

**K.R. GIRISH**

President

20<sup>th</sup> February, 2010

Mr. V. Madhu, IAS  
Principal Secretary,  
Infrastructure Dev. Dept.  
Government of Karnataka  
Room - 28, Vikasa Soudha,  
Bangalore - 560 001.

Dear Sir,

**Representation on Swiss Challenge Guidelines to IDD  
(Infrastructure Development Department) Government of Karnataka (GoK)**

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The objective of this Memorandum prepared by Members of the Infrastructure Expert Committee of our Chamber is to consider providing adequate incentives by Government of Karnataka to private sector Project Proponents in general and suo moto initiators of Swiss Challenge projects in particular.

This Representation relates to the thresholds introduced in the '**Draft Guidelines for Procurement of PPP projects through Swiss Challenge proposals route**', issued by the **Infrastructure Development Department (IDD), Government of Karnataka (GoK)**.

The essence of a swiss challenge model is that the State can attract ingenious and innovative proposals from private sector (Project Proponents), which when implemented will capture considerable value for the state and the public at large. The model should therefore provide adequate incentives to the 'Project Proponents'.

It is critical for the person submitting an innovative proposal to continue being the project proponent throughout the process, so that he/she has the opportunity to match any competing bids that may arise, as and when the state invites bids from third parties.

In a swiss challenge model, the project proponent initiates a suo moto proposal and undertakes feasibility studies and submits a Detailed Project Report (DPR), because his position as the project proponent would be protected by the state and he would have the opportunity to match any superior bids that may be presented to the state subsequently. Consequently, if the state were to deprive the project proponent of such opportunity and merely offer monetary compensation for the expenses incurred by such proponent, it would not provide a private sector participant any incentive to initiate a Suo moto proposal. In any event, project proponents do not participate in swiss challenges because of the safety net of compensation. They do so because of the opportunity to submit innovative proposals and because of the certainty that their right to match a competing bid will continue to be protected by the state.

We are sure, in light of the concerns expressed by our Members, the Government of Karnataka will take adequate and immediate steps in providing the necessary incentives to private sector Projects Proponents and remove the restrictions on them for the overall development of industry and trade.

Thanking you,

Yours faithfully,

**K.R. GIRISH**

## New Guideline versus Existing Guideline and Observations on New Guideline

Clause No.	New Guideline	Existing Guideline	Observation
4.7	<p>Proposal Initiator shall submit a detailed proposal, through Annexure VI, within time period as mentioned in para 4.6, to the department containing:</p> <p>i. Detailed Project Report (DPR contents as per Annexure v). The DPR would establish (a) Project's capital expenditure and financing plan (b) operational expenditure and Revenues (c) extent of land being sought (d) Support sought from Government, with all support converted to monetary equivalents (e) Utility relocation plan (f) Environmental Impact Assessment (g) Social Impact Assessment</p> <p>ii. The Proposal Initiator's role in the proposed concessionaire company and its ability to construct and /or operate the project as per the qualification norms in the Model RFQ published by GOI and prescribed by GoK.</p> <p>iii. Direct cost of preparing the DPR, which is certified by an audit agency (broken up into external payout, internal cost, out-of-pocket</p>	<ul style="list-style-type: none"> <li>• A Private Sector Participant (Proposal Initiator) may submit a suo-moto/ innovative proposal (Original Proposal) to GoK/ GoK Agency for setting up an Infrastructure Project containing the following: <ul style="list-style-type: none"> <li>• Articulation of the public need for the project</li> <li>• Requisite technical details, i.e., details of alignment/site, estimates of cost, etc.</li> <li>• Cost incurred by the Proposal Initiator for the development studies related to the project.</li> </ul> </li> <li>• GoK would, in the first instance, assess the public need for the Infrastructure Project. In case the Infrastructure Project is found to satisfy a public need, GoK would assess the technical feasibility/ suitability of the Original Proposal and modify the same, if required. GoK may carry out additional studies for the project, if required.</li> <li>• After evaluating the proposal and considering it suitable, GoK would, put up competitive bidding for counter proposals ("Swiss Challenge"). The Original Proposal (except proprietary information and details of the financial proposal) and contract principles of the Original Proposal would be made available to any</li> </ul>	<ul style="list-style-type: none"> <li>• Section 4.7 (i) of the Guidelines mandate that the detailed project report ("DPR") submitted by the proposal initiator must provide complete details of the financing of the project, the various sources for such financing and the exact amounts being provided by such sources as part of the financing. Although the proposal initiator will be providing such information as part of the bid in a sealed cover to the relevant administrative department, providing such financial information as part of the DPR is prejudicial to the interests of the proposal initiator. Since the challengers will be provided with a copy of the DPR (being part of the transaction documents as specified in Section 4.9 (v) of the Guidelines), such price sensitive information of the proposal originator is made easily available to all the challengers.</li> <li>• This hampers level playing field being made available to the proposal initiator. It is likely that such price sensitive information will be misused by the challengers to prepare a quote which is lesser than that of the proposal initiator. To ensure fair play to the proposal initiators, it is necessary that only broad heads of financial information is specified in the DPR. The proposal initiator however should be mandated to provide all other details to the relevant</li> </ul>

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	<p>expenses and taxes; accompanied by original receipts).</p> <p>iv. Bid Value for the project to be submitted in a sealed cover in Format in Annexure VIA (the sealed cover shall not be opened until the process in para 4.12).</p> <p>Interest free Bid Security equivalent to 0.75%/ 0.5% of the estimated project cost (Upto Rs 2000 Crore/ above Rs 2000 Crore) through a demand draft or bank guarantee, acceptable to the authority, with a validity period of not less than 180 days (including claim period of 60 days) to be extended as may be mutually agreed from time to time. The Bid shall be summarily rejected if it is not accompanied by the Bid Security. Bid security shall be forfeited under conditions as prescribed in Model RFP issued by DEA, GOI.</p>	<p>interested applicants. If the competitive bidding process results in a superior proposal, the Proposal Initiator would be given an opportunity to match the competing counter proposal within a stipulated time-frame, and be selected as the project concessionaire. If the Proposal Initiator declines to match the superior counter proposal, then the applicant that has made the superior proposal would be selected as the concessionaire. Upon such selection, GoK/ GoK Agency concerned shall cause/ arrange to reimburse to the Proposal Initiator, a part or the whole of the development costs, as determined upfront and declared in the bidding documents, and may recover the same from the successful bidder.</p>	<p>administrative department or nodal agency, at the time of submission of bid in a sealed cover.</p> <ul style="list-style-type: none"> <li>• Section 4.7 (v) specifies that interest free bid security equivalent to 0.75% in case of projects where the estimated cost is upto Rupees 2,000 crores and 0.5% in case of projects where the estimated cost is above Rupees 2,000 crores must be paid by the proposal initiator. Infrastructure projects proposed under Swiss challenge, are generally diversified and therefore a waterfall of <ul style="list-style-type: none"> <li>• 0.25% in case of estimated project cost being above Rupees 10,000 crores,</li> <li>• 0.50% in case of estimated project cost being within Rupees 5,000 crores and Rupees 10,000 crores,</li> <li>• 0.75% in case of estimated project cost being within Rupees 2,500 crores and 5,000 crores and</li> <li>• 1.00% in case of estimated project cost being less than Rupees 2,500 crores should be considered</li> </ul> </li> </ul>
4.9	The administrative department shall carry out, along with PPP Cell of the Infrastructure Development Department, the following exercise <sup>2</sup> :	<ul style="list-style-type: none"> <li>• GoK would evaluate all proposals received for any Infrastructure Project. GoK may also choose to</li> </ul>	<ul style="list-style-type: none"> <li>• Section 4.9(iv) specifies that the development fee that may be recovered by the proposal initiator must</li> </ul>

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	<p>i. Detailed examination of the submitted documents by the Proposal Initiator as in para 4.7.</p> <p>ii. Examination of technical feasibility of DPR to identify aspects of the technology, which is replicable through other means. (The guiding principle shall be 'output based specification' for meeting certain service objectives not favoring any particular technology).</p> <p>iii. The administrative department may carry out additional studies for independently determining the project cost, project revenues, viability and risk analysis etc., if required including Value for Money test (It represents difference in costs of the service provided by public entity and by the private entity in NPV terms) to ensure proper benchmarking.</p> <p>iv. Based on para 4.9 (iii), the department shall then negotiate the cost of preparation of the DPR with the Proposal Initiator and ensure that</p>	<p>appoint suitable external advisors or consultants, where necessary, for the purposes of evaluation</p> <ul style="list-style-type: none"> <li>• In order to facilitate expeditious project implementation, GoK would endeavour to conclude the evaluation process for all Infrastructure Projects within 90 days from the date of submission of the final proposals. In the case of suo-moto proposals, GoK would decide to proceed with the bidding process within 180 days of their submission.</li> <li>• In any event, GoK would endeavour to provide all necessary State-level clearances and enable implementation of any Infrastructure Project being taken up through Public Private Partnerships within 180 days from the date of submission of the final proposals for such project.</li> </ul>	<p>be subject to a limit of 0.25% of the estimated project cost. Since the proposal initiator not only conceptualizes the project, conducts various studies to make such project feasible and transfers the proprietary information to the relevant administrative department and challenger, the fee payable to the proposal initiator should be compensatory to the efforts proposal initiator. Therefore a waterfall of</p> <ul style="list-style-type: none"> <li>• 0.50% in case of estimated project cost being above Rupees 10,000 crores,</li> <li>• 0.75% in case of estimated project cost being within Rupees 5,000 crores and Rupees 10,000 crores,</li> <li>• 1.00% in case of estimated project cost being within Rupees 2,500 crores and 5,000 crores and</li> <li>• 1.50% in case of estimated project cost being less than Rupees 2,500 crores should be considered.</li> </ul>

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	<p>such costs are reasonable and justifiable subject to a limit of 0.25% of the project cost determined in 4.9 (iii) or 0.25% of project cost as estimated by the Proposal Initiator or cost of DPR determined in 4.9 (v), whichever is lower.</p> <p>v. Preparation of the Transaction Documents<sup>3</sup> for bidding namely- (a) RFQ/RFP based on Model RFQ/RFP of GOI, (b) Reconstructed DPR with output based specifications (c) Draft concession agreement as per Model Concession Agreements (MCA) or frameworks (d) the cost of development.</p> <p>The administrative department may also determine development cost of the project.</p>		
4.13	<p>If the competitive bidding process results in a superior proposal<sup>5</sup>, the Proposal Initiator would be given an opportunity to match the competing counter proposal only if the Proposal Initiator's bid value is within 15% of the superior bid value and be selected as the project concessionaire.</p>	<ul style="list-style-type: none"> <li>• After evaluating the proposal and considering it suitable, GoK would, put up competitive bidding for counter proposals ("Swiss Challenge"). The Original Proposal (except proprietary information and details of the financial proposal) and contract principles of the Original Proposal would be made available to any interested applicants. If the competitive bidding process results in a superior proposal, the Proposal Initiator would be given an opportunity to match the</li> </ul>	<ul style="list-style-type: none"> <li>• Paragraph 4.13 of the draft guidelines which stipulate the 15% threshold, runs contrary to the touchstone principles denoted in the Karnataka Infrastructure Policy – 2007. Paragraph 29 of the Karnataka Infrastructure Policy clearly denotes that the "Proposal Initiator" in swiss challenges should be given an opportunity to match the subsequent competing bids within a specific time frame. The policy does not contain any value thresholds for</li> </ul>

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		<p>competing counter proposal within a stipulated time-frame, and be selected as the project concessionaire. If the Proposal Initiator declines to match the superior counter proposal, then the applicant that has made the superior proposal would be selected as the concessionaire. Upon such selection, GoK/ GoK Agency concerned shall cause/ arrange to reimburse to the Proposal Initiator, a part or the whole of the development costs, as determined upfront and declared in the bidding documents, and may recover the same from the successful bidder.</p> <ul style="list-style-type: none"> <li>•</li> </ul>	<p>disqualification.</p> <ul style="list-style-type: none"> <li>• In a swiss challenge model, unless the project proponent is reasonably certain that he/she will have the opportunity to match any competing bids, irrespective of the size and quantum of such bids, he/she will have no incentive to submit an innovative proposal to the State. Further, he/she will also have no incentive to spend a considerable amount of time, energy and money to conduct feasibility studies and submit Detailed Project Reports.</li> <li>• In particular, paragraph 4.13 of the draft guidelines mandates that the project proponent will have the opportunity to match a subsequent superior competing bid only if the project proponent is within fifteen per cent (15%) of the subsequent superior bid in terms of value. The introduction of a cut off threshold of fifteen per cent (15%), which in effect disqualifies the Project Proponent and deprives him the opportunity to match the subsequent superior bid, runs contrarian to the pith and substance of a Swiss Challenge model. Providing an opportunity to the Project Proponent to match the subsequent superior bid is the essence of a Swiss Challenge mechanism. Further, providing such an opportunity to the Project Proponent would not in any manner harm the financial interests of the State, as the Project</li> </ul>

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			<p>Proponent would have to match the superior bid, if he desires to continue as the executor of the project.</p> <ul style="list-style-type: none"> <li>• Section 4.13 of the Guidelines specifies that if the competitive bidding process results in a superior proposal, the proposal initiator would be given an opportunity to match the competing counter proposal if and only if the proposal initiator's bid value is within 15% of the superior bid value. This restricts the right of the proposal initiator to challenge any counter proposal which is more than 15% of the superior bid value and is contrary to the pith and substance of a Swiss challenge form of procurement.</li> <li>• Swiss challenge form of procurement has been recognized by eight other states in India other than Karnataka, namely: <ul style="list-style-type: none"> <li>• Maharashtra;</li> <li>• Gujarat;</li> <li>• Andhra Pradesh;</li> <li>• Punjab;</li> <li>• Madhya Pradesh;</li> <li>• Uttaranchal;</li> </ul> </li> </ul>

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			<ul style="list-style-type: none"> <li>• Rajasthan; and</li> <li>• Chhattisgarh.</li> <li>• The framework applicable for Swiss challenge form of procurement in each of the states specified above requires that competitive bidding must be followed to select the superior proposal and that the proposal initiator should be given the opportunity to match the superior proposal. The frameworks do not curtail the rights of the proposal initiator to challenge a superior proposal. In the absence of any precedents, such restrictions envisaged in the Guidelines not only discourages proposal initiator, but is also contrary to the spirit of fair play and level playing field which is the fundamental principle underlying the tendering process in India.</li> <li>• Similar thresholds for disqualification do not exist in Swiss Challenge Legislations / Regulations promulgated by other States in the Country, notably Gujarat, Andhra Pradesh, which boast of an impressive track record of development of Infrastructure Projects under PPP.</li> <li>• The following are a few examples of swiss challenge regulations applicable in other states of the country, which Do Not contain the fifteen percent (15%)</li> </ul>

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			<p>threshold for disqualification.</p> <ul style="list-style-type: none"> <li>• The Gujarat Infrastructure Development Act, 1999 does not impose any restrictions on the right of the project proponent to match superior bids, irrespective of the quantum of difference between the original proposal and the subsequent superior bid.</li> <li>• The Andhra Pradesh Infrastructure Development Enabling Act, 2001 does not impose similar restrictive thresholds. The legislation merely denotes a time frame within which the project proponent should match the subsequent superior bid.</li> <li>• The Bihar Infrastructure Development Enabling Act, 2006 does not impose any restrictive threshold. The Act merely mandates that the project proponent should match the subsequent superior bid within a specified time frame.</li> <li>• Even internationally, the norm is Not To introduce any disqualification thresholds in terms of value of the bid. It is an accepted norm internationally in Swiss Challenge processes that the Project Proponent can match the subsequent bid, whatever the difference is, within a specified time frame. The Swiss Challenge guidelines applicable to projects in Taiwan; the City of Toronto; and Guam (a protectorate of the USA) – all</li> </ul>

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			<p>contain stipulations in terms of time within which the Project Proponent should match subsequent superior bids. None of the regulations contain any thresholds in terms of value that disqualify the Project Proponent.</p> <ul style="list-style-type: none"> <li>• Paragraph 4.13 of the draft guidelines is not in tune with the above philosophy. It imposes unreasonable restrictions on the rights of a project proponent and those restrictions run contrary to the essence of a swiss challenge model.</li> <li>• Although it is the intention of the PPP Cell to prevent frivolous proposals, the Guidelines thwart the spirits of an entrepreneur to develop socially beneficial projects through Swiss challenge procurement. The essence of the Swiss Challenge form of procurement is that the proponent is given the opportunity to either match the superior challenge or decline to do the same. This should be left as is.</li> <li>• At a time when various states within the country and for that matter various countries in the world are vying one with the other to attract and retain private sector initiative / investment as a vehicle for development, economic growth and well being of the people, GoK should not be seen as lagging behind in providing adequate incentives to private sector</li> </ul>

Clause No.	New Guideline	Existing Guideline	Observation
			Project Proponents in general and suo moto initiators of Swiss Challenge projects in particular.