

India Legal Update is a journal of Singhanian & Partners. Its objective is to offer a legal perspective on the new business climate and opportunities in India in keeping with the existing laws, and present a panorama of the current happenings and events in Corporate India.

# INDIA LEGAL UPDATE

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VANTAGE POINT

RAVI SINGHANIA

## India's Economic Growth Offers Premium Opportunities

Despite the current economic slowdown sweeping the globe, the Indian economic juggernaut is chugging along at a steady pace. Rated as the second fastest growing economy in the world during all of the past five years, Indian economy has grown at an impressive 7 per cent. Reflecting on this high growth rate, International Monetary Fund (IMF) senior official Charles Collyns attributes this to India's strong internal growth dynamics, fuelled by the high productivity growth and its rolling integration with the global economy.

Spurred by its immense human capital, the increased competitiveness of its enterprise and also its intrinsic resilience to the global meltdown, India is expected to continue on its course of high economic growth rate with only a minor effect of the current recession.

If this economic growth rate is to keep pace, there is an acute need to augment the infrastructure facilities across the country. The Government of India is sentient of this need and also the fact that if the infrastructure building process has to be hastened, without compromising on quality, creativity, funding, and accountability, it must take the private sector on board. The concept of public private partnership (PPP) is born out of this sound and all-inclusive philosophy.

Broadly pertaining to long-term partnerships between public and private sector agencies, specially targeted towards financing, designing, implementing, and operating infrastructure facilities and services that were traditionally provided by the public sector, PPP from now on has to be the flagship of India's economic growth.

Not only has the Government notified many more new areas for such partnerships, it is also eager to set a level playing field for its partners, by defining new guidelines, new laws and legislations. This makes the environment more friendly and thriving for the private players both from overseas and within the country and encourages them to hitch their economic growth goals to the Indian juggernaut. Enormous opportunities await those who are willing to farm new pastures. The caveat however is that before jumping on to the bandwagon, the private partner must be well apprised of the rules and regulations and the laws which define such foremost issues as the conflict of interest, accountability, valuation of assets, contingent liability, and exit and termination clauses on this land.

The Government of India is eager to set a level playing field for its partners, by defining new guidelines, new laws and legislations. Enormous opportunities await those who are willing to farm new pastures. Despite the global recession, the Indian economic juggernaut is chugging along at a healthy 7 per cent.

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## New Guidelines for Public Private Partnerships

Affirmative Action for culling inequality, bringing parity between the public and private sector

AAKANKSHA AGARWAL

The public-private partnership model has emerged as the favoured prototype of project execution in India, especially in areas related to infrastructure development, health and education. Partnerships between the public and private sectors, in both social and economic spheres, establish a fundamental basis of further development and improvement of society. This phenomenon is currently applied in all spheres of activity in societies worldwide as the essential element and impetus for economic enrichment and social growth.

Numerous political, administrative and civic—both universal and specialized—agencies, organisations and corporations at both national and international levels work to encourage partnerships between public and private sector officials. Although the partnerships are helpful for all countries including developed countries, they may be particularly useful for development of the countries in economic transition.

The public-private partnership (PPP) model has been in practice in India for some years. Of recent, the guidelines governing PPP have undergone significant revision. The central theme of the new guidelines focuses on bringing parity between the public and private sector and, at the same time, cull such rules, regulations and practices which pits the public sector inequitably against the private sector.

### What PPP stands for?

PPP broadly refers to a longterm partnership between a public and private sector agency, specially targeted towards financing, designing, implementing, and operating infrastructure facilities and services which were traditionally provided by the public sector. In a PPP, each partner, usually through legally binding contract(s) or some other mechanism, agrees to share responsibilities

related to implementation and/or operation and management of a project.

### The Concept

PPP is a mode of implementing a government programme/scheme in partnership with the private sector. The term private in PPP encompasses all non-government agencies such as the corporate sector, partnership firms, individuals and community based organizations. PPP subsumes all the objectives of the service which was being provided earlier by the government, without compromising it any bit. Essentially, the emphasis shifts from a direct delivery of services to service management and coordination.

The roles and responsibilities between partners may vary from sector to sector. While in some partnerships the private provider may be a significant player, yet in others it may only have a minor role.

PPPs can take many forms. The partnership could range from complex public-private teaming and workshare arrangement to a straightforward lease of DoD facilities or equipment by the private sector.

In a teaming arrangement, the public and private partners accomplish DoD work jointly through a contractual relationship. Some partnerships are established by contracts under statutory authority and some as arrangements pursuant to Memorandum of Agreement (MoA) or other non-contractual agreements.

In a workshare arrangement, each partner works separately to accomplish a portion of the workload.

Partnerships can range from joint public-private undertakings, to private participation in some aspect of DoD production to direct sales of articles/services by a private partner.

PPPs have flexible characteristics; and each partnership should reflect the unique objec-

tives that are the basis of the partnership as well as the particular needs of the partners and the resources to be shared.

### Priority Sectors for PPP

- Information technology related projects
- Transportation—roads, bridges, road transport and related areas
- Urban infrastructure including:
  - Water supply;
  - Sewage disposal and treatment;
  - Urban roads and street lighting;
  - Solid waste management;
  - Parks;
  - Urban mass transit system;
  - Parking facilities,
  - Park and ride facilities;
  - Effluent treatment and related activities;
  - Disposal of bio-medical wastes
- Industrial estates, industrial parks, modern industrial townships and special economic zones
- Water conservation and management
- Food processing and post harvest facilities like warehousing facilities and cold chains, and marketing infrastructure for agricultural produce
- Super-specialty health care facilities and medical research and treatment facilities
- Tourism related facilities and infrastructure
- Power sector including power generation and transmission infrastructure
- Infrastructure for giving boost to technical education

### New Guidelines on PPP

The Committee of Secretaries, Government of India has evolved new guidelines, which have been approved by the Deputy Chairman of Planning Commission and the Finance Minister.

Any private player that wishes to step into a PPP arrangement, needs to consider the new guidelines carefully. The new guidelines address several important issues including those relating to conflict of interest, accountability of public sector entities, valuation of assets, contingent liability, and the exit and termination clauses. Some of the salient points of these new guidelines are as follows:

### Segregate between the "regulatory" and "corporate" roles of government agencies

In the PPP model, government agencies often have a minority equity participation, yet the accountability almost entirely rests on the



private entity. With the new guidelines, the regulatory and corporate interests of government agencies would stand separated, and this anomaly will disappear.

The objective is to bring about the much-needed accountability in the implementation and operations of core infrastructure projects. Core agencies like Airports Authority of India, Indian Railways and major ports would not be allowed to directly participate in PPP projects any longer, since such a function on their part causes a conflict between corporate interests and policy-making (regulatory) functions.

The future PPP ventures will be promoted through agreements where the regulators will lay down the basic rules in which companies can operate at their best. Joint ventures, with a direct equity participation of government agency, will be permitted only where no clash of interests exists.

### No equal JV between a private firm and a government company

Under the new guidelines, equal joint ventures (JV) between a private firm and a government company will no longer be allowed in the infrastructure sector. The move aims to fix responsibility of the project with the majority owner and prevent a deadlock on matters of public interest. The equity stake will also define the public or private character of the JV.

The new guidelines bar 50:50 JVs between the private and public entities, since such



New guidelines have now been framed to foster the public-private partnership model in India. The central theme of these new guidelines focuses on bringing parity between the public and private sector and, at the same time, cull such rules, regulations and practices which pits the public sector inequitably against the private sector.

The new guidelines apply to all Central Ministries and Departments, statutory entities and central Public Sector Undertakings. They will benefit the core infrastructure areas like power, roads, railways, shipping and aviation, and health and education. The estimates are that India will be requiring investments to the tune of \$500 billion for its infrastructure development during the current 5-year plan.



shareholding patterns create confusion over accountability and escape the scrutiny of government agencies. Such ventures between public and private companies in future will be regarded as a private entity irrespective of the shareholdings.

**Prohibits Regulators and Government entities from the construction and management of PPP projects through JVs**

The new rules prohibit regulators and government entities such as Port Trust, Airports Authority of India, Railways, National Highways Authority of India from undertaking construction and management of PPP projects through JVs. They have to detach their regulatory functions from commercial interest and implement all future PPP projects by creating a separate entity for a given project.

**Bars government officials from becoming chairpersons in JVs where shareholding of private sector is 50% or more**

The new guidelines bars government officials from becoming chairpersons in a JV where the shareholding of private partner is 50% or more. It also bars consultants and advisors of a public sector entity to be engaged in a similar role in the private sector entity created through JV.

**Restriction of public sector participation in unviable projects**

The new guidelines restrict public equity participation in JVs which are unviable. Rather, if the government wishes to support such projects, it can do so by providing suitable financial grants.

**Selection of private partners through an open and competitive process**

The selection of private partners shall now be done in an open and competitive process.

**Threshold technical capacity of a bidder to be at least twice the estimated cost**

Under the new PPP model, the government has enhanced the threshold technical capacity of bidders to a minimum of twice the

estimated project costs. Hence, under the new norms, if a developer is bidding for a PPP project worth Rs. 500 crores, it should have executed a project worth at least Rs. 1,000 crores. Earlier, this limit was lower. It was essential for the developer to have done a project costing at least one-and-a-half times the cost of the proposed project during the previous five years. The objective of this new norm is to keep out all frivolous bids.

**More bidders to be short-listed**

The government has increased the minimum number of bidders to be short-listed from five to six for projects costing more than Rs 500 crores, and from five to seven for projects with a cost of less than Rs 500 crores. The latter numbers would also apply to repetitive projects.

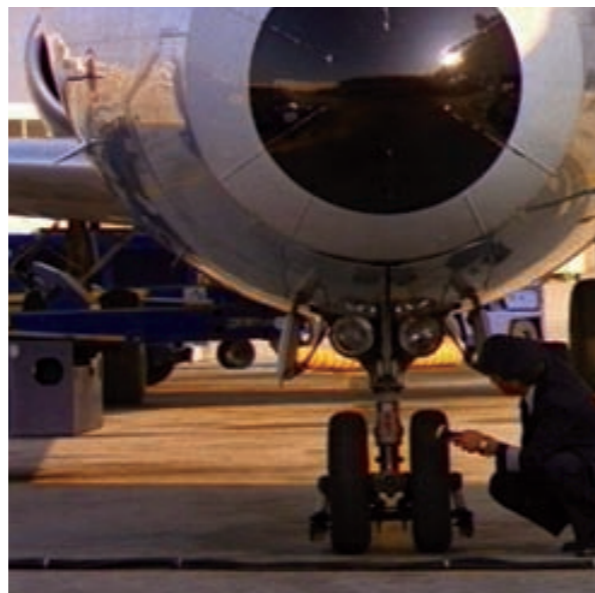
**Scope of the new guidelines**

The new guidelines apply to all central ministries and departments, statutory entities and central public sector undertakings. They will benefit all core infrastructure areas like power, roads, railways, shipping and aviation.

It is estimated that India will be requiring \$500 billion investment for its infrastructure development during the 11th Plan. A large portion of this investment is expected to come from the private sector.

**Conclusion**

The prime objective of PPP is to hasten the development of infrastructure facilities in India through an equitable participation of the private sector. The new guidelines endeavour to strengthen this partnership by removing the existing anomalies.



The new guidelines focus on several important issues including those relating to the conflict of interest, accountability of public sector entities, valuation of assets, contingent liability, and the exit and termination clauses.

NEWS QUEST

MANJU MOHOTRA



**INDIA TO PUSH PPP PROJECTS FOR NEW PORTS**

The Shipping Ministry, Government of India, has set targets to revise the guidelines for port operations and speedier acquisition of ships and equipment. Five more Public Private Partnership (PPP) Projects are likely to be awarded, including coal terminals at Ennore and Tuticorin. The Ministry is also seeking to declare the Andaman and Nicobar Islands and the Lakshadweep as major ports.

**UK-INDIA BUSINESS COUNCIL SEES BIG BIZ OPPORTUNITY IN INDIA**

At a recent UK-India Business Council (UKIBC) meet, the Central Minister for Transport and Highways, Mr. Kamal Nath unveiled one of the largest ever PPP programmes in the world. The Minister informed that India will be building 7,000 km of roads annually at an investment of USD 80 billion over the next 3-4 years.

**SEBI AMENDS COMPANY TAKEOVER NORMS**

The Securities and Exchange Board of India (SEBI) has revised the takeover norms. It has made it mandatory for the holders of global depository receipts (GDR) or American depository shares (ADS) with voting rights to make an open offer if they henceforth acquire 15 per cent shares in a public company.

**SEBI GETS TOUGH ON PROMOTERS ISSUING PREFERENTIAL WARRANTS**

As per the recently notified Capital and Disclosure Requirements (ICDR) Regulations 2009, those company promoters who have been issued preferential warrants, will have to forfeit the upfront payment made on unexercised warrants. The new norms also ban firm allotment to "privileged people"—relatives, associates and friends of the promoters.

**GOVERNMENT BRINGS CHANGES IN ITS MEGA POWER POLICY**

The Government of India has approved amendments in the mega power policy to encourage setting up of new power plants. According to the new norms, the states that control power distribution network can also buy electricity from mega power policy plants without privatizing the power distribution network.

**RADICAL CHANGES PROPOSED IN DIRECT TAXES**

The Government of India is planning to bring in radical tax reforms through a draft code that aims to reduce the tax burden and streamline the over four decade old Income Tax Act. The Finance Minister, Mr. Pranab Mukherjee has said a bill could be placed in the Winter 2009 session of the parliament. The FM also proposes to abolish the Securities Transaction Tax. However, investors will have to pay a Capital Gains tax on the profits earned by them irrespective of the tenure of investments.



# SYNAPSE

## S&P COUNSEL TO MIDMARK CAPITAL FOR ITS ACQUISITION OF CARBON LORRAINE

S&P served the US based company MidMark Capital in its acquisition of Carbon Lorraine Madras Pvt. Limited, an Indian company, as a part of its worldwide acquisition process.

MidMark Capital is currently in the midst of acquiring carbon brushes for their automobiles and appliances division from Carbone Lorraine, a world leader in graphite solutions and electrical components. -RAVI SINGHANIA

## S&P APPOINTED LENDERS' LEGAL COUNSEL TO IDBI BANK FOR SHIPYARD PROJECT IN PIPAVAV

S&P has been appointed as the Lenders' Legal Counsel to IDBI Bank for the proposed term loan of Rs. 377 crores to M/s Pipavav Shipyard Ltd. The loan will be used for their shipyard project at Pipavav Port, Gujarat for (a) augmentation of the shipbuilding facilities for building naval ships, (b) creating facilities for fabrication of offshore structure, and (c) meeting the long-term working capital margin requirements. -OP SINGAL



## DOUBLE OPEN OFFER

S&P is acting as Indian counsel for a US company (US Corp) which is a majority stakeholder in a Hong Kong listed company that, in turn, owns a majority stake in an Indian entity. US Corp is divesting its stake in the Hong Kong company. Transfer of US Corp's stake in the Hong Kong company would not only trigger an open offer in Hong Kong but also an open offer under the Indian SEBI takeover code. The successful completion of the US Corp sale of its stake in the Hong Kong company would be subject to the completion of the open offer of the Indian Company. It is an interesting transaction for the firm as the transaction would entail open offer in two jurisdictions.

## LEGAL COUNSEL TO SECURITY PRINTING AND MINTING CORPORATION OF INDIA

S&P will serve as the legal counsel to Security Printing and Minting Corporation of India Ltd. (SPMCIL) for their joint venture with Bharatiya Reserve Bank Note Mudran Private Limited (BRBNMPL) for setting up of Security Paper Mill.

BRBNMPL was established by Reserve Bank of India as its wholly owned subsidiary with a view to augmenting the production of bank notes in India to enable the RBI to bridge the gap between the supply and demand for bank notes in the country. -RAVI SINGHANIA

## LEGAL COUNSEL FOR PELIKAN

S&P is representing Pelikan PBS-Produktionsgesellschaft mbH & Co. KG- a globally reputed company, as the legal counsel for presenting their case before the Ministry of Environment /CITES Managing Authority, India in connection with the export of their woods from India.

Pelikan PBS is one of the largest sellers of the famous brand of stationery products "Pelikan". -SUNIL KUMAR

## FACILITATION OF BID PROCESS MANAGEMENT OF STATE HIGHWAYS IN KARNATAKA

S&P has been mandated to assist the Karnataka State Highways Improvement Project (KSHIP) in the bid process management for BOT (Annuity) projects on PPP basis for the reconstruction, finance, operation and maintenance of its existing state highways.

The state highways number 33 and 3 will be developed to meet the 2 lanes standard in four annuity packages funded by World Bank. The packages would cover highways from (i) Malavalli to Pavagada (package 1) - 190.3 km, (ii) Mudhol to Nippani (package 2) - 103.8 km, (iii) Managuli to Devapur (package 3) - 109.6 km, and (iv) Shikaripura to Hangal (package 4) - 153.5 km.

The mandate includes drafting/vetting annuity Bid Documents including Concession Agreements, RFQ, RFP based on the Planning Commission's MCA, Model RFQ and RFP. The scope also includes assisting KSHIP in bid evaluation and other related issues, and developing the financial models for annuity packages. -DIPAK RAO



## LEGAL COUNSEL TO MINISTRY OF CHEMICALS AND FERTILIZERS, GOVERNMENT OF INDIA

S&P has been appointed as the legal counsel to Ministry of Chemicals and Fertilizers, Government of India in consortium with PricewaterhouseCoopers for preparing a scheme for the revival of Fertilizer Corporation of India Ltd., which is a sick company. -SUNIL KUMAR



## LEGAL CONSULTANCY SERVICES FOR POWER PROJECTS IN RAJASTHAN

S&P has been mandated for providing legal consultancy services for 3 power projects in Rajasthan on tariff-based bidding. -ROHIT JAISWAL

## FIRM'S RETREAT IN GOA

The Firm took a three-day retreat in Goa at the Rameda. The Partners of the firm presented papers on diverse subjects including Joint Ventures, Mergers and Acquisitions, Project Finance, Arbitration, Restructuring, Intellectual Property Rights, Court Procedures, Power Projects, Writ Jurisdiction, Lease, and DRT. This convention gave the S&P counsels and staff members from New Delhi, Mumbai, Bangalore and Hyderabad an opportunity to interact with each other, update their knowledge and unwind. The group took a river cruise on the Mandovi River, visited the celebrated church The Basilica of Bom Jesus (where the mortal remains of St. Francis Xavier rest), and enjoyed the pristine white sand beach that South Goa is most famous for. -AAKANKSHA AGARWAL



# COURTROOM

## Navinya Buildcon Pvt Ltd Vs. Union of India and Others

SHAMBHU SHARAN

In a recent judgment wherein a Contractor had challenged its disqualification under a tender process for a highway project, the Hon'ble Delhi High Court held that adherence to the instructions under the tender document cannot be given a go by and dismissed the writ petition filed by the Contractor. The said case was handled by the litigation wing of S&P on behalf of the Highways Authority. It is one of the rarest case in which cost of Rs. 7 lacs has been imposed upon the Contractor for initiation of frivolous litigation against Government body.

The tender process under dispute comprised of pre-qualification stage (RFQ) and the bid stage (RFP). In both the stages, the RFQ and the RFP document contained a "Conflict of Interest" clause as per which cross holding of shares with another Applicant/Bidder or its consortium partner in excess of 1% amounted to "Conflict of Interest" and the said Applicant/Bidder was liable to be disqualified on that ground. In addition to this all the Applicant / Bidder had to submit an undertaking at the RFQ and the RFP stage stating that it did not have "Conflict of Interest" with any of the Applicant/Bidder. In the present case, the member of the Petitioner consortium had a "Conflict of Interest" with a member of another bidder to the extent that the member of another bidder held 6.68% shares in the member of the Petitioner's consortium. Upon knowing the above fact, the Highways Authority disqualified the Petitioner and proceeded with the tender process. Aggrieved by the said action of the Highways Authority, the Petitioner filed a Writ Petition before the Delhi High Court stating inter-alia that the condition with regard to the "Conflict of Interest" had been waived by the Highways Authority. It was also stated that the condition stipulated in the RFQ and RFP with regard to the "Conflict of Interest" are not mandatory and the same should be read down so as to be read pragmatically. It was also submitted on behalf of the Petitioner that at the time of making application at the RFQ stage, it was not aware that the member of another consortium held 6.68% shares in the member of its consortium. Further, it was contended that the Highways Authority did not follow the principles of natural justice in as much as the Petitioner had not been informed of its disqualification prior to the remaining bidders. The last submission made on behalf of the Petitioner was that since the member of consortium which held shares in the member of its consortium did not participate in the second stage of bidding

(RFP) and did not submit its financial bid, therefore, the Petitioner did not incur any disqualification.

The Hon'ble High Court after hearing arguments of both the sides did not agree with the above contentions on behalf of the Petitioner and finally dismissed the writ petition filed by the Petitioner. Relying on the various judgments of the Hon'ble Supreme Court, the Hon'ble High Court held that:

(a) It is not in dispute that the 6.68% shares of the member of the Petitioner consortium were held by the member of another bidder's consortium and despite the same the Petitioner had furnished an undertaking in terms of the RFQ and RFP whereby it confirmed that it did not have any "Conflict of Interest".

(b) There was no waiver on part of the Highways Authority with regard to the condition of "Conflict of Interest". The Highways Authority had proceeded in disqualification of the Petitioner on the basis of unequivocal undertaking furnished by the Petitioner. Even otherwise there could be no waiver. In view of the provisions of Clause 2.6.4 of the RFP, which clearly stipulated that failure to undertake verification of all statements, information and documents submitted by the bidder would not relieve the bidder of its obligation or liability under the terms and condition of the tender, nor would it affect any rights of the Highways Authority in this respect.

(c) "Conflict of Interest" and cross holding are a matter of fact and it had nothing to do with whether the applicant participated in the tender deliberately and or inadvertently. In other words, knowledge of participation was irrelevant.

(d) The conduct of the Petitioner by itself disentitles it to the grant of discretionary relief under Article 226 of the Constitution of India.

(e) Under the provisions of RFQ as well as the RFP, the Highways Authority could forthwith disqualify any applicant / bidder at any time upon discovery or uncovering of any material misrepresentation or violation of any condition stipulated by RFQ or the RFP. Moreover, before the Highways Authority could seek explanation from the Petitioner, on its own, through a letter, it tried to clarify to the Highways Authority its stand. Therefore there was no violation of the principles of natural justice.

(f) On the issue that the stipulations contained in the tender ought to be read pragmatically and subsequently read down, the Hon'ble Court relied upon the observations made by the Hon'ble Supreme Court in the matter of West Bengal State Electricity Board vs. Patel Engineering Co. Ltd. AIR 2005 Delhi 298 wherein the following has been held:

"It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract.....In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values."

On the basis of the above findings, the Hon'ble High Court dismissed the writ petition of the Petitioner with exemplary cost. The citation of the above judgment is MANU/DE/ 0368/2009.

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