Awarding contracts the “swiss” way…

Introduction

Infrastructure projects are massive projects involving players who are required to prove their mettle before contracts can be actually awarded to them. The government decides the extent of private participation and chooses the contractor based on prescribed set of guidelines. However, the “Swiss Challenge Method” ("SCM") has gained popularity and was, in fact, recently also validated by the Supreme Court of India.

The bulletin seeks to analyse the “Swiss Challenge Method”, its advantages and disadvantages, the recent judgment of the Supreme Court and, consequently, its overall impact on the infrastructure sector.

1.0 What is the “Swiss Challenge Method”?

Conventionally, big infrastructure projects have been awarded by the government by way of a bidding process in which the government calls for proposals from the interested parties. The bidders are required to meet the specified criteria in order to be able to compete in the bidding process. The lowest bidder is awarded the contract. The point being driven home is the fact that the government identifies the project and calls for bidders.

On the other hand, a “Swiss Challenge Method” gives the option to a private player ("proponent") to suo moto identify a project and approach the government. The proposals are, thus, unsolicited. Upon obtaining proposal from the proponent, the government seeks tenders/proposals from other private players pursuant to which a bidding process is held based on standard rules followed by the government. Once the bidding process is complete, the proponent is given a chance to better his original bid or match up to the winning bid i.e. the proponent has the right of first refusal. Thereafter, the award is given to the proponent. On his refusal, the award goes to the next best bidder. Typically, the steps involved in a SCM are as follows:

Step 1 - The proponent identifies a project and submits a preliminary description (this may be either a concept or detailed information of the project) to the relevant authority or the concerned Ministry;

Step 2 - Based on the preliminary assessment and scrutiny by the authority/concerned Ministry, it will give a response categorizing the nature of the project in terms of project meant for public interest or strategic infrastructure plan;

Step 3 - Once the initial project plan is accepted, the proponent is given time to produce a detailed plan of the project;

Step 4 - The detailed plan is reviewed by the government, which may be accepted or rejected. Once approved, the government calls for a competitive bidding process.
Step 5 - Upon completion of the bidding process, the government/agency allows the proponent to match up to the winning bid, failing which; the winning bidder is awarded the contract.

Swiss challenge methods have increasingly gained popularity in all parts of the world. In countries such as Philippines and South Korea, most of the public projects are executed using this method. In India, the governments both at the Centre and the States have begun to embrace the concept albeit with certain reservations, which though is likely to be dispelled with the recent Supreme Court’s validation on this mode of awarding public contracts.

2.0 Ayes (alias “Yes”) v Nays (alias “No”) - the SCM debate

As is true for every system, or practice, there are supporters as well as critics for this method of awarding contracts too. The supporters believe:

- It enables innovative ideas to take shape;
- It can be a cost-effective method if planned and implemented well;
- It encourages greater private participation for public projects i.e. augments public-private partnerships;
- It facilitates infrastructure development;
- It will have a ripple effect as award of contracts to one private player will encourage the others to take the initiative for other projects and promote *inter se* competition between the private players thereby raising the overall standard;
- It reduces burden on the government to the extent of identifying new projects and inviting bids.

The critics argue:

- The method is not transparent and it allows government to give preferential treatment;
- The first mover advantage and right of first refusal gives a head start to the proponent and the competitive bidding process becomes a mere procedure with the other participants lacking an effective chance to win the contract;
- There may be instances where the challengers’ proposal specifications are different from the original proponents’ and SCM may not have a mechanism to deal with such situations.

Surely, every system has certain inevitable flaws, but prudence lies in minimizing the negatives and capitalizing on the positives. Moreover, with the validity of SCM having been recently sanctioned by the Supreme Court of India (*discussed in the next section*), it is a shot in the arm for all the stakeholders and puts to rest the allegations of arbitrariness, lack of transparency and bias as claimed by the critics.
### 3.0 The Apex Court’s validation of SCM

In May, 2009 in the case of *Ravi Development v Shree Krishna Prathishthan and Others*\(^1\) the Supreme Court of India endorsed the legality of awarding contracts using the SCM. In the said case, Ravi Developers ("the Appellant") 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 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 further clarified that the project would only go to the highest bidder in the normal bidding process if the Appellant turned down the project. The project, in this case, was awarded to the Appellant who decided to match the highest bid.

The award of the project was, however, challenged by some of the other bidders on the ground that the bidding process and final award of the project to MHADA were unfair, arbitrary, and ambiguous and the SCM was invalid. It was on these grounds that the Bombay High Court struck down the bid process. The Supreme Court, however, reversed the High Court’s order, and, on the various issues, held:

(i) The contention of the SCM being unfair, and not transparent was false as the public notice for tender issued by MHADA had clearly mentioned about the said method, the rule of “First right to refusal” to the “originator of the proposal.” So it was concluded that the existence of the “originator of the proposal” was very much in the knowledge of the other builders at the time of applying for the said bidding.

(ii) The project plan did not lack innovativeness and originality as was held by the High Court. Appellant had adopted an approach which tried to strike a balance between highly developed high-rise with the low-rise buildings of lower specifications built-up for the various income groups and was, thus, original and innovative.

(iii) The decision to apply swiss challenge method clearly fell within the realm of executive discretion and in this case, exercised after due application of mind. The Courts should not interfere in such situations as there was neither arbitrariness nor unreasonableness in the process and, in fact, the new initiative of awarding contracts was laudable.

Finally, the Supreme Court provided broad parameters to be followed by the state/authority for smooth implementation of SCM or any other similar method while awarding contracts to ensure there are no allegations of arbitrariness or ambiguity. These are:

- The state/authority should publish in advance the nature of SCM and particulars;
- Publish the nature of projects that can come under such method;

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\(^1\) 2009 INDLAW SC 637
- Mention/notify the authorities to be approached with respect to the project plans;
- Mention/notify the various fields of the projects that can be considered under the method;
- Set rules regarding time limits on the approval of the project and respective bidding;
- The rules should be followed after a project has been approved by the respective authorities;
- All persons interested in such developmental activities should be given equal and sufficient opportunity to participate in such venture and there should be healthy *inter se* competition amongst such developers.

**Conclusion**

Innovation drives every field. It is important to evolve newer and better techniques to meet the demands of changing times and needs. Infrastructure is undoubtedly an important driver of growth. The Swiss Challenge Method is an interesting and innovative way of performing contracts. In a developing country like India, where infrastructural development is of paramount significance, an initiative by private players to bid for projects will go a long way in catapulting the nation. It will augment public-private partnership; encourage *inter se* private sector competition, reduce government’s burden, and in the process develop the overall infrastructure of the country. With the apex court’s legal validation, the private players should grab this golden opportunity and spearhead the infrastructure growth in India.

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