

Infrastructure's Swiss challenge

Instead of waiting for the government to identify projects, the Swiss Challenge method allows firms to propose projects which can then be bid out, say Arjun Rajgopal and Kartik Ganapathy

Traditionally, the bidding process for a project involves the government identifying the project and seeking bids from companies/consortiums in the private sector who will ultimately undertake the project. The government also lays down certain parameters that bidders must meet in order to qualify for the bidding process. This process relies primarily on the government for identifying new projects.

For India, the Swiss Challenge method is a new step in the field of public private partnerships. It entails a private sector enterpriser (the original proponent) *suo motu* identifying a project and then going to the government with the proposal. The government subsequently starts a competitive bidding process for the project in accordance with its standard rules. Generally, the proprietary information contained in the proposal made by the original proponent is kept confidential.

In order to incentivise the private sector to make such proposals, the government may offer certain privileges to the original proponent. For instance, the government may provide the original proponent an opportunity to match or better the winning bid on the completion of the competitive bidding process in other words, a right of first refusal.

The Supreme Court's view

The Supreme Court's decision in *Ravi Development vs Shree Krishna Prathistan & Others* served to cement the Indian legal position on the subject. In that case, the appellant, 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. The award of the project was, however, challenged by some of the other bidders on the grounds that the bidding process and final award of the project were unfair, arbitrary and ambiguous. It was on these grounds that the Bombay High Court struck down the bid process. The Supreme Court, however, studied the facts carefully and found that the process was patently fair and that the courts should not, in such a situation, interfere with properly exercised executive discretion.

The Supreme Court, therefore, upheld the Swiss Challenge method for awarding public projects. In doing so, the Supreme Court also made

certain suggestions for ensuring smooth implementation of a Swiss Challenge project in the future, thereby reducing any allegations of arbitrariness or ambiguity. Some of the suggestions of the Supreme Court were:

- The nature of the Swiss Challenge method and its particulars should be published in advance by the relevant authority.

- The nature of projects that can be bid for under the Swiss Challenge method should also be clearly enumerated by the relevant authority.

- There must be a clear mention or notification of the authority which is to be approached with project plans in the event that a private

person wishes to make a Swiss Challenge project proposal.

- Alongside the nature of the projects, the fields in which such projects are categorised must also be notified. This would assist a potential bidder in determining the appropriate authority to approach.

- The relevant authority must set clear rules regarding timelines for the approval of a project and the relevant bidding process.

- The rules decided upon must be followed once the project received/identified via the Swiss Challenge method has been approved by the relevant authorities and a decision has been taken to use the Swiss Challenge method to take the bidding process forward.

- Ample opportunity must be provided for a participatory and adequately competitive bidding process.

The Supreme Court has clearly given the Indian governmental authorities a go ahead so far as utilising the Swiss Challenge method is concerned. Furthermore, in light of the objections raised by competing bidders in Swiss Challenge cases prior to the Ravi Development case, the recommendations of the Supreme Court that suggest a way to streamline the Swiss Challenge process are most welcome.

The primary benefit of a properly implemented Swiss Challenge process is that it provides for a more inclusive attitude towards development in the form of government projects. It is a process that not only encourages public private partnerships but also provides a wide scope for *inter se* competition between private parties. If the government provides a good regulatory and governance framework, and promotes the Swiss Challenge method by providing the private sector this opportunity and the incentives that go with it, there may arrive a time when the issues with infrastructure in India may be tackled by way of a direct proposal from private persons, rather than waiting for the infrastructure problem to get big enough for the government to finally notice. Maybe, some day, you will actually go out and propose to fix that road in front of your house, and you may actually get the chance to do it too!

The authors work with Nishith Desai Associates