PPP

PPP: Pure and Private Pelf

A growing number of Indians are now living their lives through a growing number of 'public-private partnerships' (PPPs). Did they notice the promised cost savings, efficiency and improved service? Maybe there are none. Here's an illustrative case study to prepare you for the bewildering array of issues and problems arising out of the PPP policy.

Kapil Bajaj

Bina Verma (33), who lives in Gurgaon (Haryana) and travels to west Delhi five days a week for her college lectureship job, acquired 'smart tag' last May to avoid having to stop at the toll plaza on Delhi-Gurgaon expressway, the 28 km 'access-controlled' stretch on National Highway 8. She pays Rs 600 to buy the right to drive, without having to stop, across the 32-lane toll plaza at Delhi-Gurgaon border for a maximum of 60 trips over a maximum of 30 days.

It's not always an uninterrupted drive though; it may take her "up to 10 minutes" on some trips to make her way through the traffic slowing before the toll plaza to get to the lane reserved for smart tag users and pass. "There is no lane discipline," she complains.

Rakesh Giri (30), a Delhi-based marketing executive who is a frequent, not daily, user of Delhi-Gurgaon expressway, says he prefers paying Rs 20 per trip to using the smart tag. His monthly payments for using the expressway are usually in the range of Rs 320-480. He must stop at the toll plaza on the border and cannot avoid the snarl-ups that sometimes happen at peak hours and consume "10-20 minutes".

On days when he drives up to Manesar or beyond, Giri pays another Rs 25 at 'km 42' toll plaza, which takes his one-way expense on the road to Rs 45. (The expressway has three toll collection points.)

Verma and Giri are thankful for the convenience and saving of time that the expressway has afforded them, compared to the traffic jams they endured before January 2008 when the stretch opened to the public after a delay of three and a half years.

They do, however, begrudge the valuable time they lose at the toll plaza.

As for the price they must pay for using the road, they do not really have a choice; the toll road is the only practical route for them.

"If you leave out the congested route that will take me from west Delhi to Gurgaon via Dwarka, I am left with only the toll road," says Giri.

Verma says simply: "It's something that I have learnt to pay because I don't have a choice."

Asked if they believe the toll charges to be reasonable, both shrug their shoulders, indicating that they do not have the necessary information.

Verma and Giri certainly need to be better informed about a project whose costs will ultimately be borne by road users and taxpayers. They also need to start wondering if it would have been possible for the government to get the expressway built without imposing any tolls on the users or much less financial burden.

(Since the taxpayers have for many years been paying the cess on fuel to help the government build national highways, why must they also have to pay tolls for using roads? Does society gain anything – financially or in terms of efficiency, quality and safety – by building privately operated pay-for-use roads as is claimed?)

The following are some of the highlights of the Delhi-Gurgaon expressway project, based on a report of the Committee on Public Undertakings (CPU) that was presented to the Lok Sabha in December 2009. The committee considered the audit of the project conducted by the Comptroller and Auditor General (CAG) and testimonies of the officials of the Ministry of Road Transport and Highways (MoRTH) and the National Highways Authority of India (NHAI).

1 The Rs 555 crore expressway project was awarded in January 2002 to a consortium of two private companies, Jaiprakash Industries and DS Construction, which jointly incorporated Jaypee-DSC Ventures ('concessionaire') to execute the project. The project was to be executed on build-operate-transfer (BOT) basis, which meant the concessionaire would finance, build and maintain the road; it would also collect tolls to recoup its investment and make a profit. The concession period was 20 years, which meant the concessionaire would maintain the road and collect tolls, revisable every year in line with inflation, until 2023.

2 In 2000, when phase-I of the National Highways Development Programme (NHDP) to which this expressway belongs, got the cabinet approval, the government had begun to favour greater private-sector participation in road projects through 'public-private partnerships'. Unlike traditional public procurement where private participation is limited to construction, PPPs allow private participation in financing, construction, operation and maintenance of road projects. PPPs marked a policy shift

ASHISH ASTHANA

towards greater commercialisation of road projects, which meant that motorists would need to pay tolls for using a road.

3 There were then no government guidelines (or NHAI's internal guidelines) as to how best to execute a highways project – through traditional procurement (old style contracting) or one of the PPP modes. The NHAI first approved the project to be executed through 'special purpose vehicle (SPV) mode' and then changed that to 'build-operate-transfer (toll) or BOT-toll mode' "despite the fact that its financial consultant (SBI Caps) had initially found the BOT-toll mode to be unviable." Justifying the change of mode, the government said (through the NHAI) that BOT-toll would bring more private investment and allow it to spread its limited budgetary funds to more highways projects in less time. (NHAI's use of the term 'SPV mode' and contrasting it with 'BOT-toll mode' can be quite confusing because both the modes will ordinarily require formation of SPVs for building-operating-transferring a project and collection of tolls from users. In NHAI's terminology, 'SPV mode' means the government will be the primary investor through the SPV even though private entities will be welcome to invest too and 'BOT-toll' means a private partner will be the primary investor.)

4 The NHAI stated the government 'policy' thus: 'first consider BOT-toll failing which BOT-annuity failing which SPV or EPC'. (EPC is a way of traditional procurement in which the contractor's role is limited to engineering, procurement of materials and construction.) The 'policy', which continues to this day, meant that traditional procurement modes were ruled out even before the NHAI evaluated their costs and benefits as compared to the PPP modes. Similarly, no comparative evaluation of the costs was done between the PPP modes. Describing this policy as beset with "serious lacunae," the Committee on Public Undertakings (CPU) recommended that "the mode of execution should be based on case-to-case basis instead of a common guideline for all projects and the NHAI be invariably made accountable in respect of project related deficiencies irrespective of the mode of execution."

The toll plaza on Delhi-Gurgaon border: delays during the rush hour nullify the time saved. That is just one of the many problems users have faced.

There were no government guidelines as to how best to execute a highways project executed through the 'SPV mode' and then changed that to BOT-toll mode despite the fact that its financial consultant had found BOT-toll to be unviable.

5 BOT-annuity, by which the government would have collected the tolls and the concessionaire would have been entitled to receive fixed payments every six months, was similarly shunned without a comparative study. The CPU said it found "it inconceivable as to how a high traffic density stretch like Delhi-Gurgaon was not opted for execution on BOT-annuity despite the fact that toll collection is of the order of Rs 208 crore in just 20 months of the opening of the project." (Such has been the traffic density that the concessionaire "will break even in three years, despite the fact that it has incurred 73 percent of cost over-run, and is running two years behind schedule," predicted a report in Business Standard of November 6, 2007.) The government's reasoning that BOT-annuity would have saddled it with the "traffic risk" (fluctuation in toll collection) was termed "unconvincing" by the CPU. "Had the government carried out a comparative study of the toll and annuity mode, the unjustified enrichment of the concessionaire could have been avoided," it said.

6 Interestingly, it was a project which was won on the basis of 'negative grant,' i.e. the winning bidder offered to pay NHAI Rs 61 crore

for being awarded the contract instead of asking for government grant. (The government provides grant up to 40 percent of total project cost to bridge the 'viability gap' of a highways PPP.) The NHAI, however, fully nullified that gain by incurring Rs 146.62 crore of costs in introducing 'change in scope' works after the finalisation of the detailed project report (DPR). This change has also been blamed for a 42-month delay in project completion. The CPU noted that the DPR, which the NHAI commissioned RITES to prepare, was deficient on many counts, such as an insufficient number of foot overbridges and underpasses. The cost of all of these additional works is being borne by the public exchequer.

7 To attract bidders, the NHAI assumed traffic density in "the worst-case scenario." It also relied on an old traffic study though its financial consultant had advised conducting a fresh study before inviting bids. "Though this project was expected to be a very high traffic density corridor, the toll rates used in the bidding documents were fixed strangely on the basis of worst case scenario on the pretext of generating sufficient bidding interest in the project," the CPU noted. This meant that the tolls were set higher than would have been the case if an accurate traffic estimate had been available. It also meant that the NHAI lost the opportunity of getting a higher 'negative grant' from the bidders.

8 While 14 years would have been enough for the concessionaire to recoup its investments and generate a reasonable rate of return (20 percent), NHAI allowed a concession period of 20 years, according to the CAG, the CPU noted. The CAG estimated that the concessionaire would gain Rs 187.77 crore over the extra six years at the cost of road users. "The committee is convinced that no homework was done by NHAI to assess the correctness of the 20 years concession period worked out by the financial consultant," the CPU said.

9 The concessionaire's honesty in generating traffic reports and sharing revenue with the NHAI became suspect when an 'independent auditor,' appointed with considerable delay by NHAI, pointed out a "difference of Rs 2.16 crore" in the financial records and toll collection reports. The CPU "took a serious note" of the issue that the NHAI had neglected inexplicably. (Upon the daily traffic exceeding 1,30,000 passenger car units or PCUs, the concessionaire is required to share the toll revenue

Public choice theory

or why citizens are not protesting

Why do Delhi-Gurgaon expressway users like Bina Verma and Rakesh Giri seem somewhat indifferent to the significant costs that they have to bear due to the bungling and corruption in the conception, execution and operation of the project? Why don't they protest against all that is wrong with the project and the policy that engendered it?

Public choice theory, developed, among others, by Scottish economist Duncan Black and American economists James M Buchanan, Gordon Tullock and Kenneth Arrow, has an interesting explanation. This theory takes a rather cynical view of three 'maximising groups': elected officials who seek to maximise their votes, civil servants who seek to maximise their salaries and voters who seek to maximise their own utility. No one cares about the larger public interest!

(A caveat: this is a theoretical and not accurate view of the behaviour of the three groups that is commonly used to explain bad policies. Elected and unelected officials and voters are also known to behave honourably and in public interest. One must guard against using public choice theory to justify a bad situation arising out of a bad policy.)

The gainers from a project like Delhi-Gurgaon expressway are developers who get monopoly rights over a money spinning road. They are a wealthy group with significant influence over politicians and the media. The losers are the entire group of citizens (taxpayers in general and road users in particular). Although they are more numerous than developers, and although their total loss is large, each individual citizen suffers only a small loss. For example, let us assume that there are five lakh frequent users of the expressway who are together being charged Rs 7.50 crore wrongly and in excess every month. Their individual loss every month would be only Rs 150. They have more important things to worry about and so do not protest against the project (nor do they contemplate voting against the government that favours bad projects like this).

As long as the average citizens are unconcerned about, and often unaware of, the losses they suffer, the vote-maximising politicians will ignore the interests of the many and support the interests of the few. The politicians will consider finding some solution for the wrongs of the project (or changing the larger policy) only when the cost of the project becomes so large that the ordinary citizens begin to count the cost (such as the large number of fatal accidents).

What is required for policy change, according to public choice theory, is that the losers become sufficiently aware of their losses for this awareness to affect their behaviour as socially and politically active citizens.

The ability of elected officials and civil servants to ignore the public interest is strengthened by a phenomenon called 'rational ignorance'. Many policy issues are extremely complex. A good example is the PPP policy, which involves a great many actors/agencies from the government and the private sector and complex contractual relationships, such as voluminous concession agreements. Much time and effort is required for a layperson even to attempt to understand the myriad issues arising out of this policy. Yet one person's vote has little influence on which party gets elected or on what they really do about the issue in question once elected. So the costs are large, the benefits small. Thus a majority of rational, self-interested voters will remain innocent of the complexities involved in many policy issues.

Who will be the informed minority? The answer is those who stand to gain or lose a lot from the policy, those with a strong sense of moral obligation, and those policy junkies who just like this sort of thing!

Except for the examples, the description of public choice theory here has been taken from 'Principles of Economics' by Richard G Lipsey and K Alec Chrystal; ninth edition, published 1999; Oxford University Press.

Since Delhi Development Authority had to bail out Emaar-MGF, what was the private partner's contribution in this Rs 321 crore PPP project?

equally with the NHAI. A Times of India report of January 16, 2010 said NHAI had imposed a fine of Rs one crore on the concessionaire, which included the fine for the "delay" in paying the share of the revenue that belonged to the authority – clearly a response to the CPU's criticism.)

10 " No road safety audit was carried out in respect of Delhi-Gurgaon project either at the planning stage or at the DPR stage," the CPU noted, citing a report of the Central Road Research Institute, submitted in 2008. Safety of the non-motorised traffic and pedestrians was neglected. Only four subways and two foot over-bridges have been provided on the entire corridor, which are inadequate by any standard. "Over 100 people lost their lives in accidents in a relatively short period of time, primarily due to inadequate safety norms and utter callousness on the part of the authorities," the CPU noted. The concessionaire has failed to deploy on the expressway even a handful of personnel who would manage traffic, enforce lane discipline and ensure safety of the roadusers. That constitutes a breach of the contractual obligation on the part of the concessionaire, as also the fact that the expressway lacks public toilets, rest areas and service facilities.

11 NHAI allowed the 'independent consultant' (who acts on behalf of the NHAI to monitor the entire project) to issue a completion certificate to the concessionaire even before several items of work were complete. No penalties were imposed on the concessionaire and NHAI simply blamed the "blatant lapse" on the independent consultant, the CPU observed. (Since then NHAI seems to have responded to the CPU strictures. The January 16 report of the Times of India said Rs one crore of fine had been imposed on the concessionaire for its failure to complete the minor works within the given timeframe and for delaying revenue sharing.)

12 A ccording to NHAI's statement to the CPU, the 'chartered accountant balance sheet of the concessionaire' showed the final project cost to be Rs 1,170.26 crore, which is a 110 percent escalation over the original project cost of Rs 555 crore.

13 T he CPU cited "avoidable confusion and chaos at toll plazas and undue traffic holdups there" which negate the very concept of a high-speed expressway. In recommending better monitoring of toll plazas, the CPU referred to "illegal and unscrupulous methods of toll collection" (more on that in the subsequent paras). It "strongly recommended that the government should find a way of providing some relief to the commuters either by sharing the toll or making it toll-free once the concessionaire has recovered his investment."

14 F inally, the CPU wondered who was ultimately responsible for monitoring the project and its failings, such as the large number of fatal accidents. "NHAI has washed its hands

off its responsibilities by submitting that monitoring is the responsibility of the independent consultant. Thereafter the government has washed its hands off by submitting that it is for NHAI to enforce the agreement."

There is much more to the financial and social costs of Delhi-Gurgaon expressway than what the CPU covered. Here is a summary of these costs, starting with the most startling:

(a) According to the concession agreement, the concessionaire cannot charge drivers of vehicles that it registers as "local personal traffic" (such as Bina Verma's car) anything more than "50 percent of the applicable fees for the specific category of vehicles". But the concessionaire has been violating this clause with impunity, cheating the registered local commuters every day, and making money in illegally collected tolls.

The concessionaire registers "local personal traffic" for 50 percent discount only through the SmartExpress plan, which allows a registered vehicle a maximum of 60 crossings of the toll plaza at Delhi-Gurgaon border over a period of 30 days (counted from the date of registration or re-charge) for a fee of Rs 600 paid in advance. (The 'applicable fee' for a personal car is Rs 20 per trip, adding up to Rs 1,200 for 60 crossings.)

But Verma, whose car has been registered as "local personal traffic" through the SmartExpress plan, has usually been crossing the toll plaza only 22 days a month, i.e., 44 times. She should be charged Rs 440 for her 44 trips, at 50 percent discount on Rs 20 per trip, and the balance (Rs 160 corresponding to unutilised trips) should be either carried forward to the next 30-day period or refunded. The concessionaire has, however, designed the SmartExpress plan to appropriate the unspent amount after every 30-day period unless Verma renews her subscription within that period to accumulate more unwanted trips. The trips that she accumulates also don't get carried forward. This is a clear violation of the concession agreement that says that the concessionaire shall deal with local traffic "so as not to cause any inconvenience or cost or loss to the operator of such a vehicle".

The concession agreement also mentions "refunds". ("It shall issue appropriate passes or make refunds in a manner that minimises the inconvenience to local traffic consistent with the concessionaire's need to prevent any leakage of fees.")

While 14 years would have been enough for the concessionaire to recoup his investments and generate a reasonable rate of return, the NHAI allowed a conession period of 20 years, according to the CAG, the CPU noted. Thus, the concessionaire would gain Rs 187.77 crore over the extra six years.

If the concessionaire has defined "local personal traffic" – as indeed it has by giving such commuters no option other than the SmartExpress plan *(See the 'terms and conditions' on concessionaire's website at http://dgexpressway.com/pdfs/terms_n_conditions.pdf)* – as a personal vehicle crossing the toll plaza at least 60 times in 30 days, then Verma's car should not continue to have been registered as 'local personal traffic' and she should not have been 'enjoying' a supposedly concessional fare. Verma, in that case, should be paying Rs 880 for her 44 trips a month rather than Rs 600. But she pays Rs 600 under a special plan flowing from the concession agreement, which means her trips have been officially recognised as "local personal traffic".

If, on the other hand, the concessionaire attempts to disclaim its own notification and argues that it has not defined "local personal traffic" in specific terms and therefore anyone is free to register their vehicle on SmartExpress plan, then it will have admitted to violating its contractual obligation of giving a differential and advantageous treatment to the local commuters.

Since subscribing to SmartExpress neither gives them the full price advantage that they deserve nor any advantage over other motorists because of "lane indiscipline" at toll plazas, even the regular commuters like to pay cash, i.e. full amount, another factor contributing to what the CPU described as "unjustified enrichment" of the concessionaire. That only a small proportion of motorists subscribe to the smart tag is borne out by media reports and substantially explains the congestion at toll plazas (which, in turn, has its own costs, such as loss of productive time and fuel).

The "local commercial traffic", which must be given a monthly discount of 66 percent of applicable fee, is being cheated similarly by the concessionaire.

The concession agreement defines local traffic only as vehicles (personal or commercial) registered with the concessionaire and "plying routinely" on the highway without crossing more than one of the toll plazas. Mischievously, the concessionaire, who is required to "formulate, publish and implement" an appropriate scheme for charging local traffic, has put in place a system that cheats the local commuters. Not only has the local traffic not been defined in a fair, transparent, and public-spirited manner, the system

of charging local traffic that the concessionaire filed with NHAI has not made public by either of the two!

Reached by Governance Now, V K Rajawat, the NHAI general manager in charge of the expressway, said: "The concessionaire has not defined the local traffic in a way other than that defined in the concession agreement." After several phone calls and text messages, Rajawat promised to send Governance Now a copy of the system for charging local traffic, but never did.

Signed in April 2002, the concession agreement itself was hidden from public eyes until Dwarka Forum, an association of local residents, compelled NHAI to upload it on its website in February 2010 after a yearlong battle using the Right to Information (RTI) Act.

(b) An investigation into the project, conducted by the director general of investigation and registration (DGIR) of Monopolies and Restrictive Trade Practices Commission, found: "It is evident that the traffic analysis submitted by the concessionaire to NHAI and RITES (independent consultant) was highly under-projected… The toll fees (which should be charged) in 2020 are being charged now, for each category of vehicles.

"Thus by submitting unprojected/misprojected figures of volume of traffic, the concessionaire has adopted a method which amounts to unfair trade practice," DGIR found in its probe as reported by PTI in August 2009. "Evidently, the NHAI influenced the notified toll charges (in a manner that resulted) in undue gains to the concessionaire at the cost of public at large," it added.

DGIR also pointed out another disturbing feature: the no-competition clause, according to which the government cannot build a road competing with the Delhi-Gurgaon expressway without meeting some very difficult conditions. The concession agreement stipulates that the government at the centre or Delhi or Haryana cannot operate a "competing road facility" before the traffic at the expressway reaches 1,70,000 PCUs per day or the expiry of the 20-year concession period, whichever is earlier.

If the government does get a competing road built and operated, the concession period of the expressway will have to be increased by half the number of years between the commissioning of the former and the end of the latter.

The competing road will have to be priced at 133 percent of the fees charged for the use of Delhi-Gurgaon expressway.

DGIR's case against the concessionaire and NHAI has been transferred from MRTPC, which was wound up in 2009, to the Competition Appellate Tribunal, set up under the Competition Act, 2002.

Since the no-competition clause finds its origin in the government-approved 'model concession agreement (MCA)' for PPPs in national highways, the entire policy of turning over the operation of public roads – a naturally monopolistic activity – to private management and then fortifying those monopolies has come under a cloud.

(c) From January 2008, when it opened to the public, to June 2009, the expressway saw 1,694 accidents, of which 1,594 were of serious nature, leading to 100 deaths, K S Anand, a Delhi-based businessman, was informed in response to an RTI query. Anand's son died on the expressway in March 2009 after his car rammed into a stationary water tanker whose presence on the high-speed road was directly attributable to the criminal neglect of the concessionaire. "The concessionaire never bothered to make available any medical assistance in violation of the concession agreement and despite a large number of serious accidents," Anand told Governance Now. None of the SOS telephones installed on the road worked, he added.

Since subscribing to SmartExpress plan neither gives them the full price advantage that they deserve nor any advantage over other motorists because of lane indiscipline at toll plazas, even the regular commuters like to pay cash, i.e. full amount, another reason for unjustified enrichment of the concessionaire.

A large number of people who lost their lives were from nearby villages trying to cross the high-speed road that does not have enough crossover facilities.

Asked why NHAI allowed the expressway to open without compelling the concessionaire to fulfill its obligation of providing fencing, foot over-bridges, underpasses and medical facilities, the authority replied to Anand that the completion certificate was issued by the independent consultant only after it was satisfied with the provisions.

Anand has filed a PIL at Punjab and Haryana high court, charging the concessionaire, NHAI and the ministry of road transport and highways with negligence.

The Dwarka Forum too has been struggling for many months to get itself heard on serious safety hazards including absence of a flyover, which will help ease traffic moving out of Dwarka sub-city, and service lanes on a long stretch of the expressway.

"The concessionaire and NHAI have zero interest in taking responsibility for their actions. We have even written to the department of public grievances of the central government and the prime minister, without any relief," says C K Rejimon, president of Dwarka Forum.

The Delhi-Gurgaon expressway is thus a classic example of how a PPP and the web of contractual relationships that it creates are used by both public and private partners to evade their responsibility and accountability to the citizens. The project, as the CPU report shows, involves at least six actors (the ministry, NHAI, financial consultant, independent consultant, concessionaire and independent auditor) performing various roles, each being used to pass the buck on.

(e) A report in the Economic Times of August 27 said NHAI had written on August 6 to the concessionaire, threatening to terminate the concession agreement if the latter did not provide satisfactory answers to "dozen-odd points of confrontation." The points include the concessionaire's traffic count being less than that estimated by the independent consultant and the concessionaire not depositing "all proceeds" into the escrow account, as laid down in the agreement.

According to the report, NHAI had alleged, citing a Central Vigilance Commission report, that during construction, thickness of the pavement was reduced from the stipulated standard without seeking permission from the NHAI; the cost of construction thus saved was not

The parking lot of the terminal 3 (T3): the PPP project has missed numerous deadlines, costs have gone up and passengers have to pay 'airport develoment fee' that many allege to be quite irregular.

passed on to NHAI even though the bid was made on the basis of pavement thickness. NHAI also complained that the concessionaire had "failed to ensure safe, smooth and uninterrupted flow of traffic," which had resulted in the loss of lives and given a bad name to the authority.

The letter is thus a clear admission by NHAI of the project's abject failures on various counts and continuing financial improprieties.

(f) While the general commuters have been left to the tender mercies of the private monopoly over a public road, the concession agreement exempts a long list of public officials and authorities from toll payment. They range from the president and the prime minister to the road ministry officials, police and even foreign dignitaries on state visit to India. So much for the constitutional principle of equality of all citizens! If private management of a public facility is indeed the epitome of efficiency and quality, then why the advocates of PPPs – those in the government, including the ministry – exempt themselves from toll payment and waiting at the toll plazas?

From the highlights of the expressway project, here are some insights for Verma, Giri and other road users.

(a) The expressway might as well have been built the traditional way as a free-of-charge road if the government had not followed, in the name of 'policy,' the irrational thumb rule that says "first consider BOT-toll failing which BOT-annuity failing which SPV or EPC". This hardly gives a chance to traditional procurement, let alone making a comparison of the lifecycle costs of the project in different modes.

(b) The road users might as well have been paying much less in tolls than they have been paying since January 2008 if the NHAI had not relied on the "worst case" traffic estimate.

(c) The 'local traffic' should not have been paying a rupee more than 50 percent of the 'applicable fees', as per the concession agreement. Why NHAI and the government have been allowing the concessionaire to cheat the road users is the question that the public must ask and the 'public partners' must answer.

(d) Cost savings and efficiency that the PPP policy promises are hardly evident in the way the expressway project has been executed and is being operated. There was a 42-month delay from the scheduled completion date of June 2004 and 110 percent cost escalation.

(e) As for the PPP promise of 'improved service', NHAI itself admits that the concessionaire has "failed to ensure safe, smooth and uninterrupted flow of traffic."

A lot of the financial and social costs of the expressway exemplify the way the centre has been implementing its PPP policy in development of infrastructure.

The PPP policy for national highways, for instance, give private partners encumbrance-free land, "facilitation" in environment clearances and getting permits, income tax exemptions for 10 years, grant up to 40 percent of project cost, generous loans from public-sector banks, up to 30 percent equity by NHAI, 100 percent FDI up to Rs 1,500 crore, easier external commercial borrowings, custom duty exemption on import of equipment, the right to collect and retain tolls, and concession periods of up to 30 years, 90 percent repayment of senior debt if the contract gets terminated prematurely, and several other benefits. *(Read 'NHAI Going for Broke' in the August 1-15 issue of Governance Now for more on the centre's irresponsible pursuit of PPPs in highways.)*

The PPPs have also been implemented without taking into account their enormous social costs, known to the economists as 'negative externalities'. The PPP policy creates complex contractual relationships that allow far greater scope for corruption and avoidance of public accountability than in traditional public procurement.

No wonder, PPP is proving itself to be the road that is taking us for a ride. ■

feedback@governancenow.com

PPP IN PLAIN ENGLISH

PPPs are fundamentally changing public procurement by allowing the private sector to exercise greater control over, and often ownership of, public assets, such as land, roads and airports.

Kapil Bajaj

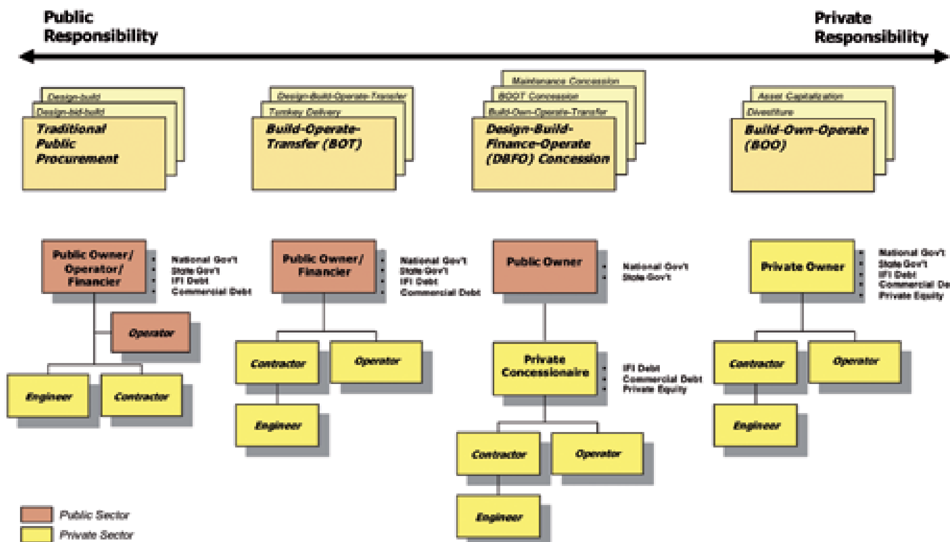
Public-private partnerships (PPPs) usually refer to an ever-widening range of the ways in which 'public procurement' (or 'government procurement') can take place with the participation of the private sector.

Since the government cannot produce and provide everything on its own, it is a big procurer or purchaser of products and services from the market. For example, it lets contracts to construct roads to private builders. It may award a contract to a private company to develop software for providing an online passport service or award a contract to a private caterer to run a canteen at a railway station for a fixed term.

These examples represent the age-old methods of public procurement, which usually involve 'inviting tenders' (i.e. calling for bids or offers from willing suppliers) to construct a road or develop a software package or provide canteen services and awarding the job to the bidder that can provide the best value for public money—usually the one who has offered to do the job at the lowest price. A contract is then signed between the government/public authority and the private party (winning bidder), formalizing their agreement over the job to be done, quality standards, the price, the time-frame, penalties, and other terms and conditions.

(A contract used commonly in traditional procurement for getting a public facility constructed is 'item rate contract' which requires the bidders to quote rates for individual items of work on the basis of a schedule of quantities furnished by the public partner. The design and drawings are usually provided by the public partner. The contractor bears little risk in these contracts, except escalation in the rates of items. Another contract used in traditional procurement is 'lump sum contract' which requires the bidders to quote a lump sum figure for completing the works in accordance with the designs and specifications of the public partner.)

Traditional public procurement, therefore, has always been a 'public-private partnership'; it is the coming together of a *public* authority and a *private* supplier in a contractual relationship with the objective of providing a part or whole of a



Source: Adapted from a description of PPPs in the EU's guidelines for successful PPPs

public good, service or infrastructure.

Then how are modern-day PPPs different from the age-old PPPs that represent the traditional methods of public procurement?

The answer lies in the nature and scope of contractual relationships that public authorities and private partners are now entering into. The governments are using modern-day PPPs to allow the private partner to play a much bigger role in the provision of a public good or service, over a much lengthier time-frame (up to 20-30 years), than is envisaged in traditional public procurement.

Most importantly, the new and emerging PPPs allow the private partners to exercise greater control over—and often ownership of—public assets (e.g. land, natural resources, roads, etc.) than what the traditional PPP contracts permitted. Private control or ownership of public assets has fundamentally changed the nature of PPPs as they have been known for long, particularly by introducing commercial principles in the provision of public services. Also, the new PPPs have been allowing more direct dealings between the private service provider and the citizens than has been the case in traditional PPPs.

The traditional PPPs restrict the role of the private partner to performing the job specified in the contract, even as the governmental partner continues to control and own all public assets used in the job. Generally, the traditional way also means that public services are provided either free or at prices ('user charges') that are subsidised or regulated by government orders; they also allow very limited amount of direct dealings between the private service provider and the citizens.

The newfangled PPPs usually allow the public partner to concede to the private partner the right to provide a service or infrastructure as well as to collect charges from the users, such as tolls from road users. Here too, the user charges are generally regulated, but the private partner is allowed full cost recovery as well as a rate of return on his investment.

Since the new PPPs are used in risky infrastructure projects and rely on a large proportion of borrowed funds, the private partner often forms a separate company, called 'special purpose vehicle (SPV)', to insulate the parent firm from the risks of the project. If the project were to fail, only the SPV would incur the losses and be liable to pay off the loans, not the parent firm(s). The SPV that signs the contract (concession agreement) with the government. The SPV may also engage subcontractors to build the facility and then maintain it and collect user charges over the period of the concession.

The public partner may provide some financial support to the SPV by subscribing to some of the equity capital of that special company. The government may also provide some amount of grant to make a PPP project 'commercially viable'.

The government may also bind itself to repaying the loans partially or fully if the contract (concession) were to be terminated prematurely. The government may also guarantee a minimum revenue to the private partner in order to mitigate 'demand risk' (fluctuation in the number of users of, say, a road), but may also provide for revenue sharing if the demand exceeds a certain threshold. In addition, the government provides various tax incentives to the PPPs. The various forms of government involvement is obviously a big attraction for the lenders.

Described below are three kinds of the new PPP modes that have been used in India.

1. The lease contracts provide a means for the private partner to purchase the income streams generated by publicly owned assets in exchange for a fixed lease payment to the public authority and the obligation to operate and maintain the assets. Lease contracts transfer commercial risk to the private partner, as its ability to derive a profit is linked with its ability to reduce operating costs, while still meeting designated service levels.

2. The BOT contract requires the private partner ('concessionaire') to design and build an asset, operate and maintain it, and transfer it back to the government partner at the end of the specified term, which can last for 20-30 years. The project is financed by either the public partner or the private partner. In India, the private partner is required to finance the project and is either paid a rent for the use of the facility or allowed to collect revenue from the users.

3. Build-own-operate-transfer (BOOT) concession is a variation of the BOT model except that the private partner also 'owns' the facility and finances the project, thus assuming risks relating to planning, design, construction and operation of the project. (It's important to realise that 'ownership' even in BOOT concessions in India does not mean an unfettered property right; it's usually limited to that of exclusive operation and thereafter transfer of the facility to the private partner.)

So from a simple outsourcing of a job that traditional procurement has been, PPPs of the present times have evolved into complex contracts, allowing deeper private involvement that may cover financing, designing, constructing, owning and operating a facility. The number and kinds of PPP that can exist are limited only by one's imagination! ■