US \$ 500,000, contributed by the financial institutions and the State government.
West Bengal	The West Bengal Policy on Infrastructure Development through Public Private Partnership, 2003 was notified to address the need to mobilize private sector investment in infrastructure development and evolve policy guidelines for the purpose.

See also https://www.pppindia.gov.in/infrastructure_initiatives_concordium.pdf for more information



Now just to look at the state legislative actions on PPP, in Andhra Pradesh, there is Andhra Pradesh infrastructure development Enabling Act of 2001. Assam has a policy, Bihar as an Enabling Act of 2006. Goa applies PPP in most projects that are sponsored by the government or the public sector undertaking. The most interesting legislation is the Gujarat Infrastructure Development Act of 1999. It was amended in 2006. This is one of those legislations that actually facilitates public-private partnership. And that is one specific legislation that has been often referred to as the legislative framework for public-private partnership process in India.

Karnataka has a policy that facilitate the same. Orissa also has a policy. Punjab has enacted a legislation called the Infrastructure Development and Regulation Act. Rajasthan has developed a fund, and West Bengal has a policy. So between the policy and act, the few states run PPP through the policy framework and few states run PPP through the legislative enactment framework.

The governments have the free hand to select sectors, projects, for a public-private partnership initiative, they have committees that can actually monitor, scrutinize the amount of PPP projects that can be done. And hence, it is done in a very careful manner today, so as to balance the interests of the government and the public sector as the process is.

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PPP: Process

- Project identification
- Feasibility study
- Value for money driver
- Management of risk
- Robust Contract
- Selection of the partner
- Tariff fixation: electricity, roads, airports etc
- PPP contractual management



Now, looking at the process of the public-private partnership, it is quite complicated and time, and time driven. It takes a lot of efforts for the governments to actually bring the PP project into place. Because we do not want to repeat the mistakes of the past. And hence, it would take anywhere between 2 years to 4 years for a public-private partnership project to be executed and the project to commence.

Actually, that is the timeline in which most of the projects have been brought into existence. So the broad processes involved are in this framework and that they are very broad. They are not very detailed and specific, but just to give you an idea of how the PP project is actually conceived and designed. First is, it goes by project identification, where to do it, in which city, which area, which sectors, whether it is water, airport. Again, to notice that airports are in the Central Union legislation so only the central government can decide, though it requires the state government's consent and approval to do the same, because land is something that only the state governments can actually identify with.

So project identification is very, very critical, which areas can be done and which cannot be done. For example, a lot of these smart city projects today, are something that are outsourced they are not necessarily under PPP, but the smart city projects or smart city missions have been encouraged to at least build projects in the PPP mode. So the cities have been kind of focus area right now, because the big infrastructure projects have already been brought into the PPP formula.

Second is to, once a project has been identified, the feasibility study is very, very critical. The feasibility studies about whether it can be viable, under say, an outsourcing mode whether it is viable for a complete government execution, operation maintenance, or should it be under PPP, if it is PPP, will the private sector will be interested in? How to make this, very attractive to the private sector? How long is the feasibility study becomes a very critical part?

Because the feasibility study will not only look at economic feasibility, it may also look at environmental feasibility as well. Because see, the environmental impact of projects, though its government, or PPP, are very, very important and critical. So the legislative framework and the public concerns of feasibility have to be taken into consideration as well. The sensitization of local communities is also very, very important. Taking them into confidence also becomes very important for the successful execution of the public-private projects.

Why PPP has to be answered, it is very important. Is it because the government does not have money to invest in this or is it because the private sector will bring in more efficiency in terms of operation and maintenance. So whatever may be the motive or the reason for projects to be granted under PPP, it should be money driven. And it should actually result in some kind of economic propulsion of activity once it is there or granted to the public-private partnership.

Otherwise, the private players will actually exit, they will not find this feasible at all. So it should generate revenue, it should have a revenue model, a robust revenue model. The calculations of revenue become very critical. To tell why money driver is important? Because remember, tomorrow to want a competitive process, in the public-private partnership space, if it can add value to the contractors, they will be interested in it. So that will be greater competition. Otherwise, there will be having just one or two bidders for this public-private partnership initiatives. It is very important that the political, economic and social risks are managed in the public-private partnership. The government has a major role to play in management of risk. And that kind of certainty can only drive the success of such projects and hence, the government must actually invest in management of all the three forms of risk, political, social, and economic risk.

The fifth, in the process is to enter into a robust concession agreement. Once the private partner has been identified through a competitive bidding process, the concession agreement, that is the title of the agreement, that is the framework agreement which will be the master agreement, that goes into public-private partnership, it must be very appropriately negotiated review and drafted.

A robust contract is a well driven contract. If the contract is properly entered into, it is not one sided or unfair or it is not taking into consideration the existing challenges with other projects, then the contract becomes very weak. So, robust contract can drive a very, very robust execution of the contract because this is a very long term contract.

What is also important is the project expectations. This is a problematic situation in most cases? Project expectations are not clearly defined by the government. Most of the time, it is left to the private player to identify and actually completed. Because of which lot of time mismatch can happen. Project expectations along with project completion schedule, are something that had to be attached to the concession agreement, and they have to be also carefully negotiated and agreed upon. Unreasonable expectations of project completions would be actually a hindrance to the project, it will actually start with a lot of distrust and mismatch of expectation.

So, the delivery schedule should be very, very reasonable, it should be flexible as well. What is important is not that the project gets completed on time, what is important is that the quality of the project is not compromised while time is made important for the completion of the same.

So, the quality of these projects are very important. The quality, is because these infrastructure projects should be world class, and expect the private player to actually get the world class technology, get the finance that can actually make this project a qualitative one. It should withstand the test of times. The government projects lack execution, because very often we have to understood that government project lack execution, sometimes are affected by quality.

And that is probably one of the main reasons for going into the PPP sector. Of course, selection of partners, is also critical, can the private player to also have a consortium of partners? More the partners, more the problems or challenges of driving consensus decision making. So, notice that at the start of the PPP process in India, that was a consortium of bidders in the private-public space.

The private players were not one, they were actually two or three or sometimes four. Right now, India has seen quite a bit of experience in PPP, so just permitting one player to partner with the government. That is something that we have always seen as a development of the sector and development of the contractor maturity, as seen today

Tariff fixation is also critical and important. For example, the problems of electricity tariff fixation, we have seen it in Delhi that electricity now is unfortunately given free, tariff fixation can be a social and an economic risk or challenge as we go forward. There has been lot of protest at toll booths for, where tolls have been increased, or where there is an expectation of the citizens that the tolls should be given free. So, toll free roads is what the citizens would demand because they will not allow the private player to actually recover his investment.

In the airport sector also there the Airport Economic Authority that would fix user development fees in the airport. This has been a challenge whenever expansion takes place, the user development fee goes high. The customers who are using the airports always find it to be quite pricey. So, there is a social and economic challenge over there. How do you fix the tariff? How do you revise the tariff? Tariff needs revision whenever where is expansion, whenever there is additional investment, whenever there is an additional maintenance cost or whenever there is price escalation of essential maintenance and operation costs, including labor and raw materials.

And hence for tariff fixation, notice that in the electricity sector, we have come up with a regulation or tariff, we allow the CERC that is a Central Electricity Regulatory Commission or the State Electricity Regulatory Commission to actually determine the tariffs which consumers have to pay to either the government or to the private player. So these are independent regulators, they can act on behalf of both the parties, they can actually act very reasonably like a judicial commission or a judicial quasi-judicial authority can do.

Tariff is critical because that cannot be fixed in the contract but because of public policy concerns the tariff fixation is an important process of how to make a PPP a successful one. And then the policy can drive, tariff policy can be something that these adjudicatory agencies can actually fix. The tariff fixation would become a critical component of balancing the public interest as well as the private interest as we go forward.

Finally, coming to the process of the contractual management. Contract can be entered into but how it should be managed? It should be managed by the Board of Directors of the Board of Managers who actually manage the PPP process. There is need for very, very professional administration professional management because some of these sectors are very, very technical. For example, electricity sector. Some of these sectors can demand a lot of attention from professional business managers. They need competency at the management level. So government interference in such projects should be minimal. They should be driven just on public interest and nothing more than that.

So, the contract is a management phase becomes also an important phase. Because there is a need to break deadlocks between the Board, you need to actually find some resolutions to these deadlocks. And those are something that the management should be able to drive forward too. Government must appreciate contractual management, they must bring in professionalism to facilitate better project execution in the PPP sector, also is something that the government owes a responsibility as well. Do not forget that contractual management is not a compromise for corporate due diligence and corporate compliances.

The PPP process is definitely something that could be regulated under the Companies Act, because the special purpose vehicle that is established on the PPP could be a private limited company, it could be a limited liability partnership, and hence, corporate compliance is also something that have to be managed, they have to be complied with.

And hence the regulators like the Registrar of Companies and others and the government can also monitor the public-private partnership process. Do not forget that when we talk about contractual management, they are also talking about some leverage of accountability of the private process. And it is not pure private contract, which is to be kept in the private domain. There is a public concern because you are actually exhibiting public work.

Citizens are going to demand accountability, are going to demand answers. So the contractual management should be pursued in a manner that has an absolute rule of transparency and accountability to the citizens at large. That is the process in which contracts should be taken forward in the PPP sector.