

AS INTRODUCED IN THE RAJYA SABHA
ON THE 21ST JULY, 2017

Bill No. XX of 2017

THE PRIVATELY FINANCED INFRASTRUCTURE PROJECTS
(REGULATION OF SWISS CHALLENGE METHOD OF
PROCUREMENT) BILL, 2017

A

BILL

*to regulate the acceptance of unsolicited proposals from the private sector through
Swiss Challenge method of procurement in respect of infrastructure project in the
country and for matters connected herewith or incidental thereto.*

WHEREAS it is essential to adhere to general principles of transparency, economy and fairness in the award of contracts for infrastructure projects by public authorities;

AND WHEREAS the Constitution guarantees the Equality before law under article 14 to all persons and the right to carry on any occupation, trade or business under article 19 (1)(g) to all its citizens;

AND WHEREAS the Swiss challenge method of procurement creates information asymmetry and bidding asymmetry between original proponent and its competitors thus violating Fundamental Rights under article 14 and article 19 (1)(g) of the Constitution;

AND WHEREAS the Committee on Revisiting and Revitalising Public Private Partnership Model of Infrastructure has also recommended that Swiss Challenge method of procurement should be actively discouraged;

BE it enacted by Parliament in the Sixty-eighth Year of the Republic of India as follows:—

Short title,
extent and
commencement.

1. (1) This Act may be called the Privately Financed Infrastructure Projects (Regulation of Swiss Challenge Method of Procurement) Act, 2017.

(2) It extends to the whole of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. 5

Definitions.

2. In this Act and in any rules made thereunder, unless the context otherwise requires,—

(a) "appropriate Government" means in the case of a State, the Government of that State and in other cases, the Central Government;

(b) "contracting authority" means the public authority having power to enter into a concession contract for the implementation of an infrastructure project; 10

(c) "developer" means any private sector participant who has entered into a contract for the infrastructure project with the appropriate Government or a local Authority;

(d) "infrastructure facility" means public work relating to infrastructure for utilising the natural resources and providing services by either public works of physical structure or systems for facilities or commodities or utilisation of resources or provision of services; 15

(e) "infrastructure project" means the design, construction, development and operation of new infrastructure facilities and includes the rehabilitation, modernisation, expansion or operation of existing infrastructure facilities; 20

(f) "Swiss challenge method" means processing of an unsolicited proposal submitted by a private sector participant (whereby called original project proponent) for undertaking an infrastructure project not initiated by the appropriate Government or a local authority having following characteristics:— 25

(i) The appropriate Government or the local authority invites competitive counter proposals on the proposal submitted by original project proponent;

(ii) The applicants submitting counter proposals are having opportunities to better the proposal of the original project proponent;

(iii) The appropriate Government a Committee, if finds one of the competitive counter proposal better than proposal of the original project proponent, the original project proponent is given opportunity to match that counter proposal to win the project; and 30

(iv) If the original project proponent does not match that counter proposal, the project is awarded to applicant submitting that counter proposal. 35

(g) "unsolicited proposal" means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure and which is submitted by any private sector participant to the appropriate Government or a Local Authority in respect of any infrastructure in the State supported by project specifications, technical, commercial and financial viability and *prima facie* evidence of the financial and technical ability of such private sector participant to undertake such project with full details of composition of the private sector participant and his financial and business background. 40

3. The contracting authority shall, in relation to an infrastructure project, have the responsibility and accountability to,—
- (a) ensure efficiency, economy and transparency;
- (b) provide fair and equitable treatment to bidders;
- 5 (c) promote competition;
- (d) ensure that the price of successful bid is reasonable and consistent with the quality required; and
- (e) evolve mechanisms to prevent corrupt practices.
4. The contracting authority shall ensure adequate competition in the developer selection process for any infrastructure project.
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5. (1) Notwithstanding anything contained in any other law for the time being in force, but save as hereinafter provided no contracting authority shall adopt the procedure of Swiss challenge method for any infrastructure project:
- Regulation of Swiss challenge method of procurement.
- Provided that the contracting authority may notify the projects which may be awarded under Swiss challenge method and no case, such project shall exceed an amount of rupees one hundred crore.
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- (2) The appropriate Government shall frame rules regarding in general and not being limited to the following:—
- (a) the nature of Swiss challenge method and its particulars;
- 20 (b) the nature of projects that may come under such method;
- (c) the authorities to be approached with respect to the project plans;
- (d) the various fields of the projects that may be considered under the method;
- (e) time limits on the approval of the project and respective bidding:
- Provided that no such project shall be proposed for Swiss challenge method unless such project is approved by a Committee duly constituted for the purpose as may be prescribed with such public notice as is necessary for the project.
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6. The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.
- Power to make rules.

STATEMENT OF OBJECTS AND REASONS

The role of private sector in the development and management of infrastructure projects has increased manifold in the recent years. This has created the challenge of ensuring economy, transparency and fairness in awarding of contracts for infrastructure projects in order to uphold democratic functioning of the country.

The Constitutional Bench of the Supreme Court of India in Natural Resource Allocation, in Re, Special Reference No. 1 of 2012 held that the allocation of any resources of a country should meet the twin constitutional tests, *viz.* the natural resources that vest in the State should be allocated to sub-serve the common good; and the allocation should not be considered arbitrary and thus be violative of article 14 of the Constitution. The Constitutional bench also held that auction is the preferable method for allocation of projects and any deviation from auction must be justified by compelling reasons and not just by convenience.

However, Governments have been increasingly using the Swiss challenge procurement method for infrastructure projects under this method, the original project proponent submits an unsolicited proposal for undertaking the project and then the Government invites competitive counter proposals. The Swiss challenge procurement route creates informational asymmetry and bidding asymmetry between the original proponent and its competitors, thus creating avenues for rent seeking. While the world over, modern tools of disposal of public authority have increasingly been adopted, having regard to the fact that a level-playing field is to be ensured for all citizens to participate in projects involving private participation, it is necessary that except in exigency, or projects requiring performance of highly advanced technological process, Swiss-challenge method of awarding projects ought to be done away with. It is also necessary that a detailed prior study is undertaken by a designated authority to lay down parameters on the basis of which a State or State undertaking can be legitimately enabled to resort to such process with in-built safeguards against any favouritism against any entity.

Therefore in order to ensure transparency, economy and fairness in the awarding of contracts for infrastructural projects, the Swiss challenge method should be regulated.

Hence this Bill.

V. VIJAYASAI REDDY

MEMORANDUM REGARDING DELEGATED LEGISLATION

Clause 6 of the Bill empowers the Central Government to make rules for the purposes of this Bill. The rules relate to matters of details only.

The delegation of legislative power is of a normal character.

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(Shri V. Vijayasai Reddy, M.P.)