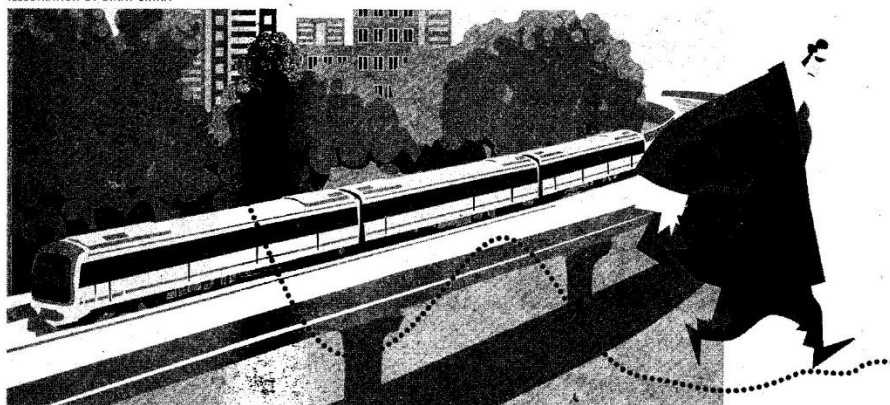


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# Questioning a holy cow

## Malfesance in Delhi Metro cannot go unquestioned

Pursuant to a recent arbitration award, the Delhi Metro Rail Corporation (DMRC) could end up paying about ₹5,000 crore to Reliance Infrastructure for termination of the concession agreement relating to the Delhi Airport Metro Express. Since DMRC has no money of its own, the government will have to pay.

Who is responsible for this \$0.78 billion hit to the taxpayer? Will the delinquents be judged by the same yardsticks that the Central Bureau of Investigation (CBI) is applying (rightly or wrongly) to several persons, including the three public servants recently convicted in a coal mine case? Or will they be treated as "more equal than others", to borrow the famous expression from George Orwell's *Animal Farm*?

Issues such as subversion of due process, lack of accountability, negligence and malfesance at once arise from an award of such enormous proportions. To settle these, a dispassionate assessment of the relevant facts, issues and the *dramatis personae* is necessary.

As an organisation, DMRC virtually functioned on the dictates of the venerable E Sreedharan. In public perception, the two have long been considered synonymous. In addition to his remarkable capacity to execute construction contracts, Mr Sreedharan also displayed an extraordinary acumen in public relations by capturing the fancy of politicians and people alike. So evaluating his actions may be akin to questioning a "holy cow" and thereby inviting public wrath. Yet, truth has to be pursued.

DMRC was cleverly structured inasmuch as it is owned 50:50 by the central government and the Delhi government. As a result, it is neither a public sector undertaking (PSU) of the central government nor of the Delhi government. DMRC is thus free of the controls and accountability that typically apply

to PSUs. For several years, DMRC even managed to ward off the mandatory Comptroller and Auditor General (CAG) audit. While this may sound ingenious for speeding up work, the consequent dilution of checks and balances that apply to public funds is not acceptable.

In 2007, DMRC recommended that civil works for the Airport Line project be undertaken by DMRC while the rest may be assigned to a private company under a 30-year concession. Since DMRC's advice was rarely questioned, the proposal was endorsed by an Empowered Group of Ministers.

Taking advantage of its position, DMRC

bypassed the mandatory appraisal and approval of the Finance Ministry and Planning Commission that was required for all PPP projects. It settled the contract structure by itself, never mind its lack of experience or expertise in dealing with such complex PPP contracts. Despite its claim that it followed the model concession agreement (MCA) of the erstwhile Planning Commission, DMRC deliberately introduced several distortions

that led to unjust enrichment of a private entity. Moreover, being a consultant for the Hyderabad Metro project, DMRC was fully aware that the then Government of Andhra Pradesh had truthfully followed the MCA for award of that project. So there was no need or justification for the impugned modifications by DMRC.

The MCA does not envisage civil works to be undertaken by one agency while assigning the entire project to another. Such an arrangement was likely to create endless disputes and claims, as it actually did. Building civil structures only to hand them over to a concessionaire is clearly a sub-optimal approach, but if this was somehow considered necessary, the agreement should have at least stip-

ulated safeguards to protect public interest. Incompetence and negligence of DMRC is writ large in this arrangement.

In its award, the arbitration tribunal has held DMRC guilty of breach of contract for failing to cure significant defects such as 1,551 cracks in 367 of the 510 girders, non-permissible twists in 149 girders, inadequate/excessive gaps between girders and shear keys, inaccessibility of bearings etc. It has, therefore, awarded heavy costs and damages to the concessionaire. Separately, the Commissioner for Railway Safety has ordered a sharp reduction in train speed. Evidently, DMRC is not only guilty of constructing low-quality unsafe structures, but also responsible for the loss of several thousand crores of rupees to the exchequer.

Further, all MCAs published by the Planning Commission (and applied across sectors) restrict the liability of the government by imposing a predetermined cap on the capital costs payable upon termination. DMRC deliberately removed this ceiling, thus enabling the concessionaire to claim several hundred crores of rupees more than what it would have got under the MCA.

In an environment where project costs were routinely gold-plated by private companies in collusion with bank officials (see *Sub-prime infrastructure* at [www.gajendralhaldea.in](http://www.gajendralhaldea.in)), there is little assurance that the same did not happen in this case. By removing the cap on its termination liability, DMRC facilitated a private company to secure large unearned gains at public expense.

DMRC also altered the arbitration clauses of the MCA by mandating that only engineers empanelled by it would act as arbitrators. So three engineer-arbitrators gave a quasi-judicial award as large as ₹5,000 crore after settling eight questions of law! Such adjudication by engineers is unprecedented, as far as I know.

The balance sheet of the concessionaire admittedly shows an equity capital of a meagre ₹1 lakh, to which even the CAG had taken a strong exception. Yet, the concessionaire has been awarded ₹371 crore as compensation for its equity contribution. Among others, the modification of MCA provisions relating to total project cost, equity, subordinated debt etc. have compromised DMRC's case in several ways. Similarly, the rate of interest to be paid by DMRC was also revised upwards, leading to a loss of several hundred crores of rupees. Space does not permit further elaboration of this misadventure.

Mutilating the MCA and yet swearing by it is an exercise in public deception. Now that a payment of ₹5,000 crore looms large before the government, the least it would have to do is fix accountability for this grave malfesance and subversion of due process. For projects such as this have ruined the banking system and slowed down economic growth.

In addition, those responsible for the sub-standard and unsafe structures, identified by the engineer-arbitrators, would also have to be nailed, for no one, howsoever influential, can be above the law. The government can hardly afford to compromise its credibility by applying different standards to some people.

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