Competitive Award of Unsolicited Infrastructure Proposals: A recent Supreme Court verdict unveils fresh opportunities for procurement reform in India

By Sandeep Verma *

Governments are increasingly looking to the private sector to fill up growing gaps between demand and supply of public infrastructure. The use of public-private partnerships (PPPs) offers an increasingly attractive alternative as compared to traditional methods of procurement and financing of mega projects. Unsolicited proposals (UNPs) that are not requested by the Government and that typically originate from the private sector have been relied upon in many countries to meet public infrastructure needs; however, a major concern with award of projects based on UNPs is the lack of competition and transparency, with consequent increased likelihood of corruption and political patronage. In fact, the lack of clarity on procedures for dealing with UNPs has been identified as an important bottleneck to the institutional environment of PPPs.

In 2005, the World Bank-supported Public-Private Infrastructure Advisory Facility (PPIAF) undertook a project to review international experiences with managing UNPs, but stopped somewhat short of developing a ready-to-use framework that developing countries could use to draft and implement policies to better manage such proposals. It is in this context that a May verdict this year by a Bench headed by the Chief Justice of India assumes great significance for the adoption of special competitive procedures for award of projects that originate as UNPs. The two-Judge Bench, while upholding the validity of the Swiss Challenge method adopted by the Maharashtra Housing and Area Development Authority (MHADA) on a pilot basis with respect to a proposal received from a private developer, echoed a number of important concerns relating to transparency in the award of such projects. The Supreme Court suggested that the State Government of Maharashtra may consider, inter alia, that (1) the nature of the Swiss Challenge method and particulars are published in advance; (2) the nature of projects that can come under such a method is published; (3) the authorities to be approached with respect to such project plans are mentioned/notified; (4) the various fields of the projects that can be considered under this method are mentioned/notified; (5) rules are formulated regarding time-limits on the approval of the project and respective bidding; (6) rules are formulated for procedures to be followed after a project has been approved by respective authorities to be considered under the method; and (7) all persons interested in such developmental activities are given equal and sufficient opportunity to participate in such ventures and that there is healthy inter se competition amongst such developers. The Court made it clear that its suggestions are not exhaustive, and that the State of Maharashtra is free to incorporate any other clauses for transparency and proper execution of the scheme while framing regulations/instructions on these lines.

While a small number of States in India have adopted the Swiss Challenge method for incentivising private participation in public infrastructure projects, the details of implementation vary across States; and many of these State regulations fall somewhat short of the expectations that the Supreme Court has so clearly outlined in its verdict. This short article therefore aims to examine the mechanics of competitive award of UNPs and the procedures adopted by different States in order that a common set of specific issues for reform can be identified and implemented.

Unsolicited proposals: An introduction

An unsolicited proposal is commonly defined as a submission by private parties of specific project concepts that are unrequested by public procurement agencies. Different country systems and international procurement frameworks have differing variations of this essential theme, with the United States defining an UNP as one that, inter alia, does not address a previously published agency requirement or one that does not amount to an advance proposal for a known agency requirement that can be acquired by competitive methods. India, on the other hand, does not have an exact legal or regulatory definition of an UNP, but many of its States allow for procurement of PPP-based infrastructure projects or concessions through unsolicited proposals that are defined as private sector generated proposals not in response to notified requests for proposals (RFPs). UNCITRAL's Model Legislative Provisions on Privately Financed Infrastructure Proposals similarly define an UNP as any proposal relating to infrastructure projects that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure.

Permitting UNPs encourages the private sector to bring useful and innovative ideas for project development, while they also target infrastructure needs in remote regions where not enough bidders are likely to express an interest. Some other important policy reasons for the Governments to allow for special treatment of UNPs are cost-efficiency through project development costs being borne by the private sector proposer, and rapid project development due to private sector involvement and consequent private interest in shortening time-frames to keep costs low. While some countries such as Columbia place an outright ban on considering UNPs, others such as Sri Lanka require the adoption of normal procedures dealing with solicited proposals to be applied equally to such proposals. On the other hand, some countries have adopted rules so as to allow the original proponent (OP) a predefined advantage within in an otherwise fully competitive bidding process, examples being India (in a number of its States), Argentina, Chile, Indonesia, South Korea, The Philippines, South Africa and Taiwan.
There are two broad approaches that have been adopted in these countries allowing for special considerations for the OP of the UNP, these being the å€œBonusâ€œ system and the å€œSwiss Challengeâ€œ system. Under the å€œBonusâ€œ system, the OP is awarded a å€œbonusâ€œ as price advantage in an otherwise fully competitive procurement process, and his offer is selected if his quoted price falls within a stipulated percentage of the best evaluated offer or bid. While this bonus could be a fixed numberâ€œ10% in the case of Chile; the maximum value of the bonus could also be placed under an upper limit, with the exact quantum of benefit being determined by other characteristics of the tender process, as in the case with South Korea. In Chile, the OP may sell the bonus to another bidder; and if the OP loses the bid or chooses not to bid, then the winning bidder/offeree may also have to compensate the OP for project development costs.

Under the å€œSwiss Challengeâ€œ system, on the other hand, a private sector partner submits a proposal, and the government agency awarding the contract must then invite comparative proposals in a public forum. Competitors then have the opportunity to better the OPâ€™s proposal. If the Government finds one of the alternative proposals as more appealing, the OP has an opportunity to match the proposal and win the contract.

Competitors in a å€œSwiss Challengeâ€œ environment generally perceive their chances of winning the contract as extremely slim, given the limited time for them to prepare competing proposals and the close relationships developed between the government officials involved and the original proponent during the negotiation period. Recent variations of the å€œSwiss Challengeâ€œ system, as in South Africa, have included a å€œBest and Final Offerâ€œ (BAFO) system with multiple rounds of tendering in which the OP is given the advantage of automatically participating in the final round; and in Argentina, where multiple rounds of tendering may take place if the difference between the OPâ€™s offer and the best offer made by its competitors is within a predetermined percentage essentially a hybrid of the å€œBonusâ€œ and the å€œSwiss Challengeâ€œ systems.

Asymmetry issues with unsolicited proposals

The very process of entertaining UNPs, and the subsequent award of such proposals through the å€œBonusâ€œ and å€œSwiss Challengeâ€œ route introduces various asymmetries into the procurement process. Firstly, there is an element of å€œinformational asymmetryâ€œ between an OP and its competitors, since the OP gets more time to prepare his preliminary and final proposals, often in the range of 6-12 months, often with considerable government assistance and sponsorship, while his competitors may only get as short as 2-3 weeks within which to devote their internal resources to come up with reasonably well-prepared competing offers.

Secondly, the å€œBonusâ€œ and å€œSwiss Challengeâ€œ systems introduce an element of å€œbidding asymmetryâ€œ between the OP and potential competitors. One element of this bidding asymmetry is the asymmetry on å€œtimeâ€œ of differing time-frames for project development to the OP and of responding to the RFP for its competitors: essentially, the OP gets considerably more time to respond and to submit a fresh counteroffer to the best evaluated proposal originating from its competitors. The second sub-element of bidding asymmetry is the å€œpriceâ€œ asymmetry in case of å€œBonusâ€œ system through a price preference within a price-band in favour of the OP; while there are both negotiation and price asymmetries in the å€œSwiss Challengeâ€œ system since only the OP essentially gets an opportunity to make the BAFO after one or more rounds of negotiation—an opportunity that is denied to its competitors who are not authorised to submit an equal number of negotiated responses.

Quite naturally then, there is some level of discomfort with widespread use of unsolicited proposals in the public sector on grounds of lack of transparency, and lack of fair and equal treatment of potential bidders.

There is some evidence that a number of public sector purchasers, perhaps the most notable being the World Bank, have started to ban or restrict unsolicited proposals. Thus, the World Bank, in its 2002 Procurement Guidelines, clearly states that unsolicited proposals will not be considered at all in its procurement process. A more recent document, the World Bank, 2006 Procurement Guidelines, while not entirely prohibiting the use of unsolicited proposals, clearly identifies that such proposals will be considered under limited circumstances only and that such proposals will be subject to the same scrutiny as solicited proposals. At the same time, the World Bank, 2006 Procurement Guidelines, explicitly states that its Procurement Guidelines are applicable to all of its projects, irrespective of whether the project is financed by the World Bank or by any other source. The World Bank, 2006 Procurement Guidelines, also states that its Procurement Guidelines are applicable to all of its projects, irrespective of whether the project is financed by the World Bank or by any other source.
Opposition to the use of the Swiss Challenge system has also been tactical: business entities have opposed the adoption of such special procedures in States where they are not the original proponents, while they could be simultaneously pursuing such projects in other States as OPs themselves. Sporadically, this competition for market shares has resulted in litigation in certain States in India, once the potential benefits of litigation appear to outweigh the costs.

Different States, different strokes A small number of States in India have adopted the Swiss Challenge procedure for competitive award of unsolicited proposals, but the modalities and details vary widely across States. For instance, Rajasthan’s (draft) Public-Private Partnership Policy, 2008 and Social Sector Viability Gap Funding Scheme of 2007 permit the Government to approve the scale and scope of a suo motu proposal or project undertaken through Swiss Challenge approach, but both these policies are silent on the modalities of implementation and selection of private partners through the Swiss Challenge route.

The Rajasthan Road Development Act (RRDA) offers better guidance for receipt and processing of UNPs in that it allows for the receipt of such proposals where no scheme has been initiated for the development of any road, and the accompanying rules require that such proposals are first technically and financially checked and certified to be viable, and after obtaining the administrative approval of the State Government, can be put to open competition with the modification that the OP is given an opportunity to take up the project on the lowest offered rates by any of its competitors.

Karnataka requires an assessment of UNP on parameters of public need, and technical feasibility/suitability, while the Andhra Pradesh Infrastructure Development Enabling Act (the APIDE Act) allows for adoption of the Swiss Challenge approach in cases of projects where:

- the government or government agency will be required to provide asset support;
- financial incentives in the form of contingent liabilities or direct financial support are required to be provided;
- exclusive rights are conferred on the developer; and/or
- extensive linkages i.e. support facilities for the project such as water connection, etc. are needed.

The PPP guidelines of the Government of NCT of Delhi do not provide for similar guidance on circumstances addressing allowability of receipt of UNPs, and time-frames for project development or for counteroffer by the OP. Gujarat, which was the first State in India to introduce a de facto Swiss Challenge based procurement procedure for the award of directly negotiated proposals, but its rules also do not adequately address the transparency issues noted by the Supreme Court in its verdict.

Formulating recommendations for reform An uncontrolled, unregulated environment for UNPs, or one that allows for UNPs to be entertained without clear guidance can be potentially problematic, and in such an ambiguous environment, the only time a genuine third party would actually become aware of the possibility of acceptance of an UNP is when an RFP has already been issued by the government agency soliciting counterproposals to an already accepted and processed unsolicited proposal. Lack of guidance is therefore not really an acceptable option for any of the States, as this lack of guidance would eventually translate into a non-transparent and non-uniform procurement regime: a situation that would go clearly against the important suggestions made by the Supreme Court in its recent verdict.

Overall, it is possible to identify a number of important sub-issues within each of these major elements; some of these being:

- content requirements—whether UNPs must relate to concepts and techniques that are new, unique, innovative, or non-obvious;
- purpose requirements—whether UNPs must satisfy public purpose, or government needs, and/or satisfy preliminary feasibility tests;
- whether UNPs are allowed only when full and open competitive processes are specifically determined to be unavailable or unsuitable;
- the extent of government involvement in project development—merely regulatory, or a deeper level of involvement through information and resource sharing;
- the extent of government participation in the project itself through funding, or through physical assets;
- the time of submission requirements—whether proposals can be submitted only if there is no RFP, or proposals can be submitted when there is no RFP and the proposals are not under consideration in government agencies in some form or the other;
- the reasonability and limitations of the time for an OP to deliver a fully developed project to the Government;
- the amount and reasonableness of time provided to the competitors to respond to the RFP, and time for the OP to respond and counter;
- the extent of information made available to competitors;
- the tradeability of OP’s rights; and
- the number of rounds of negotiations in a Swiss Challenge based approach: this could be one round of negotiation as
provided for in most frameworks, or the number of rounds could be more than one. In fact, the more the rounds of negotiations take place, the greater is the extent to which the OP’s valuation would be revealed to potential competitors, thus permitting better price testing of UNPs in the procurement marketplace. Based on the manner in which different national and international frameworks deal with some of these aspects, certain safeguards in the form of specific guidance appear to be necessary in order to address concerns over the possible misuse of the UNPs:

Firstly, the State procurement regulations should explicitly provide for allowability or unallowability of UNPs through specific insertion in procurement rules. Information must be made clearly available in procurement guidelines or in project announcements to include details on the type of special procedure permitted (â€œSwiss Challengeâ€ system, â€œBonus system or some other variant) and the quantum of preference (percentage of price-preference, number of rounds of negotiations permitted, and other relevant details).

Secondly, it may be examined if UNPs are to be permitted where they do not relate to new or innovative projects, or where the project is â€œobviousâ€ to a reasonably prudent person engaged in the relevant sector. For instance, a project using government land for roads may be too obvious to be treated as an UNP, and special treatment for the OP may result in a potentially unfair and non-best value decision by the Government.

Thirdly, not only should â€œpublic purposeâ€ and â€œpreliminary feasibilityâ€ tests be applied on such proposals, but there must be a specific determination that fully competitive methods are unsuitable for the particular acquisition. Such a determination must be made available in the public domain in a meaningful way for competitors to be able to be aware of the reasons behind such a determination, and procedures should preferably be put in place for them to challenge such a determination before a designated agency contact.

Fourthly, there should be no government involvement in project development for UNPs, or, where such participation is essential to project development, the Government must provide equal support to competitors to develop their responses as it does to the OPs. Where government participation is through public assets, details of such assets and any other resources that can be claimed should be provided equally and fairly to competitors so as to enable them to formulate their own proposals based on equal information, on a par with the OP.

Fifthly, UNPs may not be entertained when an RFP is announced or when the proposal is in response to known agency requirements. Specifically, UNPs could be permitted to relate only to those projects that are not under consideration or contemplation in the Government.

Sixthly, the time for competitors to prepare counterproposals should be reasonable in relation to the time taken by the OP to develop the project right from the stage of submitting the original UNP. Similarly, the time for the OP to counter must be relatively short, since the OP is anyway in a superior position in terms of project familiarity.

Seventhly, the amount of information placed in the RFP inviting counterproposals in the case of an UNP must not be less detailed than that in a normal RFP, thus requiring the government agency to provide sufficiently detailed information that a competitor may rely on to submit a meaningful offer to the solicitation.

Finally, trading of an OP’s rights to a price or negotiation advantage may need to be expressly disallowed, with strict requirements on the OP to perform the project as proposed, as any trading or rights may result in a first-come-first-serve situation with the kind of cybersquatting witnessed in the internet domain names registration process, or with spectrum squatting observed in the allocation of telecom spectrum in a number of countries, including India.

Each one of these recommendations can be further detailed and fine-tuned so as to provide better guidance, and the suggested measures should lead to greater transparency and uniformity in the use of UNPs. Adoption of these recommendations will also encourage and incentivise the submission of sound, truly innovative projects by OPs in the first place, and enhance bidder confidence and participation at all stages of the procurement, thus harnessing the strengths of UNPs in providing innovative and unique solutions to the country’s public infrastructure needs.

* Sandeep Verma has been a member of the Indian Administrative Service since 1993, and can be reached at svurma.ias@gmail.com. He obtained his Bachelorâ€™s and Masterâ€™s degrees in Engineering from IIT, Delhi and LLM with highest honours from George Washington University Law School, Washington DC, with specialisation in Government Procurement Law. Views expressed are purely academic and personal.
- Ibid.
- Ibid.
- PPIAF was launched in 1999 as a joint initiative of the Governments of Japan and the United Kingdom, with inputs
from the World Bank Group’s Infrastructure Action Program. It is a multi-donor technical assistance facility created to help Governments in developing countries improve the quality of infrastructure through partnerships with the private sector.

- See, PPIAF website for a status report on the project; see also generally, PPIAF, â€œToolkit: A guide for hiring and managing advisors for private participation in infrastructureâ€•, available online.
  - Ibid. at para 62.
  - Ibid.
  - United States, 48 CFR Â§ 15.603.
  - Ibid. at p. 3; see also, supra, n. 1 at pp. 2-3.
  - Ibid. at pp. 3-4; see also, supra, n. 1 at pp. 3-4.
  - Supra, n. 1 at pp. 35-36.
  - List of countries compiled from Hodges, supra, n. 11, and also supra, n. 1.
  - Supra, n. 11 at pp. 1-2; supra, n.1 at p. 2, and vii at pp. 7 and 8. In South Korea, while the bonus translates into additional points in the total score when evaluating the proposal, the net effect turns out to be the same as the case when the original proponentâ€™s offer being selected if within a stipulated percentage of the best offer in the competitive process.
- Supra, n. 1 at p. 8.
  - Ibid. at pp. 8-9.
- Supra, n. 1 at pp. 9-10.
- There is another informational asymmetry possible: that between the Government and the OP, where the OP arguably has better knowledge of the project vis-à-vis the Government. However, this asymmetry exists in differing degrees in most procurement systems unless the Government drafts extremely detailed specifications and holds bidders or offerers to meet such exacting specifications.
- Asian Development Bank, â€œDeveloping Best Practices for Promoting Private Sector Investment in Infrastructure â€” Roads, ADB (2001)â€•, at p. 120.
- ADBâ€™s procurement guidelines, last updated 2007, may be seen at (The World Bank procurement guidelines, last updated 2004, are available online at .
- Bob Finlayson, â€œPhilippines: Case Study on Private Sector Development and Operationsâ€• ADB (2007), 7 at p. 3.
- Supra, n. 1.
  - Supra, n. 14.
  - Ibid., Recommendation 31, at xvii; Notes III-E-2(c), 113(a) at p. 95; Ibid., Model Provision 22(2) at p. 18.
  - Government of India, â€œGuidelines for Formulation, Appraisal and Approval of Central Sector Public Private Partnership Projects (2008)â€•, available online , at iii, 10 at 3, 3.1(ii)(a) at 14, 8.1 at 16; and 8.1, at 25; Govt. of India, â€œScheme and Guidelines for Financial Support to Public Private Partnerships in Infrastructure (2008)â€•, available online , 3.5 at 2; 6(1) at 8; and 6.1 at 3. However, it appears that the Govt. of India, at an earlier point of time in 2007, had allowed for UNPs and for special competitive procedures, a policy that seems to have been subsequently withdrawn in favour of fully competitive procedures. See, BangaloreBuzz, â€œSwiss Challenge is a NICE headache (30-7-2007)â€•, available online.
  - Central Vigilance Commission Office (India): Order 68/10/05 dated 25-10-2005 (available online ) and Circular 4/3/07 dated 3-3-2007 (available online ). See also, Central Vigilance Commission (India): Office Order No. 23/7/07 dated 5-7-2007 (available online ).
  - North-East Watch, â€œPlanning Commission Seeks Statesâ€™ Stand on PPP (27-8-2008)â€•, available online .
  - Planning Commission of India, â€œReport of the PPP Subgroup on Social Sector (2004)â€•, 2.2.2(ii) at p. 8.
  - Planning Commission of India, â€œReport of the Working Group on Coal and Lignite for Formulation of Eleventh Five Year Plan (2007-2012) (2006)â€•, at p. 21, 16.6(10) at p. 172; and 45 at p. 197. The Report of the Working Group on Coal and Lignite constituted by the Planning Commission of India for the formulation of Eleventh Five Year Plan recommends that in case of unsolicited projects proposed suo motu by private entrepreneurs/companies or singular bids, the merits of the
proposal need to be evaluated by the Government to ensure fairness, impartiality and cost effectiveness; and that the "Bonus System" or the "Swiss Challenge System" of competitive bidding should be followed where the claims, veracity and global competitiveness of the unsolicited proposals could be put to open test by inviting competitive proposals from other market players (Ch. 16 of the Report, part 16.1-II-10, at p. 172).

- Supra, n. 13.
- Ibid., 7(i) at p. 5.
- RRDA, Â§Â§ 2(d) and 5(1).
- Rajasthan Road Development Rules (2002), Rule 6(2).
- APIDE Act, Schedule II, Item 2.
- Gujarat Infrastructure Development Act (Government of Gujarat, Act 11 of 1999), Â§ 10(1)(i) and (1)(ii).
- This critical aspect of informational asymmetry in Swiss Challenge-based contracting systems, though noted in Ravi Development, (2009) 7 SCC 462, does not appear to have been addressed in the Supreme Court verdict.