Issues with Power sector

What is the issue?

The absence of a legal framework in dealing with PPP contracts is resulting in a lot of stress in the infra sector.

What are the concerns with the power sector?

- Of the 312 projects approved by the Public Private Project Appraisal Committee since 2006, only 48 have been approved in the last four years, and only 13 in the last two financial years.
- Fear of accusations of corruption constricts the space for meaningful dialogue between honest bureaucrats and businessmen.
- The 40th Standing Committee on Energy estimated that loans to two- thirds of the country's coal-based power capacity are under stress.
- Hence, banks are hesitant to take any further risk on the thermal power sector.
- Further, Insolvency may result in the power companies being sold off piece by piece, leading to recovery of money poured into them by the banks.
- Hence, long-term ramifications for the country's power-generation capacity and investor confidence in the sector are obvious.

What are the judicial interventions to avoid arbitrariness of the state?

- In 2012, the Supreme Court cancelled first-come-first-served spectrum allocations.
- In that case, the SC noted that "while transferring or alienating natural resources, the state is duty bound to adopt the method of auction by giving wide publicity".
- However, in 2009, it upheld the decision not to publicly auction the development of Pondicherry port.
- In 2013, the SC upheld the grant of land, without auction, to a joint venture public-private-partnership project in Ahmedabad.
- Also, in 2014, while cancelling the coal block allocations, the court accepted the contention that the coal blocks need not have been auctioned.

- Thus, in each case, the court examined the individual circumstances to assess whether the state acted in an arbitrary manner.
- Also, in 2014, the Supreme Court cancelled over 200 coal-block allocations.

- This was because no objective criteria or consistent standards and guidelines were followed, and consequently found the approach to be arbitrary, unconstitutional and illegal.
- The decision exposed the absence of a comprehensive legal framework when entrusting public resources and duties to the private sector.

What should be done?

- **Identifying right partners** - In India, template contracts developed years ago are still the norm.
- Given the high public cost of business failure, one-sided contracts in favour of the public authority do not necessarily serve public interest.
- In addition to getting the best price and service quality, public authorities should also aim to identify the right commercial partner and achieve the correct balance of commercial risk.
- For this, European Commission directives provide detailed guidance and different auction procedures to help achieve this.
- Also, any exceptions to a public auction should be clearly articulated in the policy document itself.
- **Contractual terms** - In the case of Delhi-Noida tollway bridge, the government extended the term of the contract to the private partner until they made a certain return.
- The Allahabad high court noted that this element of perpetuity in a public contract where the assets belonging to the state have been put in the hands of a private company.
- Hence, they partly struck down the contract.
- Most countries with PPP laws stipulate at least some basic guidelines on public contracts, such as the maximum term.
- (In Brazil, for example, the term of the contract cannot be more than 35 years.)
- Thus, the government should know the limits of what they a project could offer during contract negotiation.
- **Consultation** - The process of setting contractual terms should ideally involve affected stakeholders.
- In India, unlike in some other jurisdictions, there is typically no formal consultation with potential stakeholders other than the bidders.
- Such consultations could serve to better identify concerns, and means to address them.
- For example, projects which entail displacement could involve consultation procedures with affected persons to better identify meaningful resettlement and rehabilitation obligations.
- **Amending contracts** - A legal framework should also provide guidance on

amendment of contractual terms.

- For example, a change in price controls for exported coal can cause several Indian power plants to become economically unviable overnight.
- Also even when power generation cost increases due to these exports, state distribution companies did not agree to change the power tariffs in the contracts.
- Thus, the power companies should be allowed to revised power prices based on external factors to ensure their financial viability.
- Recently, the Supreme Court agreed to permit approaches to electricity regulatory commissions to tweak the contracts.
- Thus, a comprehensive policy review for the power sector should be made at the earliest.

Source: Business Line

SHANKAR IAS PARLIAMENT
Information is Empowering