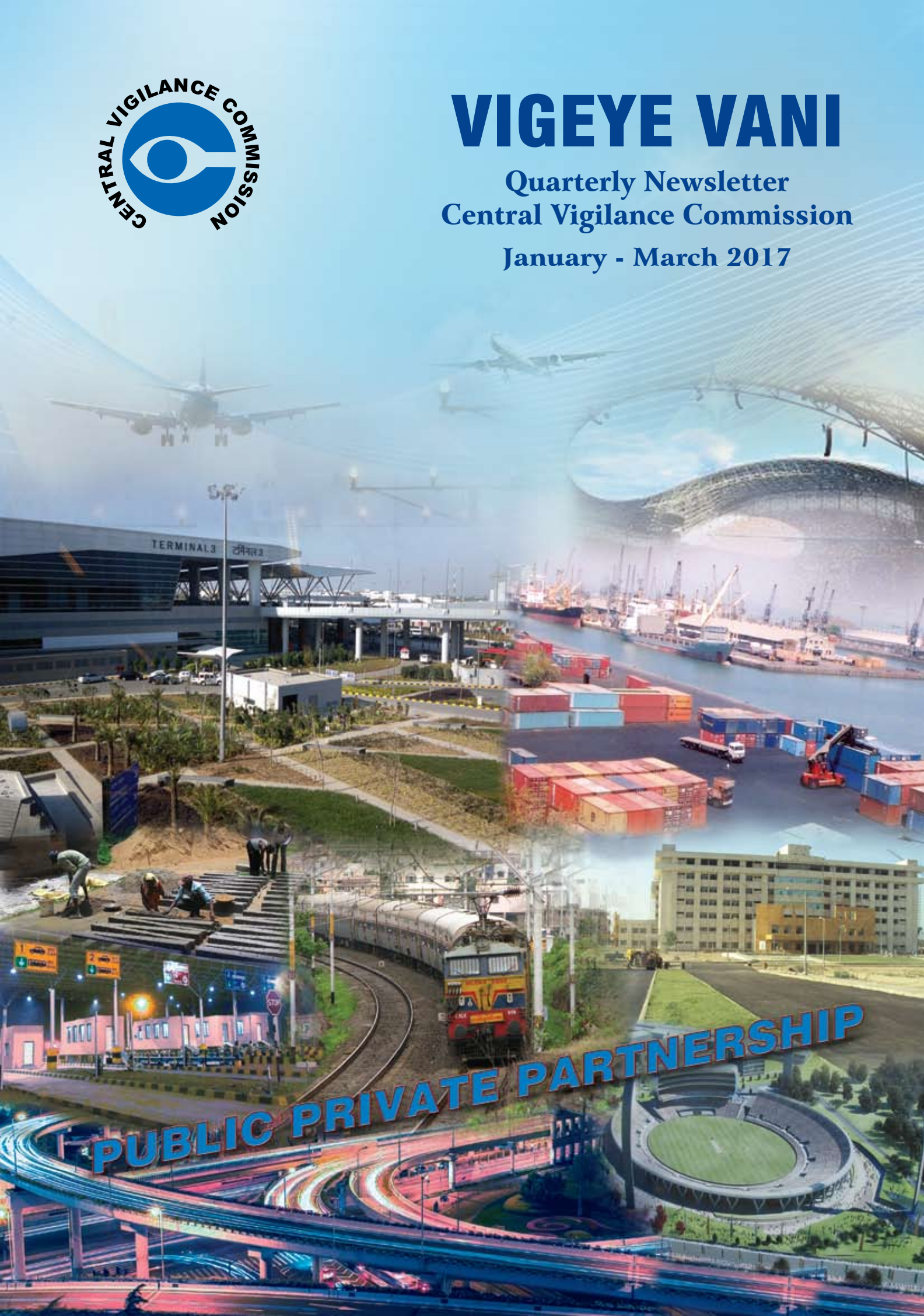




VIGEYE VANI

Quarterly Newsletter
Central Vigilance Commission

January - March 2017



PUBLIC PRIVATE PARTNERSHIP

Integrity Pledge for Citizens

I believe that corruption has been one of the major obstacles to economic, political and social progress of our country. I believe that all stakeholders such as Government, citizens and private sector need to work together to eradicate corruption.

I realise that every citizen should be vigilant and commit to highest standards of honesty and integrity at all times and support the fight against corruption.

I, therefore, pledge :

- To follow probity and rule of law in all walks of life;
- To neither take nor offer bribe;
- To perform all tasks in an honest and transparent manner ;
- To be accountable for my actions;
- To act in public interest;
- To lead by example exhibiting integrity in personal behaviour;
- To report any incident of corruption to the appropriate agency.

नागरिकों के लिए सत्यनिष्ठा प्रतिज्ञा

मेरा विश्वास है कि हमारे देश की आर्थिक, राजनीतिक तथा सामाजिक प्रगति में भ्रष्टाचार एक बड़ी बाधा है। मेरा विश्वास है कि भ्रष्टाचार का उन्मूलन करने के लिए सभी संबंधित पक्षों जैसे सरकार, नागरिकों तथा निजी क्षेत्र को एक साथ मिलकर कार्य करने की आवश्यकता है।

मेरा मानना है कि प्रत्येक नागरिक को सतर्क होना चाहिए तथा उसे सदैव ईमानदारी तथा सत्यनिष्ठा के उच्चतम मानकों के प्रति वचनबद्ध होना चाहिए तथा भ्रष्टाचार के विरुद्ध संघर्ष में साथ देना चाहिए।

अतः, मैं प्रतिज्ञा करता हूँ कि :

- जीवन के सभी क्षेत्रों में ईमानदारी तथा कानून के नियमों का पालन करूँगा;
- ना तो रिश्वत लूँगा और ना ही रिश्वत दूँगा;
- सभी कार्य ईमानदारी तथा पारदर्शी रीति से करूँगा;
- जनहित में कार्य करूँगा;
- अपने निजी आचरण में ईमानदारी दिखाकर उदाहरण प्रस्तुत करूँगा;
- भ्रष्टाचार की किसी भी घटना की रिपोर्ट उचित एजेंसी को दूँगा।

From the Editor's Desk



Sonali Singh
Chief Editor

The newly reconstituted Editorial Board is happy to bring out the first issue of Vigeye Vani for the year 2017 with some new features and in new formats to make this newsletter more interesting and useful for our readers. The thematic focus in this issue is on Public Private Partnership (PPP) projects.

The UNODC has brought out a report entitled "India: Probity in Public Procurement- Transparency, objectivity and competition in Public Private Partnership projects in line with United Nations Convention Against Corruption" which is available at <http://www.unodc.org/documents/southasia/publications/research-studies/India-PPPs.pdf>

This report while pointing out that India has emerged as one of the leading markets for PPPs in the world also states that PPP projects are complex, as they require strong legal frameworks and mechanisms for managing large spend and the development of solid relationships between public and private actors over the life cycle of a project.

Readers would surely be aware that the UN Convention Against Corruption (UNCAC) was adopted in 2003 and came into force in 2005. In May 2011, India became party to the UNCAC. The then Secretary-General of the UN Mr. Kofi A. Annan observed that "The Convention introduces a comprehensive set of standards, measures and rules that all countries can apply in order to strengthen their legal and regulatory regimes to fight corruption. It calls for preventive measures and the criminalization of the most prevalent forms of corruption in both public and private sectors". Chapter II of the Convention deals with Preventive Measures and includes Article 9. Public procurement and management of public finances which states that

"Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making that are effective, inter alia, in preventing corruption..."

Inclusion of Article 9 underlines the importance of putting in place appropriate anti-corruption measures in the area of procurement. Public procurement is an area that is vulnerable to corruption and the Commission has also been highlighting the need for putting in place systems to plug loopholes, make effective use of IT and automation, reducing public interface, implementing Integrity Pact etc. and the imperative of ensuring fair play and transparency in public procurements. The articles in this issue aim to touch upon the various aspects of PPP projects and highlight some lessons from specific case studies.

We would like to thank Shri Rajiv, Vigilance Commissioner for his interaction with the Editorial Board of Vigeye Vani (EBV) and also all those who have contributed articles to this newsletter. We look forward to suggestions and feedback to help us improve.

Shri Rajiv, Vigilance Commissioner (VC) interacts with the Editorial Board (EB)



EB – Sir, what are the main challenges before the Commission?

VC – Central Vigilance Commission is the apex body for exercising general superintendence over vigilance administration in Government. With passage of time the contours of corruption have changed. The Commission has had to keep pace and make a shift in its role, making it a more thinking, interactive and nurturing organization by engaging stakeholders by progressively getting into activities which assure, support and influence stakeholders. This is aimed at creating a more fair, transparent and efficient governance while continuing to maintain a robust traditional role. The statutory responsibilities of the Commission have also assumed a great deal of significance against the backdrop of the current environment in the country where consensus seems to be building for zero tolerance for corruption. However in my view one of the main challenges continues to be cutting down delays at different stages of a vigilance case. Timely submission of investigation report by Chief Vigilance Officers, prompt initiation of criminal or disciplinary proceedings wherever applicable and timely completion of these proceedings are all extremely important. Through constant effort by the Commission and the CVOs, delays have been brought down to some extent. However, a lot remains to be done. Apart from this there is shortage of manpower resources in the Commission. This requires timely action to prevent working of the Commission from being crippled. We are closely monitoring these issues.

EB – What do you consider as being high priority areas for the commission?

VC – As I mentioned against previous question, cutting down delays is definitely one of the high priority areas. Apart from this, capacity building among the officers of the Commission and various CVOs is another area of priority so as to ensure investigation and follow up action is of high quality. The Commission would like the CVOs and the other vigilance officers/officials to upgrade their skills and competencies so that they are suitably equipped to handle the demands of their job. Apart from this Commission continues to lay strong emphasis on systemic improvements and implementation of preventive vigilance measures including leveraging technology in all organizations to curb corrupt practices. We are also advising the Departments/Organisations suitably on issues where we find gaps or lack of procedures which result in misconduct/irregularities.

EB – How would you like to address delays in vigilance/disciplinary cases?

VC – Regular monitoring by officers in the Commission is being done. But apart from that, all Heads of the Departments and Chief Vigilance Officers in various Ministries, PSUs and Autonomous Organizations are being duly sensitized. We also utilize the powers under the CVC Act to issue summons to officers of the concerned Department/Organisation in those cases where inordinate delays have occurred. Delays are closely monitored through IT system available in the Commission. The Commission expects the CVOs to closely and proactively monitor cases at their end to ensure their timely submission of reports to the Commission. We do not hesitate to take action against CVOs who fail to respond despite reminders.

EB – What is your advice to CVOs?

VC – CVOs have a whole canvas of duties and responsibilities which are quite critical. They

are posted in the organization for few years but bring with them an outsider's perspective which is important. They should carry out their functions promptly and diligently in an impartial manner. For this they may need to acquire new knowledge or hone their existing skills. There should be greater emphasis on systemic improvements whereby scope for indulging in corruption itself is minimized. A CVO should impress upon the Head of Organization the need for adopting practices like e-procurement, e-payments etc wherever it has not been done till now. All organizational processes should be carefully examined and suggestions should be given for improving them. However the CVOs needs to keep in mind that they function as an extended arm of the Commission and that while their actions should enable efficient vigilance administration but at the same time they should not act as an impediment to transparent, reasoned and bonafide decision making in the organization.

EB – What do you think is the way forward for the Commission?

VC – We, in the Commission believe that transparency and objectivity in governance hold the key to combating corruption and have been emphasizing on strong internal control mechanisms and laid down guidelines based on good governance principles. The Commission has also been stressing on predictive, proactive and participative vigilance measures in addition to building up public awareness to combat corruption. The Commission's constant pursuit is a corruption free environment in government. With adoption of technology, improvements are visible. A holistic approach encompassing a multi pronged strategy including training and capacity building, leveraging of technology, better systems would be the way forward. Commission shall continue to pursue this.

EB – What in your view, should be done to enhance involvement of the general public in fight against corruption?

VC – The theme of this year's Vigilance Awareness Week "Public participation in promoting Integrity and eradicating corruption" was identified because the Commission believes

that an aware, active, involved and empowered public is essential to any anti-corruption campaign. The theme of public participation in eradicating corruption and promoting integrity also resonates with the overall climate within the country today, of inclusive growth and empowerment of the common man. People have to be made aware not only of their responsibility as critical stakeholders in fighting corruption but also of the mechanisms in place which could serve as enablers in the process. The change cannot be expected to come overnight and we need to convince the people, especially the youth, that they are the change agents. However, public participation is a continuous process and needs to be pursued all the time. Commission provides access to the public through various channels i.e. website, on-line complaint, helpline etc. Despite other available means, most of the complaints received in the Commission are by post.

EB – What steps can be taken to improve the negative perception that is attached to vigilance functions and functionaries within an organisation?

VC – Negative perception mainly arises because of an apparently disproportionate penal action and delay in proceedings. This can be addressed by cutting down delays and ensuring proper implementation of systemic improvements. Wherever cases of bonafide mistake and ignorance of rules and regulations are observed, suitable opportunity should be given to the concerned person. Greater emphasis should be laid on regular training to all for preventing mistakes in decision making.

EB – Do you think CVOs/CMDs should do more by way of systemic improvements?

VC – Yes from the perusal of the cases received in the Commission, it is clear that most organizations need to carry out substantial improvement in process and make effective use of information technology. Ultimately the organization will be in a position to perform better if it has in place systems that are transparent and accountable.

Public-Private Partnership in Action



Prof. M P Jaiswal
Director, IIM, Sambalpur

A public-private partnership (PPP) is a contractual arrangement between a private sector entity and a public agency (centre, state or local). Through this agreement, the skills and assets of each sector (public and private) are shared in delivering a service or facility for the use of the general public[1].

In addition to the sharing of resources, each party shares the risks and rewards in the delivery of the service and/or facility. Public Private partnerships can prove to be beneficial when conventional solutions fail to make an impact. Infrastructure thus created can provide enormous benefits to people's lives.

The PPPs are becoming popular in India, but does the reality match the idea of cooperating actors who achieve enhanced value together and share risks? An analysis of the PPPs suggests that, in practice, PPPs are less ideal than the idea. Partners have difficulty with joint decision-making and organization tend to revert to traditional forms by contracting out and by separating responsibilities.

Some 1.2 billion people in the world don't have access to electricity; at least 663 million people lack access to safe drinking water; and about one billion people in low-income countries lack access to an all-weather road – cutting them off from basic health, education, trade, and employment opportunities. While more than 3 billion people worldwide now have access to the internet, more than 4 billion people (60% of the global population, most in developing countries) do not – leaving them with a significant opportunity gap. In order to mobilize the trillions of dollars needed to close the infrastructure gap, much work is needed to make projects “investor ready,” and to develop

innovative frameworks to leverage multi-stakeholder partnerships such as public private partnerships. PPPs can be a tool to deliver much needed infrastructure services.

When designed well and implemented in a balanced regulatory environment, PPPs can bring greater efficiency and sustainability to the provision of such public services as water, sanitation, energy, transport, telecommunications, healthcare and education[2].

From a practitioner's perspective PPP projects are successful in arenas wherein the deliverable and value are linked with revenue and tangible outputs. Be it renewable energy sector, smart city initiatives, utility and infrastructure – thorough analysis and linking of economic value via PPP is imperative for growth and success of the projects. A PPP being a contractual relationship between the public and private sectors for the execution of a project or service, should include a detailed description of the responsibilities, risks and benefits of both the public and private partners. Such an agreement will increase the probability of success of the partnership. Realizing that all contingencies cannot be foreseen, a good contract will include a clearly defined method of dispute resolution. While the private partner may provide a portion or all of the funding for capital improvements, there must be an identifiable revenue stream sufficient to retire this investment and provide an acceptable rate of return over the term of the partnership.

Income streams can be generated by a diversity and amalgamation of sources (fees, tolls, availability payments, shadow tolls, tax increment financing, commercial use

of underutilized assets or a wide range of additional options), but must be judiciously guaranteed for the length of the partnership's investment period.

Some of the successful large e-Government projects such as Passport Seva, MCA-21 have been implemented under PPP model. The MCA-21 project of ministry of company affairs been executed by Indian private software company in a BOOT (built, open, operate and transfer) mode. Similarly Passport Seva project of ministry of external affairs (MEA) been implemented through PPP by TCS. Under this project only sovereign and fiduciary like granting and issuing of passport have been retained by MEA and rest all routine activities are carried out by TCS. The smart city projects are likely to go for PPP model and in fact Surat city has implemented smart city surveillance project using crowd funding on PPP mode.

Although India has taken lead in PPP projects particularly in infrastructure domain, many PPP projects have setbacks also. Many leading private players in infrastructure field such as GMR, GVK have faced serious challenges in executing PPP projects. Public Private Partnerships was adapted to usher in growth in infrastructure in the country and thereby giving a positive thrust to the economy. The Government took the PPP route for implementation of projects in roads, ports, airports, railways, power and urban utilities as well as in social sectors. The contribution of PPPs in the infrastructure development across the country has been immense. However, poor planning towards implementation of the PPP model has led to

faulty contractual structures and absence of remedial tools. Examples such as the pull-out of Reliance Infrastructure-led concessionaire from the Airport Express Line of Delhi Metro raise a question mark on PPP projects in India[3]. In India, 65 PPP projects with investments worth over Rs 77,000 crore have been terminated[4]. Examples of PPP failure are legion: ADAG-led Rs 5,800 crore airport metro link in Delhi, GMR's Rs 7,700 crore Kishangarh-Udaipur-Ahmedabad highway project, Emaar-MGF's Commonwealth Games Village project (where the government was forced to extend a bailout), and Gammon's 1,400 crore container terminal project in Mumbai port have all collapsed[5]. The major reasons for such challenges are lack of institutional capacity, absence of regulatory body, lack of flexibility in project design, financing availability, flawed risk-sharing etc.

While PPPs hold immense promise for growth of infrastructure, a more careful drafting of contracts is necessary to ensure a win-win situation for all stakeholders.

- [1] <http://www.ncppp.org/ppp-basics/7-keys/>
- [2] <http://www.worldbank.org/en/topic/publicprivatepartnerships/overview#1>
- [3] http://www.business-standard.com/article/economy-policy/what-is-wrong-with-ppp-in-india-113070600510_1.html
- [4] <http://www.thehindu.com/news/cities/mumbai/business/Maharashtra-leads-in-termination-of-PPP-projects/article13999354.ece>
- [5] <http://economictimes.indiatimes.com/news/economy/infrastructure/what-ails-indias-ppp-model-and-why-it-doesnt-bode-well-for-modi-governments-infrastructure-push/articleshow/47940200.cms>

“
It is a fraud to borrow what we are unable to repay.

- Publilius
”

Public-Private Partnership



Keshav Rao

CVO, Pawan Hans Ltd.,
DGCA & AAI

A Public-private partnership (PPP) is a commercial legal relationship defined by the Government of India as *“an arrangement between a government / statutory entity / government owned entity on one side and a private sector entity on the other, for the provision of public assets and/or public services, through investments being made and/or management being undertaken by the private sector entity, for a specified period of time, where there is well defined allocation of risk between the private sector and the public entity and the private entity receives performance linked payments that conform (or are benchmarked) to specified and predetermined performance standards, measurable by the public entity or its representative”*.

PPP is a cooperative agreement between one or more public and private sector entities which may be long term in nature. PPP can be understood as a governance mechanism. It can cover different long term contracts with a range of risk allocations, funding arrangements and transparency requirements. Common themes of PPPs are the sharing of risk and the development of innovative, long term relationships between the public and private sectors. The use of private finance is another key dimension of many PPPs.

In PPP often private party provides a public service or project and assumes substantial financial, technical and operational risk in the project. In some types of PPP, the cost of using the service is borne exclusively by the users of the service and not by the taxpayer. Government contributions to a PPP may also be in kind (notably the transfer of existing assets). In projects that are aimed at creating public goods like in the infrastructure sector, the government may provide a capital subsidy in the form of a one-time grant, so as to make the project economically viable.

In some other cases, the government may support the project by providing revenue subsidies, including tax breaks or by guaranteed annual revenues for a fixed time period. In all cases, the

partnerships include a transfer of significant risks to the private sector, generally in an integrated and holistic way, minimizing interfaces for the public entity. An optimal risk allocation is the main value generator for this model of delivering public service.

Government of India is actively promoting PPPs in many sectors of the economy. According to the World Bank, about 824 PPP projects have reached financial closure since 1990. The Government also created a Viability Gap Funding Scheme for PPP projects to help promote the sustainability of the infrastructure projects. This scheme provides financial support to infrastructure projects, normally in the form of a capital grant at the stage of project construction.

There are many drivers for PPPs. One driver is that PPPs enable the public sector to harness the expertise and efficiencies that the private sector can bring to the delivery of certain facilities and services traditionally procured and delivered by the public sector. Another common driver is that PPPs may be structured so that the public sector body seeking to make a capital investment does not incur any borrowing. Rather, the PPP borrowing is incurred by the private sector vehicle implementing the project. On PPP projects where the cost of using the service is intended to be borne exclusively by the end user.

PPP is generally for a specified period of time (concession period) on commercial terms and in which the private partner has been procured through a transparent and open procurement system.

A common problem with PPP projects is that private investors try to obtain a higher rate of return than the government's, even though most of the income risk associated with the project is borne by the public sector.

PPP is susceptible to a number of problems primarily corruption and conflicts of interest. This is generally created by a lack of sufficient

oversight. Corruption and conflicts of interest, in this case, leads to costs. Some contracts under PPP are:

- Public Water utilities
- Health services
- Infrastructure
- Midday meal

There are a number of mechanisms/ products available in the market for project sponsors, lenders and governments to mitigate some of the project risks, such as: Hedging and futures contracts; insurance; and risk mitigation products provided by international finance institutions.

In India, public-private partnerships have been successful in developing infrastructure, particularly road assets under the National Highways Authority of India.

From an economic theory perspective, what distinguishes a PPP from traditional public procurement of infrastructure services is the fact that the building and operating stages are bundled in the case of PPPs. Hence, the private firm has strong incentives in the building stage to make investments with regard to the operating stage. However some Challenges and barriers include:

1. **Flexibility:** If public entity feels they are losing some of the control they may work on adopting more rules and regulations
2. **Timeline:** Organizations are more short-term oriented because of focus on profitability.
3. **Focus:** Partners may not have the same focus when entering into a partnership even though they think they might.
4. **Funding priorities:** When parties cannot agree on where funding should go this can sometimes lead to losses in time, resources.
5. **Accountability:** When responsibilities are not set to the letter this can cause some problems.
6. **Communication or understanding:** Lack of communication can be a huge downfall and can contribute to many of the other risks within partnerships.
7. **Autonomy within the partnership:** Absence of autonomy can stifle PPP.
8. **Conflicts:** These can arise from any of the above topics but even outside issues or forces may bring a partnership to a halt.

Even though these partnerships are entered into with the best of intentions even the most trivial issues can snowball into greater conflict halting a partnership dead in its tracks.

Addressing Conflicts

Creating a formal control mechanism for the partnership.

1. Ensure that there is a continuous commitment with negotiations in any time of trouble and even an outline for termination procedures if necessary.
2. Conflict resolution, outreach and organizational development are items that managers can work on and even assign specialists to each task. Creating a timeline to be followed throughout the partnership assists in mutual understanding and communication as well.

Risks

PPP involve greater costs than traditional government procurement processes. Some have questioned the value-for-money relevance of PPP projects in India. The private sector does not provide a service that is not specifically outlined in the PPP contract. It is thus critical that key performance indicators are precisely laid out in the contract and that the government monitors closely the work of its private partner. Furthermore, there is a cost attached to debt and while private sector can help access to finance, if the customers or the government may end up bearing much of this cost. Another critic of PPP projects is related to their social and political consequences, which can be significant. For example, a PPP project may result in tariff increases or resettlement issues to name a few.

Finally, PPPs often end up being renegotiated. This is due to the long-term nature of the PPP projects (some run for up to 30 years) and their complexity. It is difficult to identify all possible contingencies during project development and events and issues may arise that were not anticipated in the documents or by the parties at the time of the contract.

Other major drawbacks include poorly drafted contracts and lack of understanding of contracts, inadequate resources, lack of managerial experience, breaches of contract, failures in team building, lack of performance measures, corruption and political interference.

(compiled from various sources on internet).

Lessons from DND Flyway



Asit Gopal
Former Director, CVC

Delhi Noida Direct (DND) Flyway is an eight lane 9.2 km expressway which connects Delhi to Noida. The project built by the Noida Toll Bridge Company Ltd. (NTBCL) was developed under a Build-Own-Operate-Transfer (BOOT) model. In 1992, UP Government signed an MoU with the Delhi Administration and Infrastructure Leasing and Financial Services Ltd. (IL&FS) to build a toll bridge across the Yamuna. IL&FS promoted NTBCL to make the flyway on BOOT model. In 1996, NTBCL was incorporated into a public listed company with its corporate headquarters in Lucknow.

The Delhi Noida bridge project is often presented as a path-breaking project which showed that private capital could indeed be attracted to provide public infrastructure services in India – despite having to deal with multiple authorities and a fragile political environment. The project was completed within budget and ahead of schedule. The bridge was opened to traffic in February, 2001. The project was structured as a Rs. 408.2 crore 30 year BOOT concession which was financed through equity of Rs. 122.4 crore and debt of Rs. 285.8 crore. The debt financing consisted of term loans from Banks and Financial Institutions totaling Rs. 235.8 crore and deep discount bonds totalling Rs. 50 crores issued by NTBCL.

Concession Agreement (CA) was signed among NOIDA, IL&S and NTBCL in 1997. The concession agreement (CA) granted the concessionaire (NTBCL) the right to collect user fees to recover (a) the total cost of the project, as well as (b) returns on the total cost of the project at a rate of 20% per annum, over the concession period starting from the effective date. Concession period had been defined as earlier of (i) 30 year period or (ii) the date

on which total cost along with the return as determined by the Independent Engineer and the Independent Auditor in accordance with Concession Agreement is recovered. Return on the total cost of the project was guaranteed in that the contract provided for extension of concession period in two-year increments beyond the 30 year initial concession period until such time as the total cost of the project and the returns thereon had been recovered by the concessionaire.

Despite completion of the project ahead of the schedule and within budget, the flawed concession agreement totally in the favor of the concessionaire led to public outcry as there appeared to be no possibility of the concession period coming to an end. The major flaws in the Concession Agreement were as under:

1. **Guaranteed Return on the Investment -** The Concession Agreement was designed in a way that it guaranteed 20% return on the total cost of the project. There was provision for extending the concession period even beyond 30 years in two years increment if the return as envisaged in the agreement was not recovered by the concessionaire i.e. NTBCL. Thus there was no risk to the concessionaire. The return of 20% was also considered as very high particularly in view of the fact that the concession for this project had not been awarded competitively.
2. **Faulty calculation of the total project cost -** The total cost of the project included project cost, maintenance expenses and shortfall in the recovery of return in any specific financial year. Therefore, the total cost of the project was not known upfront.

Further, there was perverse incentive for showing every expense as maintenance expense. The inclusion of shortfall in return in the total cost of the project was leading to a vicious cycle of lengthening of the concession period. As per the documents of NTBCL itself, the concession period was expected to exceed 70 years.

3. **No incentive for minimizing cost** - The total cost of the project was being completely passed on to the consumers and therefore, there was no incentive for NTBCL to minimize cost. There was no tight definition of O&M expenses and also no norm based estimate for putting a cap on various categories of expenses. NTBCL was found to be adding attorneys' fees for the settlement of pending or threatened suits/claims without any limitation to the total project cost.
4. **Faulty Termination payment conditions** – The conditions pertaining to terminations payments were also heavily loaded in favor of the concessionaire. Even in the case of termination following a concessionaire event of default, NOIDA was obligated to compensate NTBCL for the debt and debt service outstanding. In this project, there was no distinction in terms of compensation between a concessionaire in the event of default which occurs prior to entry into operation of the bridge versus one that occurs after commercial operation has commenced i.e. post construction. In both, NOIDA was obliged to pay off the total debt outstanding. Normally, no payment is due to the concessionaire in the event of concessionaire default prior to construction as this condition maximizes incentive for swift construction of the project.
5. **Multiple role of the sponsor** - IL&FS as a project sponsor was involved in conceptualizing the project and as a member of the Steering Committee, in deciding that the project should be implemented by a corporate entity promoted by itself. IL&FS was involved in designing the structure

and setting the technical specifications of the project which was later awarded to a corporate entity promoted by it. This would be considered as a clear conflict of interest. IL&FS was also lenders to the concessionaire and in that capacity had a role in the appointment of Independent Auditor and Independent Engineer.

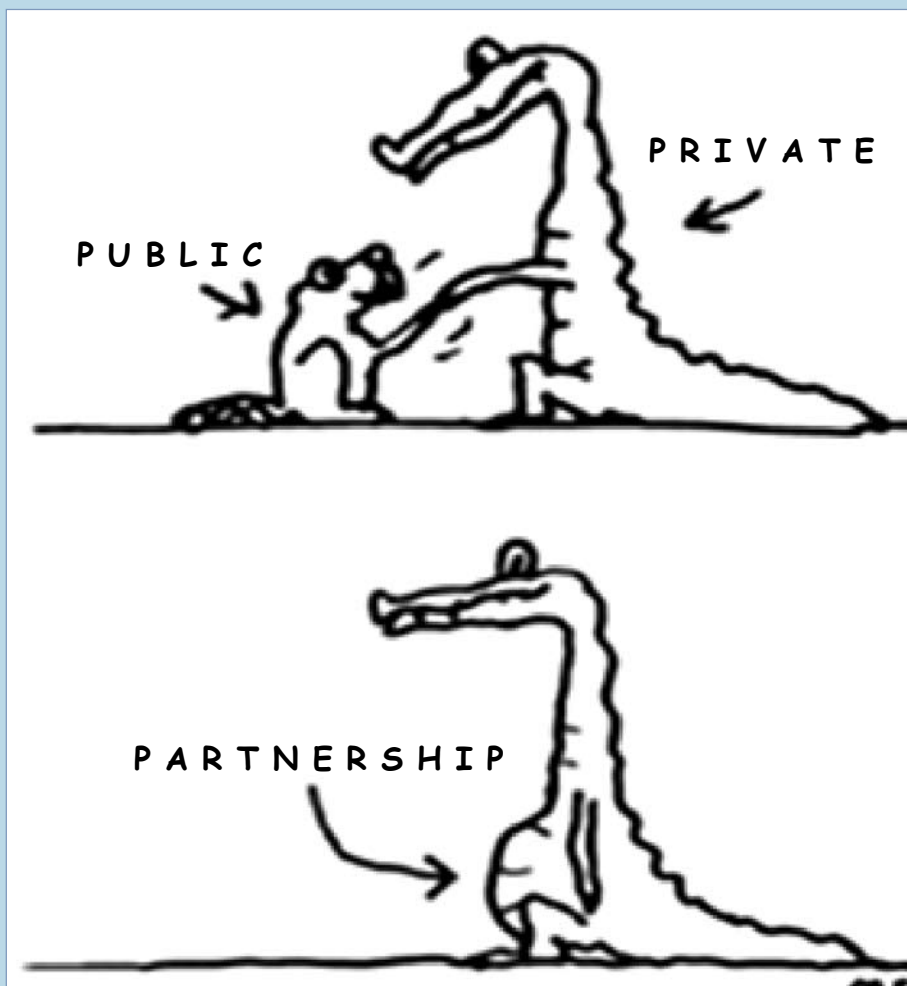
6. **Faulty selection process of Independent Auditor and Independent Engineer** - The contract accorded substantial decision making powers and discretion to the Independent Engineer and Independent Auditor. Their role inter-alia included certification of compliance with quality standards, certification and approval of construction and O&M costs, verification of calculations underlying requests for fee revision, determination of occurrence of Force Majeure and determination of steps to restore financial viability of the project. While substantial powers had been given to Independent Engineer and Independent Auditor, the process and principles to be followed in their selection had been left vague. Their qualifications were also not well defined.
7. **Faulty selection process of Project Oversight Board** – Project Oversight Board was a one member body to resolve disputes arising out of decisions of Independent Auditor and Independent Engineer. It was perceived to be biased towards the private party as the lenders had a final say in its selection and IL&FS was also included among the lenders.

Judgement of Allahabad High Court– In 2012, Federation of NOIDA Residents Welfare Association filed a PIL in Allahabad High Court challenging the collection of toll by NTBCL on DND Flyway and in October, 2016 Allahabad High Court ordered scrapping of the toll collection on DND Flyway. The court observed that no private person or company can be allowed to earn profit from the public property at the cost of public at large. The Court held that the concessionaire had already recovered

the cost and reasonable profits and in view of clauses of agreement on cost being recovered, the bridge could be handed over to NOIDA. The Court noted that as per the financial statements of the concessionaire itself, NTBCL had recovered Rs. 810.18 crores from toll income from the date of commencement of project till 31.03.2014 and after deduction of O&M expenses and corporate income tax, the surplus was Rs. 578.80 crores. NTBCL filed an appeal in the Supreme Court but the Supreme Court refused to interfere with the High Court order.

Lessons from the DND Flyway case - The key lessons learnt from DND Flyway case which are crucial for serving public interest in PPP projects are as under:

- Risk sharing among parties is integral to the concept of PPP. Thus, negotiated sole-
- source contracts and guaranteed returns on cost must be avoided.
- Project capital and operational costs must be capped. The party bearing these costs should be able to check its reasonableness.
- Potential conflicts of interest must be identified and resolved as early as possible.
- There should be a clear separation between the roles of the public authority as concedent and the private sector as concessionaire. The criteria for selection of Independent Engineer, Independent Auditor and Project Oversight Board should be transparent; their qualification criteria should be well defined and unambiguous.
- Award criteria for Development Rights must be precise and unambiguous.



Source: MassTransitMag.com

Vigilance issues in PPP Projects



Kamlesh Kr. Pant
CVO, NHAI

In order to reduce dependency on its finances, bring in professional project management practices and improved technology, better quality of construction, Govt. of India has started involving private sector participation through the Public Private Partnership (PPP) mode.

A PPP is an arrangement between a public entity (government) & a private entity by which services that have traditionally been delivered by the public entity are now provided by the private entity under a defined set of terms and conditions. Common issues with reference to vigilance in PPP projects with the National Highways Authority (NHAI) are brought out in the succeeding paragraphs.

It has been observed that in some PPP projects, transparency in competitive bidding was lacking since during bidding process the projects were restructured by making major changes in initial project parameters and Total Project Cost (TPC) but no fresh Request For Quotation (RFQ) was invited. This happened in case the scope of project was reduced/structures were deleted to make the project viable. Therefore, the agencies who actually should have been eligible could not participate in bidding owing to higher initial eligibility criteria, thereby reducing competition.

Similarly, in some of the PPP projects, faulty feasibility reports/detailed project reports had been prepared which were inconsistent with the projected highway traffic. It was observed that during the construction period, the concessionaire resubmitted road construction designs on reduced count of traffic/traffic growth thereby implying reduced road crust, against the proposal submitted during financial

closure. It was also observed that in order to make the projects viable, necessary structures/provisions are deleted initially and later on considered which results in additional scope thereby inviting disputes/arbitration. When this addition/change of scope/work was taken up during Operation & Maintenance period, it lead to discomfort to road users (who were paying toll) due to ongoing construction work on Toll road. Similarly due to faulty feasibility report/DPR, the change in scope resulted in loss to public exchequer.

It has been observed that in some of the cases, there were changes in alignment or shifting of alignment after commencement of Section 3(A) of the land acquisition Act under which the land is acquired, this change in alignment is sometimes due to local reasons or due to non-consultation with local administration/stakeholders before finalising the alignment. This change in alignment results in higher actual cost paid finally as compared to initial estimated amount for land acquisition at the time of Section 3(A).

Another area of concern is the absence of any mechanism/provision with Independent Engineer to cross check design of any structure and drawing which has been submitted by the concessionaire for the approval. The Concessionaires save in cost of construction of the structures due to freedom for innovations with the design to the Concessionaire. There is an apprehension that these innovative design of structures may not safely last for design life of structures, which is more than 50 Years whereas the concession period is not more than thirty years. So this issue has to be addressed carefully. In many projects, non-effective monitoring on the part of Independent Engineer was observed

especially on the contractual issues.

In a few cases, it was found that there was mismatch in levels of existing bridge in comparison to new bridge. The existing levels/benchmarks were often not found preserved either at site or in records.

It has been observed in some cases that road crust for which the documents were submitted by the concessionaire in order to obtain financial cost approval and for which the lender bank sanctioned the loan, was not laid due to opting of stage construction method by the concessionaire. It is seen that the concessionaire obtained loan for laying down full road crust as per norms but on the other side, he opted for stage construction method wherein the second layer of crust would be laid at the time when the traffic exceeds the projected limit for the period. It is seen that by opting for stage construction method, the concessionaire (at later stages), while citing lesser volume of traffic, reduces crust thickness, thereby reducing expenditure on project but at the same time demands increase in concession period in accordance with the provisions of agreement without reducing the financial cost of the project.

Further, at the time of Provisional Commercial Operation Date (PCOD), many un-authorized cuts/speed breakers are found to exist on the median of stretch, sometimes due to law and order problem/local reasons or for stop gap arrangements. The unauthorised median cuts/speed breakers are forcibly provisioned by locals particularly in dense habited areas. Therefore while finalising alignment either elevated highway or bypass should be provisioned in such areas. Moreover, safety measures such as zebra crossing, solar lights, cat eyes, delineators etc. are missing because of absence of any provision for unauthorized opening at median.

In various projects where concessionaires are not maintaining the existing stretch under development period due to various reasons, NHAI has called tenders for maintaining the stretch on the risk and cost of the concessionaire.

However, it is a one sided act of NHAI, carried out without the consent of concessionaire. Legally, it gets difficult to claim expenses incurred on this count from the concessionaire. A large number of cases are pending in arbitration, mainly due to divergent interpretation of clauses of contract agreement. Therefore, detailed videography/condition survey of road should be done jointly so as to avoid litigation on maintenance during construction period.

There is no provision for issuance of e PCOD but PCOD's are being issued initially at the stage of 75% completion of project and thereafter nearly at 100% completion of project, but final Commercial Operation Date(COD) is normally not being issued. It has been observed that in the concession agreement, there is no role of Executive Committee (of NHAI management) and directions of Board applicable to the concessionaire. Therefore, concessionaire follows the direction if it is in his favour and opts for arbitration, if it is against him.

It is observed that there is substantial difference in TPC of NHAI and Concessionaire. The Concessionaire prepares financing documents especially EPC contract with abnormally high rates and in most of the cases, Concessionaire's subsidiary company works as EPC contractor of the project. The concessionaire has to infuse his equity (20 to 30%) as a basic condition of the contract but he rarely infuses mandatory equity in the project. There is no real check by the Lender Bank Engineer on the progress of work. The Independent Engineer of project is also not consulted by Banks while releasing debt/loan to Concessionaire. This leads to misuse of funds/loan by Concessionaire.

Suggestions for improvement

All structures which are required as per Indian Road Congress/MoRTH provisions should be frozen, in scope of BOT project at the time of inviting bids, so that there should not be any change of scope (which gives rise to time and cost overrun as well as loss of Toll revenue in case of delayed project completion and invites disputes involving huge financial

implications to NHAI). In case any Change of Scope is taken due to IRC/MoRTH requirements then stringent action be initiated against Feasibility consultant for preparation of feasibility report.

- The loan may be released to Concessionaire by Bank/lenders after recommendations of Independent Engineer as there is no real check by the Lender Bank Engineer on the progress of work. This will avoid misuse of funds/loan by Concessionaire.
- The unauthorised median cuts/speed breakers which are forcibly built by locals, particularly in dense habituated areas. Therefore while finalising alignment either elevated highway or bypass may be provided, keeping this eventuality in mind.
- The primary risk in post Commercial Operation Date period pertains to tollable traffic on the project road. The long

Concession period in BOT projects ranges up to 30 years and the project viability is based on tollable traffic during the concession period. This tollable traffic is based on certain assumptions and risks. The assumption of increase in Tollable traffic is generally @ 5% p.a. However, there can be significant change in tollable traffic during post Commercial Operation Date period owing to good alternate network of state roads/ competing modes of transport in future, such as rail/metro, commuter's willingness to pay toll(which diverts traffic when toll starts), etc. NHAI may face this challenge in ongoing BOT projects and is a matter of concern, which leads people to opt for other modes. Careful planning and coordination with other agencies/ State governments may prove beneficial in this regard so as to take a comprehensive view of the situation.



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Fraud and falsehood only dread examination. Truth invites it.

- Samuel Johnson

Injustice anywhere is a threat to justice everywhere.

- Martin Luther King, Jr.

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Are we prepared for Public Private Partnership in India ?



Ghansham Bansal, CVO/DMRC

Chitiz Kumar, Dy. CVO/DMRC

Public Private Partnership (PPP) is a provision of participation of a private partner who has been conceded some right for creating public infrastructures and services. It is normally for a specified and sufficiently long periods depending upon various factors and the sector for which it is created. It is mainly an instrument to speed up the infrastructure development in India.

Need of the day

It is an accepted fact that 'PPP' is a new concept in India and we need to switch-over to changed attitude and mindset of all concerned. As rightly mentioned in 'Kelkar Committee' this change in attitude requires the following things :

- (1) Moving away from a narrow focus on transactions to focussing on the relationship and on service delivery for citizens,
- (2) Building in an approach of "give and take" between private and public sector partners, and
- (3) Developing a mechanism for dealing with uncertainties inherent in long-time contracts.

Uncertainties are the Hallmark of PPP projects and we are normally not attuned to deal with these uncertainties. PPP projects are essentially the long-term commitments based upon limited information. Therefore, 'trust' between the private and public partners is the key word for success, but unfortunately this trust is yet to be developed.

DMRC Experience

DMRC experimented with PPP model in 2007-08 for the first time when it conceived plan for execution of a dedicated 'Airport Metro

Express Line'. It was conceived in the backdrop of Commonwealth Games and proposed to give a world-class metro connectivity from City Centre to Airport terminal T-3 which was under construction at that time. This was a prestigious project and first of its kind in India. Unlike other projects of DMRC, it was decided to go for PPP model, wherein the cost of all civil works was to be borne by DMRC whereas the cost of other services and Rolling Stock was to be borne by the Private Partner. The operation after commissioning of this line was also entrusted to Private Partner. As like all PPP projects, this arrangement was supposed to bring private funds as well as expertise for Project Management, which could be beneficial to both the parties. The project management during construction was given to a Project Management Consultant for fast and quality construction.

Relianceinfra was selected as the Concessionaire and a Special Purpose Vehicle (SPV) was formed to run this project. In this SPV, DMRC and Reliance infra had participated as equity contributors and rest of the funds were taken from the banks as loan. The work was started in time but this line was slightly delayed and could not be commissioned before commonwealth games, as targeted. In fact, this was the only line of phase-II of DMRC which could not be started before commonwealth games. So the very purpose of executing this project as a PPP model and involving private partner for speedy and timely completion of the project was defeated. The project was finally commissioned in February 2011. Unlike other DMRC metro routes, this line could not become popular among the commuters and the total traffic and revenue collection on this line was much less

than expected. This was due to the fact that all domestic traffic was shifted to T-1 which was not directly connected with Metro line. When the losses started mounting, Reliance infra stopped operating this line from July 2012 citing technical reasons. Finally, in June 2013 Reliance infra announced that they are unable to operate this line further and withdrew unilaterally from the Contract Agreement of operating this line and DMRC had to take-over the operation of this line.

Lessons Learnt

The failure of PPP model experimented by the DMRC left many lessons to be learnt. The most probable reason for Reliance infra to abandon this project was perhaps the losses due to generation of less than expected revenue from operation of this line. In all probabilities, this is the common reason for failure of all such projects. Therefore, it is learnt as a lesson that the Private Sector will never works in loss for long.

Normally, the PPP model should be adopted for large infrastructure projects only and public money has definitely to be infused to make the project commercially viable. But even then there is always a possibility of losses in a business as it happened in this line. In such cases, it must be clearly defined who will bear the losses and to what extent. Moreover, in such projects, most of the management and policy decision regarding running the project lies with the concessionaire/private partner whereas the risk of losses is mainly with the Public Partner.

In many PPP project and also in the Airport express line, the project was managed through a separate entity or company (SPV) in which the private partner had a limited liability only. Although at the time of selection of Concessionaire, it was selected on the basis of the credential of mother Organization, yet the running of a project was through a separate company in which the mother company had only limited liability and this encouraged the private partner to exit the project when long term losses were anticipated.

Normally in PPP projects, both Private and Public partners contribute through equity and rest of the funds are arranged through bank loans. In case there is an escalation of project cost, the same is also arranged through bank loan as the bank loan is relatively easy to obtain in case of a PPP project. In such case, the overall public funding is further increased in the project and the private party share gets diluted. But the management and use of this fund is in the hand of Private Partner who may misuse this fund to their advantage. Therefore, there should be a provision of some type of Auditing in the PPP project for control over expenditure, which may be done by appointing a public representative to the board of the company.

Another lesson includes that the allocation of risk and control of management are two major issues in all PPP models. If more risk is assigned to the private partner, this will discourage them to participate. At the same time there should not be any control of Government on day-to-day management, otherwise the decision-making will be slowed down and it will affect the efficiency. Both these issues are very important and a fine balance is required to be maintained. However, it should be clearly mentioned that the party having control of management should bear more risk also.

Keeping all above points, it is certain that managing all these conflicting issues in the PPP project could be very tricky, dicey and complex. If one try to control one aspect, the others may suffer and excessive control will defeat the very purpose of PPP.

Present Position

The requirements of Public and Private Partner are different and sometime conflicting. PPP model is not giving desired results in many cases and many such projects have failed due to lack of experience and conventional mind-set of the dealing authorities. Change-over from the conventional methods to PPP may take some more time to mature. Every failed project should become a case study for the new projects. For this, a separate mechanism need

to be devised where all the inputs from existing projects are received and remedial measures are taken. Three key pillars of PPP frameworks namely Governance, Institutions and Capacity all need to be strengthened.

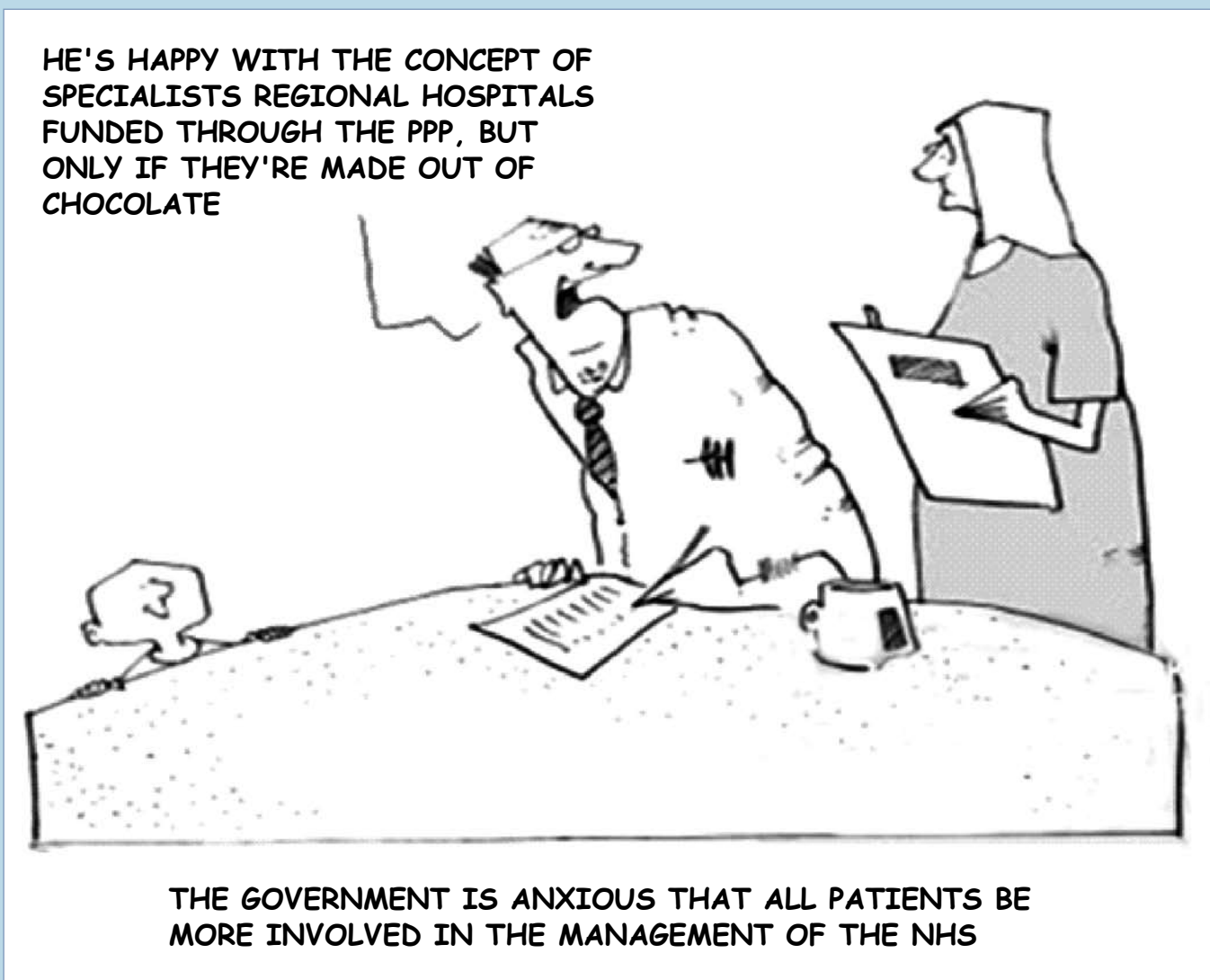
Conclusion

The success of PPP depend on the change in attitudes and mindsets of all concerned including investigating, auditing and legislative institutions. Success or failure should not be judged solely based on the initial hiccups and setbacks. In fact, we learn more from the 'Failures' as compared to 'Successes'. The ongoing projects under PPP are true 'Learning

Process' as new challenges and opportunities emerge in every project. Every project whether 'Successful' or 'Failed', contributes in the process of learning.

However, there should be a dynamic mechanism available for amending various clauses of Concession Agreement when some new risks, not contemplated initially, emerge. Otherwise the projects under Public Private Partnership (PPP) are liable to become distressed.

There are already a no. of distressed projects, which should not discourage for future PPP projects but should be used as 'Case Studies' and a suitable mechanism be evolved to kick start all these distressed projects again.



Source: cartoonstock.com

Role of Vigilance in PPP airport projects



Suresh N. Borkar
General Manager-Vigilance,
A.A.I

Public private partnership is a joint venture between the private players who participate in, or provide support for, the provision of infrastructure; with the State or Central Government. A PPP project results in a contract agreement for a private company to deliver public infrastructure-based services.

Generally in PPP project,

- The Public sector i.e. State/Central Government company transfers land, property or facilities controlled by it to the private sector company usually for the term of the arrangement.
- The private sector company Plans, Invests, builds, extends or renovates the infrastructure for the use of Public at large.
- The Private Sector Company operates the project facility as per the terms and conditions of the Public sector Company.
- Private Sector Company provides the services for a defined period of time.
- The private sector Company transfers the facility to the public sector company at the end of the contract agreement.

Examples of the PPP models are: Design-Build (DB), Operation & Maintenance Contract (O&M), Design - Build - Finance - Operate (DBFO), Build-Own-Operate (BOO), Build-Own-Operate-Transfer (BOOT), Buy-Build-Operate (BBO), Build-lease-operate-transfer (BLOT) Operation License, Finance Only, etc.

As the participation by Public body through PPP involves public interest securing value for money and maintaining transparency and fair practices by the management need

to be ensured for strict compliance through a dynamic Monitoring mechanism by the Government. This is where the role of vigilance can be envisaged in case of deviations from the necessarily required accountability of the PPP Management.

In the past, this country has witnessed the poor quality designed airport buildings with cost overrun and delay in construction and poor quality service delivery, due the attitudes and culture of the public sector, as compared to the airports in other countries like U.S.A., U.K. etc.

The liberalization in Indian economy started in the late 1990s also resulted in the liberalization of aviation industry particularly in the airline business. In the decade following liberalization, the growth was propelled further by the emergence of low-cost airlines carriers, which induced competition and resulted in the low fares. With that, renewed focus came to be placed on the aviation infrastructure segment, in which investments by the Airport Authority of India(AAI) had historically been inadequate. The emphasis on further developing the country's aviation infrastructure meant opening up of airports to private investment, as was one of the key recommendations of The Naresh Chandra Committee Report on the Road Map for the Civil Aviation Sector—November 2003. India's airports have suffered from decades of neglect and underinvestment.

When the Naresh Chandra Committee presented its report to the Ministry of Civil Aviation in November 2003, it remarked frankly that the country's "passenger airports are for the most part an embarrassment".

The inadequacy of the airport infrastructure was

exposed as air traffic expanded dramatically from 2004 onwards, pushing several metro airports to well beyond their design capacity. Congestion in the terminals, on the runway and in the air, resulted in a deteriorating passenger experience and an increasingly inefficient (and costly) operating environment for the airlines.

In the past decade, India has encountered an extraordinary growth in passenger air traffic. The air cargo market in the country has also witnessed increased activity over the last few years especially with the entry of number of new players in cargo handling market.

In order to meet financial requirements to support such growth and to infuse private fund in the Airport Infrastructure Sector recognising the potential for airport infrastructure constraints to stifle the aviation industry, in 2005 the Government of India announced a USD10 billion airport upgrade and modernisation programme over 5 years to 2010. A further USD20 billion of investment is expected in the following 10 years. **Acknowledging that it possesses neither the expertise nor the capital to carry out such an undertaking by itself, the government has invited private sector participation in the PPP projects.**

Present Indian scenario: AAI has transferred Delhi and Mumbai Airports to DIAL and MIAL for modernization and operation of the Airports under Operation, Management and Development Agreement (OMDA) as permitted under Sec 12 A of AAI Act which empowers AAI in the public interest or in the interest of better management of airports to make a lease to carry out some of its functions.

As the Govt. of India permitted private players to build and operate these airports on the public assets is a positive step towards involving the private sector in development of the country's aviation infrastructure, there is also a growing need to establish an appropriate vigilance setup to monitor the likely non-transparent business activities in the PPP project.

Therefore, it is expected that, a due importance is given to the Vigilance aspects as it is an

integral part of the management.

Vigilance mechanism may provide appropriate checks and controls at various stages of the execution of the PPP projects.

Its preventive measures may result in corrective and cost effective solutions in execution, operation and maintenance of the PPP project.

The objective is to secure value for public money and provide efficient and cost effective services to the users.

Operation and maintenance: Operation and maintenance of the airport is proposed to be governed by strict standards with a view to ensuring a high level of service for the users, and any violations thereof would attract stiff penalties. The MCA/OMDA provides for an elaborate and dynamic mechanism to evaluate and upgrade safety requirements on a continuing basis. The MCA/OMDA also provides for traffic regulation, security and rescue operations. Here, Vigilance may check for any irregularities in the periodic inspections and ensure that whether the rules and regulations stipulated as per the MCA/OMDA are followed or not.

In case of complaints/representations, if it is alleged that JVCs under PPP Model have adopted practices which are not fair and transparent, objective and reasonable, then decisions taken by JVCs regarding the bidding process, eligibility criteria, fixation of reserve price etc. which are not as per MCA/OMDA, may be questioned by the government through provisions under MCA/OMDA.

Checks and balances should be provided for ensuring full accountability of the Concessionaire.

In order to provide enhanced security to the lenders and greater stability to the project operations, all financial inflows and outflows of the project should be routed through an escrow account.

Vigilance in the context of the PPP airport projects:

There are four cardinal principles of vigilance.

- **Transparency:** not hiding any facts or matter from all those who are stakeholders in PPP project and who take the decisions.
- **Fairness:** application of same principles to all concerned under similar conditions.
- **Competitiveness:** encouraging competition in the interest of the PPP project.
- **Accountability:** the obligation of an individual or organization for its activities, accept responsibility for them, and disclose the result in a transparent manner.

Vigilance issues may arise while executing PPP Projects

The PPP are joint ventures of a number of private companies which agree in advance to subcontract each of the different activities and take equity stakes in the SPV to bond the relationship. But sometimes transparency and competitiveness in the bidding process are lost, or more correctly traded-off for innovation opportunities, which may not always be the best solution.

Therefore, in order to execute a successful PPP project the bidding process must be fair, transparent, accountable and competitive.

Following points must be taken into consideration,

- Issues due to unclear or vague terms and condition in MCA/OMDA.

For example: As observed in one of the clause of OMDA agreement, which stipulates that a fair, transparent and competitive bidding process should be followed. Therefore, a PSU partner who is a public representative in the PPP project expects that the CVC guidelines for procurement are being followed by the Private partner, but practically it is not followed and some other system of competitive bidding is evolved under the pretext that competitive bidding process is being adopted in the procurement and following CVC guidelines

is not mandatory as it is not mentioned in the OMDA agreement.

- Empanelment of selective number of contractors for the specific jobs, and selective award of work.

For example: while investigating one of the complaint against the JVC company, it is observed by the Vigilance that, empanelment list of selective number of contractor for the specific jobs in airport has been prepared. The sealed offers from the empanelled bidder are called but, sometimes the L1 concept is not followed. Even the work is awarded selectively to L2, L3 and so on as per the suitability and repetitively. Following aspects need to be looked into:

- Demanding and/ or accepting gratification for an official act or influencing others to obtain certain contracts.
- Cartel formation of bidders to suppress competition and other coercive practices.
- Limited skills of consultants or personnel in a PPP project to detect corrupt practices and limited liability of consultants.
- Integrity of external consultants.
- Tampering or loss of records.
- Subjectivity at all stages leading to the award of contract.
- Subversion of procedures under the excuse of 'Suitable bidders not available'.
- Loopholes and vulnerability to corruption after contract is awarded.
- Too many stages in public procurement process leading to vulnerable delay.
- Non-payment of appropriate revenue share by airport operator to the Government, thereby affecting the interest of the Public entity.
- Non-transparent dealings/transactions with the Commercial service providers such as Food and beverages, Duty Free, Retail, Car parking etc, which is resulting in leakage of revenue share.

- Implementation of land use plan and its monitoring for the appropriate use of Govt. land for the airport development purpose.

Vigilance is a tool of management: It keeps a watchful eye on the activities of the PPP project and takes prompt action to promote ethical practices and ensure integrity and honesty in the official transactions.

- Provides important tools for improving performance of JVC organization operating a PPP project i.e. promoting clean business transactions, professionalism, productivity, promptness and ethical practices.
- It also assists in systemic improvements in various process of implementation of the PPP project in curbing opportunities for corruption.
- Therefore, Vigilance helps in improving efficiency and effectiveness of the personnel as well as the organization.

Vigilance set up in the JVC of a PPP project: It should have independent Chief Vigilance Officer for the Government, who must identify such area of likely corruption and target the efforts for setting up clean governance systems through introduction of **comprehensive checks and controls**.

- The vigilance must formulate the policy to achieve these goals which should be simple, clear and transparent.
- It is an important tool to increase productivity and profitability by plugging the seepage in resources.
- It is an essential **TOOL OF THE MANAGEMENT** in PPP projects.
- It helps to improve managerial and financial practices and working procedure.
- It assists in better performance and greater customer satisfaction.
- Thus the role of vigilance in PPP projects is **complementary**.



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The strength of a nation derives from the integrity of the home.

- Confucius

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Mukesh Saxena
Technical Examiner, CVC

Doctrine of Substantial Compliance/ Responsiveness

The doctrine of substantial compliance is primarily a judicial invention designed to avoid hardship in cases where a party does all that can reasonably be expected of it, but faulted in some minor or inconsequential aspects which cannot be described as the essence of the requirements.

The doctrine is equally applicable in processing/ evaluation/ assessment of bids. The procuring entity should prefer inclusion of an offer despite immaterial non-compliance/ non-responsiveness, rather than its rejection on strict literal compliance. The immaterial irregularities of little or no significance should be waived off in a transparent/equitable manner and not to insist upon the exact compliance of ancillary and subsidiary conditions.

The Hon'ble Supreme Court vide judgement dated 06.05.1991, in a case of Poddar Steel Corp. vs Ganesh Engineering Works, allowed the procuring entity / the authority issuing the tender to deviate from and not to insist upon the strict literal compliance of the conditions which are merely ancillary or subsidiary to the main objective to be achieved by the tender conditions.

It does not mean that if a bid is not substantially responsive to the requirements of the bidding document, it may subsequently be made responsive by correction of the material deviation, reservation, or omission. Nevertheless, if a bid is substantially responsive, the bidder may be requested to submit the necessary information or document, within a reasonable period of time, to rectify nonmaterial nonconformities in the bid. Requesting information or documentation on such nonconformities shall not be related to any aspect of the price of the bid. Failure of the

bidder to comply with the request may result in the rejection of its bid. Similarly, in case of quantifiable nonmaterial ambiguities related to the price bid, e.g. mismatch in the rate quoted in figures and words, typographical errors and other errors, the same may be corrected for comparison purposes only, to reflect the price of a missing item or component. The adjustment may be made as per the methodology stipulated in the tender.

Non-compliance may be considered as an 'immaterial non-compliance' if it does not-

- i) dilute, in any substantial way eligibility/ qualification criteria; and/or
- ii) affect, in any substantial way, the scope, quality or performance of the goods and related services specified in the contract; and/or
- iii) limits, in any substantial way, inconsistent with the tendering documents, the procuring entity's rights or the bidder's obligations under the contract; and/or
- iv) if rectified, would unfairly and materially affect the competitive position of other responsive bidders; and/or
- v) extend undue benefit to the bidder over other bidders in unfair & inequitable manner.

Following are the illustrative examples substantial compliances -

- a) Earnest Money Deposit (EMD) validity specified in a tender as three months and a bidder submits EMD with a validity of 90 days (which falls short of three calendar months by one or two days), then although as per strict literal and

legalistic interpretation, this is a non-compliant bid, yet it is acceptable since it meets the criteria of immaterial non-compliance above.

- b) Similarly if the past experience criteria lays down that the firm must have supplied and commissioned the machine in question during last 3 years ending March' 2016, and the bidder has supplied and commissioned in relevant time-frame that machine as part of a turnkey project, where the full turnkey project was completed and commissioned in April 2016.

For the purpose of identifying nature of non-compliances, major deviations and minor deviations need to be mentioned upfront in the tender viz.

- Major deviations will refer to those instances of non-compliance which are otherwise material to the eligibility of the bidder. Failure to meet the same appropriately would result in disqualification. All such deviations are non-negotiable.
- Minor deviations will be the ones where non-conformities/missing links can be cured at post tendering stage, in time bound

manner as per the 'terms & conditions' and 'instructions to the bidders' of the tender.

In order to ensure a thorough check of the substantive responsiveness of all bidders, a table of substantive responsiveness covering all major technical and commercial terms and requirements should be prepared. The responsiveness of each bid received should then be checked by registering conformance / partial conformance / non-conformance against each of the requirement mentioned in the table. Bids which fail to conform to any of the major conditions should normally be considered non-responsive and should be rejected while other bids can be considered responsive/ substantial responsive.

If this doctrine of substantial compliance is included in the tender documents/ pre-qualification criteria in clear and unambiguous terms, it would not only result in saving of lot of infructuous efforts of procuring entity but would also ensure transparency, competition and fairness in the procurement process. The doctrine, if implemented equitably and consistently, by way of mentioning it upfront, in all the tenders than it would eliminate arbitrariness in the procurement process.



Fraud and falsehood only dread examination. Truth invites it.

- Samuel Johnson

Important Activities in the Commission

- Shri K.V. Chowdary, Central Vigilance Commissioner delivered an interview highlighting the steps taken by the Central Vigilance Commission to prevent corruption in Central Government and its Departments under the purview of CVC on All India Radio, Visakhapatnam on 06/01/2017.



- Shri K.V. Chowdary, Central Vigilance Commissioner inaugurated two-day International HR Summit 2017 organized by SCOPE at New Delhi on 20th February, 2017. While addressing the august gathering, CVC observed that HR today is facing a big challenge of managing the diverse workforce having diverse expectations and high ambitions. He underlined that HR needs to identify areas of training that their employees need and advised HR executives to build a bond between employees and the organization. CVC also mentioned that HR needs to be a facilitator in striking a work life balance that will have a huge impact on the quality of work the employee performs.



- The Commission met Mr Martin Kreutner Dean & Executive Secretary International Anti Corruption Academy (IACA), Laxenburg, Austria and Mr Abhishek Bharati, Research Associate at IACA on 21st Feb 2017 at Satarkta Bhawan, New Delhi. During the meeting discussions took place on ways to strengthen the cooperation between the Central Vigilance Commission and IACA.



The Commission interacted with Shri Martin Kreutner, Dean and Executive Secretary of IACA

- The Commission also met the delegation from the Organisation for Economic Cooperation and Development (OECD) on 22nd Feb 2017 at Satarkta Bhawan. The OECD delegation was lead by Mr. Patrick Moulette, Head Anti Corruption Division, OECD and Ms. Christine Uriarte, senior Legal Analyst, OECD.
- Shri K.V. Chowdary, Central Vigilance Commissioner attended the meeting of the Executive Committee of the International Association of Anti-Corruption Authorities, which was presided by HE. Dr. Ali Al Marri-Attorney General of the State of Qatar on 27-28th February, 2017.
- Shri K.V. Chowdary, Central Vigilance Commissioner delivered the inaugural address on 03.03.2017 as Chief Guest of 8th Conclave of Vigilance Officers organized by Institute of Public Enterprises at Osmania University Campus, Hyderabad, Telangana State.



- In this quarter the Commission had organized following domestic and foreign training programmes for CVOs of CPSUs, Central Departments and Autonomous Organizations of Government of India and other officers in the vigilance administration.

| S.No. | Training Programme | Duration | Participants |
|-------|--|--------------------------|--------------|
| 1 | Induction Training Programme for CVOs at Sardar Vallabhbhai Patel National Police Academy at Hyderabad | 16.01.2017 to 27.01.2017 | 28 officers |
| 2 | Vigilance related training at IACA, Vienna, Austria | 20.03.2017 to 31.03.2017 | 20 officers |



Training group at IACA at Laxenberg, Austria © Photo copyright IACA

- The Commission convened Annual Zonal/Sectoral Review Meeting with the Chief Executives/ CMDs and Chief Vigilance Officers of Petroleum Sector on 12.01.2017 at CVC, New Delhi, Steel & Mines Sector and Defence Sector on 01.02.2017 at Hyderabad. During the meeting, Commission emphasized various aspects of vigilance administration, the need for bringing greater transparency and accountability in the functioning and for undertaking systemic improvements, leveraging of technology through e-procurement etc. The Commission also underscored the need for updation of Manuals, sensitization of officials by conducting training programmes, affecting rotational transfer of officials, as well as expeditious finalization of departmental proceedings.

Petroleum Sector Review



- In this quarter the Commission invited following eminent persons to deliver lectures and interact with audience under its Knowledge Management Programme. These were webcasted live by NIC to a wider audience worldwide. These lectures can be accessed at the Commission's website www.cvc.gov.in

| Eminent Speaker | Topic | Date |
|--|--|------------|
| Justice B. S. Chauhan, Chairman, Law Commission of India | Fair Investigation, Trial and Disciplinary Proceedings | 20.01.2017 |
| Prof. Ashish Nanda, Director, IIM, Ahmadabad | Rights and Responsibilities of the Public Officials | 16.02.2017 |
| Dr. Y.V. Reddy, Former Governor, Reserve Bank of India | State and Markets in India | 22.03.2017 |



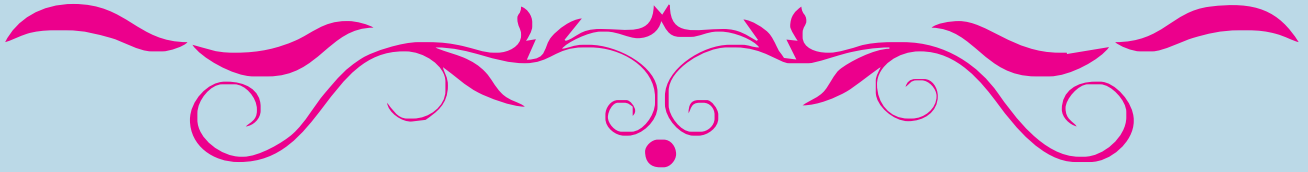
Justice B.S. Chauhan delivering the lecture on 20.01.2017



Prof. Ashish Nanda addressing the gathering on 16.02.2017



Dr. Y.V. Reddy interacting with audience on 22.03.2017



Farewell /Welcome Corner



Shri Philip Bara, Director,CVC was relieved from the commission on 03.02.2017 on being posted as CVO of IREDA.

Shri Asit Gopal, Director,CVC was relieved from the Commission on 23.02.2016 after completion of tenure. Besides serving as Director, he made a valuable contribution as a member of the Editorial Board of this newsletter.



Smt. Shivani Singh, Director,CVC was relieved from the Commission on 23.02.2016 after completion of tenure.

Smt. Anita Sharma, PS, CVC superannuated from the Commission on 28.02.2016.



Shri Hemant Kumar, joined as Assistant Legal Advisor, Central Vigilance Commission on 24.01.2017

Shri Dinesh Kapoor, joined as Assistant, Library & Information, Central Vigilance Commission on 01.03.2017.



We wish them all the best.



IMPORTANT CIRCULARS/GUIDELINES/OM ISSUED BY COMMISSION

1. CIRCULAR No. 02/01/2017 dated 1st January 2017
Sub: Adoption of Integrity Pact-Revised Standard Operating Procedure– Regarding.
2. CIRCULAR No. 01/01/2017 dated 23rd January 2017
Sub: Systemic Improvement Guidelines- Engagement of Consultants- Regarding.
3. Office Memorandum dated 10th January 2017
Sub: Complaint pending for investigation and report with CVO's-Regarding
4. Office Memorandum dated 10th January 2017
*Sub: Expeditious finalisation of departmental proceedings pending with the Ministries/Departments/
Organisations-Regarding.*
5. CIRCULAR No. 04/03/2017 dated 14th March 2017
Sub: Vigilance Awareness Week- Integrity Pledge– Regarding.

Note: For details, please refer to the Commission's website www.cvc.gov.in

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Disclaimer: The views expressed in the articles etc. are those of the authors and do not necessarily reflect the policy or position of the Commission. In order to ensure brevity and readability, some articles may be abridged.

Integrity Pledge for Organisations

We believe that corruption has been one of the major obstacles to economic, political and social progress of our country. We believe that all stakeholders such as Government, citizens and private sector need to work together to eradicate corruption.

We acknowledge our responsibility to lead by example and the need to put in place safeguards, integrity frameworks and code of ethics to ensure that we are not part of any corrupt practice and we tackle instances of corruption with utmost strictness.

We realise that as an organisation, we need to lead from the front in eradicating corruption and in maintaining highest standards of integrity, transparency and good governance in all aspects of our operations.

We, therefore, pledge that :

- We shall promote ethical business practices and foster a culture of honesty and integrity;
- We shall not offer or accept bribes;
- We commit to good corporate governance based on transparency, accountability and fairness;
- We shall adhere to relevant laws, rules and compliance mechanisms in the conduct of business;
- We shall adopt a code of ethics for all our employees;
- We shall sensitise our employees of laws, regulations, etc. relevant to their work for honest discharge of their duties;
- We shall provide grievance redressal and Whistle Blower mechanism for reporting grievances and fraudulent activities;
- We shall protect the rights and interests of stakeholders and the society at large.

संगठनों के लिए सत्यनिष्ठा प्रतिज्ञा

हमारा विश्वास है कि हमारे देश की आर्थिक, राजनीतिक तथा सामाजिक प्रगति में भ्रष्टाचार एक बड़ी बाधा है। हमारा विश्वास है कि भ्रष्टाचार का उन्मूलन करने के लिए सभी संबंधित पक्षों जैसे सरकार, नागरिकों तथा निजी क्षेत्र को एक साथ मिलकर कार्य करने की आवश्यकता है।

इस दिशा में स्वयं को एक उदाहरण के रूप में प्रस्तुत करने तथा रक्षोपाय, सत्यनिष्ठा ढांचा तथा नीति संहिता स्थापित करने के अपने उत्तरदायित्व को हम स्वीकार करते हैं ताकि यह सुनिश्चित हो सके कि हम किसी भी भ्रष्ट आचरण का हिस्सा नहीं हैं तथा भ्रष्टाचार के दृष्टान्तों पर हम अत्यधिक सख्ती से कार्रवाई करते हैं।

हम मानते हैं कि भ्रष्टाचार उन्मूलन करने में तथा अपने कार्यों के सभी पहलुओं में सत्यनिष्ठा, पारदर्शिता तथा सुशासन के उच्चतम मानक बनाए रखने के लिए, एक संगठन होने के नाते हमें सामने से नेतृत्व करना होगा।

अतः, हम प्रतिज्ञा करते हैं कि :

- हम नीतिपरक कार्य पद्धतियों को बढ़ावा देंगे तथा ईमानदारी और सत्यनिष्ठा की संस्कृति को प्रोत्साहन देंगे;
- हम ना तो रिश्वत देंगे और ना ही रिश्वत लेंगे;
- हम पारदर्शिता, जिम्मेदारी तथा निष्पक्षता पर आधारित निगमित सुशासन की प्रतिज्ञा करते हैं;
- हम कार्यों के संचालन में संबद्ध कानूनों, नियमावलियों तथा अनुपालन प्रक्रियाओं का पालन करेंगे;
- हम अपने सभी कर्मचारियों को उनके कर्तव्यों के लिए एक नीति संहिता अपनाएंगे;
- हम अपने कर्मचारियों को उनके कर्तव्यों के ईमानदार निष्पादन के लिए, उनके कार्य से संबद्ध नियमों, विनियमों आदि के बारे में सुग्राही बनाएंगे;
- हम समस्याओं तथा कष्टपूर्ण कार्यकलापों की सूचना देने के लिए समस्या समाधान तथा पर्दाफाश तंत्र का प्रबंध करेंगे;
- हम संबंधित पक्षों एवं समाज के अधिकारों तथा हितों का संरक्षण करेंगे।

HAVE YOU TAKEN INTEGRITY PLEDGE ?
PARTICIPATE IN THE FIGHT AGAINST CORRUPTION

केन्द्रीय सतर्कता आयोग
CENTRAL VIGILANCE COMMISSION

ईमानदारी को प्रोत्साहन देने तथा भ्रष्टाचार उन्मूलन में जन सहभागिता
PUBLIC PARTICIPATION IN PROMOTING INTEGRITY AND ERADICATING CORRUPTION

सत्यनिष्ठा प्रतिज्ञा
INTEGRITY PLEDGE

एक नागरिक के रूप में
AS A CITIZEN — OR — एक संगठन के रूप में
AS AN ORGANIZATION

प्रतिज्ञा तीन आसान चरणों में है
TAKE PLEDGE IN THREE EASY STEPS

व्यक्तिगत विवरण दर्ज करें
ENTER BASIC DETAILS

प्रतिज्ञा की भाषा चुनें
SELECT PLEDGE LANGUAGE

पढ़ें और सही करें
READ & TAKE PLEDGE

यदि प्रतिज्ञा पहले ही ले ली है तो वाचनबद्धता का प्रमाण-पत्र प्राप्त करें | If already taken Pledge, Get the Certificate of Commitment

प्रमाणपत्र अपने ई-मेल/मोबाइल पर भेजें | Send certificate to your Email/Mobile — OR — प्रमाणपत्र डाउनलोड करें | Download Certificate

1,450,079
नागरिक | Citizen

27,997
संस्थान | Organization

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