

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION (CIVIL) 7181/2009**

Reserved on : 5th March, 2009
Date of Decision : 8th April, 2009

NAVINYA BUILDCON PRIVATE LIMITED Petitioner

Through : Mr. Mukul Rohtagi with Mr. Rajiv Nayar, Sr. Advocates with Ms. Meghna Mishra, Mr. R.N. Karanjawal and Ms. Lakshmi Ramchandra, Advs.

versus

UNION OF INDIA & OTHERS Respondents

Through : Mr. Gaurav Duggal, Adv. for UOI. Mr. Prag P. Tripathi with Mr. Sandeep Sethi, Sr. Advocates with Ms. Arti, Ms. Shambhu Sharan & Ms. Udisha Sahay, Advs.

% **CORAM:**
HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

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|----|---|-----|
| 1. | Whether reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

J U D G M E N T

SIDDHARTH MRIDUL, J.

1. The Petitioner has filed the instant writ petition, *inter alia*, seeking writ of certiorari for quashing the letter dated 20th February,

2009 vide which the National Highways Authority of India (NHAI), Respondent No.3 herein have disqualified the Petitioner, and also seeking writ of mandamus to restrain the NHAI from inviting the second round of bids from the other bidders.

2. The brief facts as are relevant for determination of the present writ petition are as follows.

- (a) The NHAI decided to undertake development of six laning of Kishangarh-Ajmer-Beawar section of National Highway No.8 from Km. 364.125 to Km. 58.245 (length 93.56 Km.) in the State of Rajasthan under NHDP, Phase-III (Project) through public-private/ Public Sector Partnership (PPP) on Design, Built, Finance, Operate and Transfer (DBFOT) basis and decided to carry out the bidding process for selection of the bidder to whom the Project may be awarded.
- (b) The process of selection of bidders comprised of the following two stages:-
 - (i) Pre-qualification of interested applicants as per parameters laid down in the Request For Qualification (RFQ). This was the qualification stage.
 - (ii) The applicants declared successful at RFQ stage, subject to a maximum of six would be allowed to participate in the second stage of bidding, namely bid stage i.e. Request For Proposal (RFP).
- (c) In March, 2008 the NHAI invited applications for above Project through RFQ published in newspaper/website with an intention to pre-qualify and shortlist the applicants as

per the provisions of the RFQ document. The due date for submission of the RFQ was 8th May, 2008. The said date for submission was thereafter extended to 29th May, 2008 and subsequently to 19th June, 2008.

- (d) In response to the RFQ invitation, 23 firms, JVs, consortiums submitted the RFQ applications by the due date of submission. The Petitioner alongwith its consortium partner, Atlantia S.p.A of Italy submitted the RFQ on the due date to NHAI.
- (e) The duly constituted evaluation committee of the NHAI evaluated the applications submitted by all the 23 applicants and on the basis of evaluation, the NHAI shortlisted the following six applicants:

Sl. No.	Name of Applicant
1.	Navinya-Atlantia Consortium
2.	GVK-Leighton-Mitsui Consortium
3.	HCC-Laing Consortium
4.	Maytas-China railway 18 th Bureau (Group) Corporation Ltd.
5.	IJM-Abertis-IDFC JV
6.	ISOLUX-SOMA Consortium

- (f) The above mentioned shortlisted applicants including the Petitioner were duly informed by the NHAI about their shortlisting in accordance with Clause 1.2.1 and Clause 3.5.2 of RFQ document by way of NHAI's letter dated 26th August, 2008 with an intimation that all the above shortlisted applicants are eligible for participation in the (ii) stage of bidding process subject to continuing

compliance to various provisions of the RFQ. It was clearly stipulated in the said letter dated 26th August, 2008 that the provisions of the RFQ would apply *mutatis mutandis* to this announcement regarding shortlisting and subsequent bidding.

(g) Subsequently, the NHAI issued RFP document to the above shortlisted applicants with last date of submission as 14th October, 2008, which was extended from time to time and the last date of submission was 23rd December, 2008.

(h) On the 23rd December, 2008 the NHAI opened the bids submitted by the parties and noticed that out of six shortlisted applicants the following four bidders had submitted their bids:-

1. M/s ISOLUX-SOMA Consortium
2. M/s HCC-Laning Consortium
3. M/s Mytas-China Railway 18th Bureau (Group) Corporation Limited.
4. M/s Navinya Buildcon Pvt. Limited-Atlantia S.p.A. Consortium.

(i) Here it is relevant to note that both the RFQ as well as the RFP contained a Clause pertaining to "Conflict of Interest". The RFQ document in Clause 2.2 provided for eligibility of the applicants. Clause 2.2.1(c) defined "Conflict of Interest" as follows:

"An applicant shall not have a conflict of interest (the **"Conflict of Interest"**) that affects the Bidding Process. Any Applicant found to have a Conflict of Interest shall be disqualified. An Applicant shall be deemed to have a Conflict of Interest that affects the Bidding Process, if:

(i) **The Applicant, its Member or Associate (or any constituent thereof) and any other Applicant, its Member or Associate (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of an Applicant, its Member or Associate (or any shareholder thereof having a shareholding of more than five percent of the paid up and subscribed share capital of such Applicant, Member or Associate, as the case may be) in the other Applicant, its Member or Associate, as the case may be, is less than one per cent of the paid up and subscribed share capital thereof; provided further that this disqualification shall not apply to a bank, insurance company, pension fund or a public financial institution referred to in section 4A of the Companies Act. 1956; (emphasis ours)**

Or

(ii) a constituent of such Applicant is also a constituent of another Applicant; or

(iii) such Applicant receives or has received any direct or indirect subsidy from any other Applicant, its Member or Associate or has provided any such subsidy to any other Applicant; or

(iv) such Applicant has the same legal representative for purposes of this Application as any other Applicant;

Or

(v) such Applicant has a relationship with another Applicant, directly or through common third party/parties, that puts either or both of them in a position to have access to each others' information about, or to influence the Application of either or each other; or

(vi) such Applicant has participated as a consultant to the Authority in the preparation of any documents, design or technical specifications of the Project."

All the applicants at the RFQ stage also had to submit before the NHAI an undertaking as prescribed in Appendix-I to the RFQ document. In terms of the said requirement the Petitioner submitted an undertaking before the NHAI stating therein that the Petitioner did not

have any "Conflict of Interest" in accordance with the above Clause 2.2.1(c) of the RFQ document.

- (j) The RFP document contained a similar provision pertaining to "Conflict of Interest" as herein below:

"2.1.14 A Bidder shall not have a conflict of interest (the "Conflict of Interest") that affects the Bidding Process. Any Bidder found to have a Conflict of interest shall be disqualified. In the event of disqualification, the Authority shall forfeit and appropriate the Bid Security or Performance Security, as the case may be, as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, the time, cost and effort of the Authority, including consideration of such Bidder's proposal, without prejudice to any other right or remedy that may be available to the Authority hereunder or otherwise. **Without limiting the generality of the above, a Bidder shall be considered to have a Conflict of Interest that affects the Bidding Process, if:**

- (i) **such Bidder (or any constituent thereof) and any other Bidder (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this qualification shall not apply in cases where the direct or indirect shareholding in a Bidder or a constituent thereof in the other Bidder(s) (or any of its constituents) is less than 1% of its paid up and subscribed capital; or (emphasis ours)**
- (ii) a constituent of such Bidder is also a constituent of another Bidder; or
- (iii) such Bidder receives or has received any direct or indirect subsidy from any other Bidder, or has provided any such subsidy to any other Bidder; or
- (iv) such Bidder has the same legal representative for purposes of this Bid as any other Bidder; or
- (v) such Bidder has a relationship with another Bidder, directly or through common third parties, that puts them, in a position to have access to each others information about, or to influence the Bid of either or each of the other Bidder; or
- (vi) such Bidder has participated as a consultant to the Authority in the preparation of any documents, design or technical specifications of the Project."

All the shortlisted bidders were required in terms of the

RFP documents to submit another undertaking as contained in Appendix 1 to the RFP document wherein the bidder had to declare that they did not have any "Conflict of Interest" in accordance with Clause 2.1.14 and 2.1.15 of the RFP document. In terms of the above requirement, even the Petitioner submitted an undertaking before the NHAI clearly stating that it did not have any "Conflict of Interest" as provided in Clause 2.1.14 of RFP document.

- (k) In the meantime before submission of the bid the Petitioner wrote a letter dated 8th October, 2008 to the NHAI with regard to Clause 2.1.14 of the RFP and *inter alia* pointed out that a similar clause had posed problems in the bid for re-development of New Delhi Station in the tenders invited by Indian Railways. It was brought to the notice of NHAI that the Railway Land Development Authority under the Ministry of Railways had modified the said clause and accordingly the limit of 1% cross holding was increased to 10%. Since the Petitioner did not receive a response to the letter dated 8th October, 2008, a further letter was addressed by the Petitioner to the NHAI on the 4th November, 2008. Vide this letter the Petitioner once again pointed out to the NHAI that the issue of "Conflict of Interest" as defined under Clause 2.1.14 of the RFP needed to be modified. Further the Petitioner drew the attention of NHAI that the above mentioned cross holding could happen without the knowledge of the bidder since it was not possible to check all such investment in all the

constituents at the time of submission of RFQ. On the 18th November, 2008, the Petitioner wrote to NHAI further to its letter dated 8th October, 2008 and 4th November, 2008 with regard to Clause 2.1.14 of the RFP and pointed out that no response had been received from NHAI so far.

- (l) On 28th November, 2008 NHAI wrote to the Petitioner stating that the Petitioner's letter dated 18th November, 2008 and other letters on similar issues with regard to the percentage of the common shareholding were under consideration. In the meantime, it informed the Petitioner that the last date of submission of RFP was the 3rd December, 2008 and further stated that in the meantime the Petitioner should abide by the provisions of the RFP document.
- (m) On the submission of the RFP document the NHAI received representations from rest of the three shortlisted bidders M/s ISOLUX-SOMA-Consortium by way of its letter dated 24th December, 2008, M/s Maytas-China railway 18th Bureau (Group) Corporation Ltd. by way of their letter dated 23rd December, 2008 and M/s HCC John Laing by way of its letter dated 26th December, 2008, representing to the NHAI that the consortium led by the Petitioner had M/s Atlantia as one of its members and consortium led by IDFC as M/s Abertis as a member. It further pointed out that Abertis being part of the consortium led by IDFC had 6.68% shareholding in Atlantia which was part of consortium led by the

Petitioner. Having disclosed the above facts the three bidders requested that the bid submitted by the consortium led by the Petitioner and IDFC should be rejected and they may be disqualified from bidding.

- (n) Before the NHAI could verify from the Petitioner the correctness of the above allegations made by the above three bidders, the Petitioner suo moto by its letter dated 8th January, 2009 addressed to the NHAI clarified the following:-

“i. That they were aware of the representations made by the competitors regarding the “Conflict of Interest” and the factum of questioning the participation of the Petitioner.

ii. Till the time the Petitioner was shortlisted to submit the proposal, they were not aware of the details of other applicants.

iii. That they had made representations for modification of the “Conflict of Interest” Clause in the RFP document to avoid future complication in the Bidding Process.

iv. That the Petitioner had received the response from Respondent No.3 wherein it was made clear that the Petitioner should continue to abide by the Clauses of RFP document and that the violation of the clause shall be dealt with as per provisions of RFP document.

v. That the Petitioner had no “Conflict of Interest” with other three Bidders who have submitted their bids.”

- (o) The Petitioner was orally informed in the meeting between the Chairman of NHAI and the representative of the Petitioner company held on 23rd February, 2009 that the Petitioner’s bid was rejected. In the meantime by the impugned letter dated 20th February, 2009 addressed to the shortlisted bidders NHAI informed the shortlisted bidders that it had decided not to accept the bid of the

Petitioner who had quoted the highest price due to non-adherence of the requirements of the RFP. NHAI further, in terms of Clause 3.3.3 of the RFP, requested the said bidders to match the bid of the Petitioner. The NHAI in the said letter stated that all the bids which will be received in the “second round of bidding” would be opened at 1130 Hours on the 27th February, 2009 in the presence of the bidders who choose to attend.

3. Mr. Mukul Rohtagi, learned senior advocate appearing on behalf of the Petitioner made the following submissions. His first submission was that the condition with regard to the “Conflict of Interest” had been waived by the NHAI, since the Petitioner had already been shortlisted for the second stage. The second submission was that the conditions stipulated in the RFQ and the RFP are not mandatory and that the same should be read down so as to be read pragmatically. Mr. Rohtagi’s third submission was that the Petitioner at the time of applying for the request for qualification was not aware of the fact that, Abertis which held 6.68% share in Atlantia, the Petitioner’s partner, was one of the members of the consortium that had also applied in response to the RFQ. Further, it was contended by the Petitioner that the principles of natural justice had not been followed by the NHAI, inasmuch as, the Petitioner had not been informed of its disqualification prior to the remaining bidders being called to participate in the second round of bidding. The last submission made on behalf of the Petitioner was that since the consortium of which Abertis was a constituent did not participate in the second stage of bidding and did not submit its financial bid, therefore, the Petitioner

consortium did not incur any disqualification at the stage of the RFP.

4. On the other hand it was urged on behalf of the NHAI by Mr. Prag P. Tripathi, learned Additional Solicitor General, that the Petitioner had furnished an undertaking alongwith the RFQ to the effect that the Petitioner did not suffer from any conflict of interest inviting disqualification, and since the NHAI had proceeded on the basis of that undertaking furnished on behalf of the Petitioner, there was no question of there being any waiver. It was next urged on behalf of the NHAI, that the Supreme Court had clearly laid down that, the clauses of the terms and conditions of a tender have to be read in a pedantic manner and cannot be read down so as to be read pragmatically, as was sought to be urged by the Petitioner. It was next contended on behalf of the NHAI that even after the Petitioner consortium and the consortium of which Abertis was a constituent were shortlisted after the first stage, at no point of time did the Petitioner, as required by the terms and conditions of tender, inform the NHAI that it had incurred disqualification resulting out of the share holding of Abertis in Atlantia, the consortium partner of the Petitioner. It was therefore urged on behalf of the NHAI that the erroneous undertaking furnished by the Petitioner amounted to a material misrepresentation that rendered it liable for disqualification. It was lastly urged on behalf of the NHAI that, upon coming to know of the disqualification incurred by the Petitioner from the representations of the other bidders, before it could call upon the Petitioner to clarify the position, the Petitioner itself had vide its communication dated 8th January, 2008 admitted that Abertis had a share holding in Atlantia, a constituent of the Petitioner consortium

and that, therefore, there was no question of violation of the principles of natural justice in the NHAI disqualifying the Petitioner.

5. Before we come to the merits of the rival submissions made on behalf of the parties, it would be necessary and relevant to extract some of the other relevant clauses of the RFQ and the RFP:

APPENDIX I

Letter Comprising the Application for Pre-Qualification
(Refer Clause 2.13.2)

Dated:

To,

Mr S K Nirmal
General Manager BOT (II) A
National Highways Authority of India
G-5&G-6, Sector 10, Dwarka
New Delhi – 110 075

Sub: Application for pre-qualification for ***** Project.

Dear Sir,

With reference to your RFQ document dated *****, I/we, having examined the RFQ document and understood its contents, hereby submit my/our Application for Qualification for the aforesaid project. The Application is unconditional and unqualified.

- 2 All information provided in the Application and in the Appendices and Annexures is true and correct and all documents accompanying such Application are true copies of their respective originals.
- 3 This statement is made for the express purpose of qualifying as a Bidder for the development, construction, operation and maintenance of the aforesaid Project.
- 4 I/ We shall make available to the Authority any additional information it may find necessary or require to supplement or authenticate the Qualification statement.
- 5 I/ We acknowledge the right of the Authority to reject our Application without assigning any reason or otherwise and hereby waive our right to challenge the same on any account whatsoever.
6. We certify that in the last three years, we/ any of the Consortium Members have neither failed to perform on any contract, as evidenced by imposition of a penalty or

a judicial pronouncement or arbitration award, nor been expelled from any project or contract nor have had any contract terminated for breach on our part.

7. I/We declare that:
 - (a) I/We have examined and have no reservations to the RFQ document, including any Addendum issued by the Authority.
 - (b) I/ We do not have any conflict of interest in accordance with Clauses 2.2.1(c) and 2.2.1(d) of the RFO document; and** (emphasis ours)
 - (c) I/ We have not directly or indirectly or through an agent engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice, as defined in Clause 4.3 of the RFQ document, in respect of any tender or request for proposal issued by or any agreement entered into with the Authority or any other public sector enterprise or any government, Central or State; and
 - (d) I/ We hereby certify that we have taken steps to ensure that in conformity with the provisions of Clause 4 of the RFQ document, no person acting for us or on our behalf has engaged or will engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice.
8. I/ We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Application that you may receive nor to invite the Applicants to Bid for the Project, without incurring any liability to the Applicants, in accordance with Clause 2.17.6 of the RFQ document.
9. I/ We believe that we/ our Consortium/ proposed Consortium satisfy(ies) the Net Worth criteria and meet(s) the requirements as specified in the RFQ document and are/ is qualified to submit a Bid in accordance with the guidelines for qualification of bidders seeking to acquire stakes in Public Sector Enterprises through the process of disinvestment issued by the GOI vide Department of Disinvestment OM No. 6/4/2001-DD-II dated 13th July, 2001 which guidelines apply *mutatis mutandis* to the Bidding Process.
10. I/ We declare that we/ any Member of the Consortium, are/ is not a Member of a/ any other Consortium applying for pre-qualification.
11. I/ We certify that in regard to matters other than security and integrity of the country, we have not been convicted by a Court of Law or indicted or adverse orders passed by a regulatory authority which could cast a doubt on our ability to undertake the Project or which relates to a grave offence that outrages the moral sense of the community.
12. I/ We further certify that in regard to matters relating to security and integrity of the country, we have not been charge-sheeted by any agency of the Government or convicted by a Court of Law for any offence committed

by us or by any of our Associates.

13. I/ We further certify that no investigation by a regulatory authority is pending either against us or against our Associates or against our CEO or any of our Directors/ Managers/ employees.
14. I/ We further certify that we are not disqualified in terms of the additional criteria specified by the Department of Disinvestment in their OM No.6/4/2001-DD-II dated July 13, 2001, a copy of which forms part of the RFQ at Appendix-IV thereof.
15. **I/ We undertake that in case due to any change in facts or circumstances during the Bidding Process, we are attracted by the provisions of disqualification in terms of the guidelines referred to above, we shall intimate the Authority of the same immediately.** (emphasis ours)
16. The Statement of Legal Capacity as per format provided at Annex-V in Appendix-I of the RFQ document, and duly signed, is enclosed.
17. I/ We understand that the selected Bidder shall either be an existing Company incorporated under the Indian Companies Act, 1956, or shall incorporate itself as such prior to execution of the Concession Agreement.
18. I/ We, hereby irrevocably waive any right which we may have at any stage at law or howsoever otherwise arising to challenge or question any decision taken by the Authority in connection with the selection of Applicants, selection of the Bidder, or in connection with the selection/ Bidding Process itself, in respect of the above mentioned Project and the terms and implementation thereof.
19. **I/we agree and undertake to abide by all the terms and conditions of the RFQ document.** (emphasis ours)

In witness thereof, I/We submit this application under and in accordance with the terms of the RFQ document.

Yours faithfully,

Date: (Signature of the Authorised Signatory)

Place: (Name and designation of the Authorised Signatory)

Name and seal of the Applicant/ Lead Firm

Note: Paragraph in square parenthesis may be omitted, if not applicable, or modified as necessary.

- 1.2.1 The Authority has adopted a two-stage process (collectively referred to as the "**Bidding Process**") for selection of the Bidder for award of the Project. The first stage (the "**Qualification Stage**") of the

process involved qualification of interested parties/Consortia in accordance with the provisions of RFQ. At the end of this stage, the Authority shortlisted [6 (six)] suitable pre-qualified Applicants who were eligible for participation in the second stage of the Bidding Process (the “**Bid Stage**”) comprising Request for Proposals. [GOI has issued guidelines (see Appendix-V of enterprise through the process of disinvestment. These guidelines shall apply *mutatis mutandis* to the Bidding Process. **The Authority shall be entitled to disqualify an Applicant in accordance with the aforesaid guidelines at any stage of the Bidding Process. Applicants must satisfy themselves that they are qualified to bid, and should give an undertaking to this effect in the form at Appendix-I](emphasis ours)**

1.2.2 In the Bid Stage, the aforesaid short listed Applicants, including their successors, (the “Bidders”) are being called upon to submit their Bids in accordance with the Bidding Documents. The Bid shall be valid for a period of not less than 120 days from the date specified in Clause .3 for submission of bids (the “Bid Due Date”). (emphasis ours)

2.6.2 The Authority reserves the right to reject any Bid and appropriate the Bid Security if:
(a) **at any time, a material misrepresentation is made or uncovered, or**

(b) the Bidder does not provide, within the time specified by the Authority, the supplemental information sought by the Authority for evaluation of the Bid.

Such misrepresentation/improper response shall lead to the disqualification of the Bidder. If the Bidder is a Consortium, then the entire Consortium shall be disqualified/rejected. If such disqualification/rejection occurs after the Bids have been opened and the [lowest/highest] Bidder gets disqualified/rejected, then the Authority reserves the right to:

(i) **invite the remaining Bidders to submit Bids in accordance with Clause 3.3.3 and 3.3.4; or**

- (ii) take any such measure as may be deemed fit in the sole discretion of the Authority, including annulment of the Bidding Process. (emphasis ours)

2.6.3 In case it is found during the evaluation or at any time before signing of the Concession Agreement or after its execution and during the period of subsistence thereof, including the Concession thereby granted by the Authority, that one or more of the pre-qualification conditions have not been met by the Bidder or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the Concessionaire either by issue of the LOA or entering into of the Concession Agreement, and if the Bidder has already been issued the LOA or has entered into the Concession Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Authority to the Bidder, without the Authority being liable in any manner whatsoever to the Bidder or Concessionaire, as the case may be. In such an event, the Authority shall forfeit and appropriate the Bid Security or Performance Security, as the case may be, as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, time, cost and effort of the Authority, without prejudice to any other right or remedy that may be available to the Authority.

2.6.4 The Authority reserves the right to verify all statements, information and documents submitted by the Bidder in response to the RFQ, the RFP or the Bidding Documents. Failure of the Authority to undertake such verification shall not relieve the Bidder of its obligations or liabilities hereunder nor will it affect any rights of the Authority thereunder.

APPENDIX – I Letter comprising the Bid
(Refer Clauses 2.1.5 and 2.14)

[The Chairman Secretary,

Dated:

National Highways Authority of India

G-5 & 6, Sector 10, Dwarka
New Delhi 110075*****
India
*****]

Sub: Bid for Design, Engineering, Finance, Construction, Operation and Maintenance for Six laning of the existing road from km 364,125 to km 58, 245 (approximately 93.56 km) on the Kishangarh-Ajmer-Beawar section of National Highway No.8 in the State of Rajasthan on build, operate and transfer ("BOT") under NHDP Phase-III on Design, Build, Finance, Operate and Transfer basis***** Project

Dear Sir,

With reference to your RFP document dated *****, I/we, having examined the Bidding Documents and understood their contents, hereby submit my/our Bid for the aforesaid Project. The Bid is unconditional and unqualified.

2. All information provided in the Bid and in the Appendices is true and correct.
3. This statement is made for the express purpose of qualifying as a Bidder for the [development, construction, operation and maintenance] of the aforesaid Project.
4. I/We shall make available to the Authority any additional information it may find necessary or require to supplement or authenticate the Bid.
5. I/We acknowledge the right of the Authority to reject our Bid without assigning any reason or otherwise and hereby waive our right to challenge the same on any account whatsoever.
6. We certify that in the last three years, we/any of the Consortium Members have neither failed to perform on any contract, as evidenced by imposition of a penalty or a judicial pronouncement or arbitration award, nor been expelled from any project or contract nor have had any contract terminated for breach on our part.
7. I/We declare that:
 - (a) I/We have examined and have no reservations to the Bidding Documents, including any Addendum issued by the Authority.
 - (b) I/We do not have any conflict of interest in accordance with Clauses 2.1.14 and 2.1.15 of the RFP document;**
 - (c) I/We have not directly or indirectly or through an agent engaged or indulged in any corrupt practice, fraudulent practice, coercive practice, undireable practice or restrictive practice, as defined in Clause 4.3 of the RP document, in respect of any tender or request for proposal issued by or any agreement entered into with the

Authority or any other public sector enterprise or any government, Central or State; and

- (d) I/We hereby certify that we have taken steps to ensure that in conformity with the provisions of Clause 4 of the RFP, no person acting for us or on our behalf has engaged or will engage in any corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice.
- 8. I/We understand that you may cancel the Bidding Process at any time and that you are neither bound to accept any Bid that you may receive nor to invite the Bidders to Bid for the Project, without incurring any liability to the Bidders, in accordance with Clause 2.6 of the RFP document.
- 9. I/ We believe that we/ our Consortium/ proposed Consortium satisfy(ies) the Net Worth criteria and meet(s) the requirements as specified in the RFQ document and are/ is qualified to submit a Bid in accordance with the [guidelines for qualification of bidders seeking to acquire stakes in Public Sector Enterprises through the process of disinvestment issued by the GOI vide Department of Disinvestment OM No. 6/4/2001-DD-II dated 13th July, 2001 which guidelines apply mutatis mutandis to the Bidding Process].
- 10. I/ We declare that we/ any Member of the Consortium, are/ is not a Member of a/ any other Consortium submitting a Bid for the Project.
- 11. I/ We certify that in regard to matters other than security and integrity of the country, we have not been convicted by a Court of Law or indicted or adverse orders passed by a regulatory authority which could cast a doubt on our ability to undertake the Project or which relates to a grave offence that outrages the moral sense of the community.
- 12. I/ We further certify that in regard to matters relating to security and integrity of the country, we have not been charge-sheeted by any agency of the Government or convicted by a Court of Law for any offence committed by us or by any of our Associates.
- 13. I/ We further certify that no investigation by a regulatory authority is pending either against us or against our Associates or against our CEO or any of our Directors/ Managers/ employees.
- 14. [I/ We further certify that we are not disqualified in terms of the additional criteria specified by the Department of Disinvestment in their OM No.6/4/2001-DD-II dated July, 13, 2001, a copy of which forms part of the RFP at Appendix-V thereof.]
- 15. I/ We undertake that in case due to any change in facts or circumstances during the Bidding Process, we are attracted by the provisions of disqualification in terms of

the guidelines referred to above, we shall intimate the Authority of the same immediately.

16. [We acknowledge that our Consortium/ proposed Consortium was pre-qualified and short-listed on the basis of Technical Capacity and Financial Capacity of those of its Members who will own at least 26% of the equity of the Concessionaire and undertake that each of such Consortium Members shall continue to hold at least 26% of the equity of the Concessionaire until the Commercial Operation Date of the Project is achieved under and in accordance with the provisions of the Concession Agreement. We further agree and acknowledge that the aforesaid obligation shall be in addition to the obligations contained in the Concession Agreement in respect of Change in Ownership.]
17. [I/ We acknowledge and agree that in the event of a change in control of an Associate whose Technical Capacity and/ or Financial Capacity was taken into consideration for the purposes of short-listing and pre-qualification under and in accordance with the RFQ, I/We shall inform the Authority forthwith along with all relevant particulars and the Authority may, in its sole discretion, disqualify our Consortium or withdraw the Letter of Award, as the case may be. I/We further acknowledge and agree that in the event such change in control occurs after signing of the Concession Agreement but prior to Financial Close of the Project, it would, notwithstanding anything to the contrary contained in the Agreement, be deemed a breach thereof, and the Concession Agreement shall be liable to be terminated without the Authority being liable to us in any manner whatsoever.]
18. I/ We understand that the Selected Bidder shall either be an existing Company incorporated under the Indian Companies Act, 1956, or shall incorporate itself as such prior to execution of the Concession Agreement.
19. I/We hereby irrevocably waive any right which we may have at any stage at law or howsoever otherwise arising to challenge or question any decision taken by the Authority in connection with the selection of the Bidder, or in connection with the Bidding Process itself, in respect of the above mentioned project and the terms and implementation thereof.
20. In the event of my/ our being declared as the Selected Bidder, I/We agree to enter into a Concession Agreement in accordance with the draft that has been provided to me/us prior to the Bid Due Date. We agree not to seek any changes in the aforesaid draft and agree to abide by the same.
21. I/We have studied all the Bidding Documents carefully and also surveyed the [project highway and the traffic]. We understand that except to the extent as expressly set forth in the Concession Agreement, we shall have no claim, right or title arising out of any documents or information provided to us by the Authority or in respect of any matter arising out of or concerning or relating to the Bidding Process including the award of Concession.

22. The [Premium / Grant] has been quoted by me/us after taking into consideration all the terms and conditions stated in the RFP, draft Concession Agreement, our own estimates of costs [and traffic] and after a careful assessment of the site and all the conditions that may affect the Bid.
23. I/We offer a Bid Security of Rs. _____ (Rupees. _____ only) to the Authority in accordance with the RFQ Document.
24. The Bid Security in the form of a Demand Draft/ Bank Guarantee (strike out whichever is not applicable) is attached.
25. I/We agree and understand that the Bid is subject to the provisions of the Bidding Documents. In no case, I/We shall have any claim or right of whatsoever nature if the Project/Concession is not awarded to me/us or our bid is not opened.
26. I/We hereby submit our Bid and [offer a Premium in the form of ____ days (number of days in words) after COD for start of Premium payment as share of the Authority / per cent (in words) of the gross revenues of the Project as share of the Authority/ require a Grant of Rs. _____ (Rupees _____ only) (Strike out whichever is not applicable) for undertaking the aforesaid Project in accordance with the Bidding Document and the Concession Agreement.
27. I/We agree to keep this offer valid for 20 (one hundred and twenty) days from the Bid Due Date specified in the RFP.
28. I/We agree and undertake to abide by all the terms and conditions of the RFP document.

In witness thereof, I/we submit this Bid under and in accordance with the terms of the RFP document.

Yours faithfully,

Date: _____ (Signature of the Authority signatory)

Place: (Name and designation of the of the Authority signatory)

Name and seal of Bidder/Lead Firm

Note: Paragraphs in square parenthesis may be omitted, if not applicable, or modified as necessary.

6. Before proceeding further it is germane to refer to the relevant judicial precedent cited on behalf of the parties:

(i) In ***Master Marine Services (P) Ltd. vs. Metcalfe &***

Hodgkinson (P) Ltd. and Another, (2005) 6 SCC 138,

the Supreme Court observed:

“It has to be borne in mind that para 11 of the tender instructions clearly conferred a power upon CONCOR to relax the tender conditions at any stage, if considered necessary, for the purpose of finalizing the contract in the overall interest of CONCOR and the trade. Therefore, it felt that having regard to the fact that the Chairman of the Company had a licence under the Insurance Act, the condition regarding the holding of such a licence by the appellant itself, in the facts and circumstances of the case, could be relaxed. So far as commercial considerations are concerned, it is the specific case of CONCOR, which has not been disputed by the first respondent, that 98 per cent of the work under the contract is of data entry of a container, for which the appellant had quoted Rs.3.00 against Rs.3.75 as quoted by the first respondent and for this kind of work no licence from IRDA is required. In such circumstances, no such public interest was involved which warranted interference by the High Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution while undertaking judicial review of an administrative action relating to award of a contract. The High Court erred in setting aside the order of the CONCOR awarding the contract to the appellant.”

(ii) In ***Canara Bank vs. V.K. Awasthy***, (2005) 6 SCC 321, the

Supreme Court remarked that:

“We may also state that there is yet another line of cases as in *State Bank of Patiala v. S.K. Sharma*; (1996) 3 SCC 364, *Rajendra Singh v. State of M.P.*; (1996) 5 SCC 460 that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter, it cannot be waived.”

(iii) In ***Rajendra Singh vs. State of M.P. and Others***; (1996)

5 SCC 460, the Supreme Court observed:

“A mandatory provision conceived in the interest of a party can be waived by that party, whereas a mandatory provision conceived in the interest of the public cannot be waived by him. In other words, wherever a complaint of violation of a mandatory provision is made, the Court should enquire – in whose

interest is the provision conceived. If it is not conceived in the interest of the public, question of waiver and/or acquiescence may arise – subject, of course, to the pleadings of the parties.”

- (iv) A Division Bench of this Court in ***Patel Engineering Ltd. and Another vs. National Highways Authority of India and Others***; AIR 2005 Delhi 298, cited with approval the ratio in ***New Horizons Ltd. vs. Union of India***; (1995) 1 SCC 478, that:

“the requirement regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman.....”

- (v) In ***West Bengal State Electricity Board vs. Patel Engineering Co. Ltd. and Others***; (2001) 2 SCC 451, the Supreme Court observed:

“**23.** The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as “a repetitive systematic computer typographical transmission failure”. It is difficult to accept this contention. A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of Respondents 1 to 4 to correct the same before submission of the bid. Had they been vigilant in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one-and-a-half months of opening of the bids will also be violative of clauses 24.1, 24.3 and 29.1 of the ITB.

24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in

ordinary local bids for small works. **It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest.”** (emphasis ours)

(vi) In *Asia Foundation & Construction Ltd. vs. Trafalgar House Construction (I) Ltd.*; (1997) 1 SCC 738, the Supreme Court observed:

“9. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favoritism in the grant of contract in favour of the appellant. In *Tata Cellular v. Union of India* (1994) 6 SCC 651 this Court has held that:

“The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers,
2. committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;
- (ii) Irrationality, namely, Wednesbury unreasonableness.
- (iii) Procedural impropriety.

The above are only the board grounds but it does not rule out addition of further grounds in course of time."

10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose....."

7. Now, coming to the rival submissions in the instant case, it is seen that the stipulations in the RFQ provided for a "Conflict of Interest" clause i.e. Clause 2.2.1(c), whereby it was postulated that any applicant having a cross holding with another applicant or its consortium partners, in excess of one per cent was disqualified from participating in the tender. It is an admitted position that Abertis, a constituent of the IDFC led consortium, has a 6.68% shareholding in Atlantia, the consortium partner of the Petitioner.

8. Also applicants were to satisfy themselves that they were qualified to bid and were required to give an undertaking in the form of Appendix-I to the RFQ. The undertaking in compliance of Appendix-I was furnished by the Petitioner as well as the consortium comprising Abertis. The undertaking in Appendix-I so furnished clearly provided

to the effect that the Petitioner did not have any conflict of interest in accordance with Clause 2.2.1(c) of the RFQ document.

9. It is further seen that in case of any change in facts or circumstances during the Bidding Process, if any, disqualification in terms of the guidelines was incurred, the Petitioner would intimate the NHAI of the same immediately. It was on the basis of this undertaking that the NHAI shortlisted the applicants as per the provisions of the RFQ document. NHAI vide its letter of 26th August, 2008 shortlisting both the Petitioner consortium as well as the consortium comprising the said Abertis clearly provided that participation in the stage of bidding process was subject to continuing compliance to various provisions of the RFQ, as well as provided that provisions of the RFQ would apply *mutatis mutandis* to the shortlisting announcement and the subsequent bidding.

10. Therefore, we find no merit in the submission on behalf of the Petitioner that the NHAI had waived the disqualification emanating from the cross holding by shortlisting the Petitioner for the RFP stage. The NHAI had obviously proceeded in the qualification of the Petitioner as well as the consortium constituted by Abertis, on the basis of the clear and unequivocal undertakings furnished by both these parties, in terms of Appendix-I of the RFQ document, to the effect that there was no "Conflict of Interest" and consequently no disqualification of the parties in terms thereof.

11. Thus, in our view there was no waiver in fact of the condition of conflict of interest in the present case. Even otherwise, there could be no waiver, in view of the provisions of Clause 2.6.4, which clearly stipulated that, failure to undertake verification of all statements,

information and documents submitted by the bidder would not relieve the bidder of its obligation or liabilities under the terms and conditions of the tender, nor would it affect any rights of the NHAI in this respect.

12. The submission on behalf of the Petitioner to the effect that they did not know that Abertis, which had crossholding of more than one per cent with the partner of the Petitioner, namely Atlantia, were to participate in the bid is untenable and also does not hold any water. “Conflict of Interest” and cross holding are a matter of fact and it had nothing to do with whether the applicants participated in the tender deliberately and/or inadvertently. In other words knowledge of the participation was irrelevant. What was relevant was that Abertis had a 6.68% shareholding in Atlantia, the consortium partner of the Petitioner, which fact has not been disputed by the Petitioner itself.

13. Further, it is observed that even after the shortlisting of the applicants on the 26th August, 2008, at which point of time the Petitioner became aware that there was “Conflict of Interest” between its partner and the consortium of Abertis led by IDFC, the Petitioner chose to remain quiet in this respect. It did not, as required by the undertaking furnished by it, immediately inform the NHAI in this behalf. Right from the time that it became so aware to the time that it filed the RFP in late December, 2008, the Petitioner wrote letters to the NHAI, bringing to the latter’s notice that the “Conflict of Interest” clause was problematic and that cross holding should be increased to 10% to attract disqualification, but there was not a whisper in any of these letters that the Petitioner had incurred disqualification in this regard. This conduct of the Petitioner by itself disentitles it to the

grant of discretionary relief under Article 226 of the Constitution of India.

14. Therefore, we find no merit in the submission made by the Petitioner to the effect that it had put NHAI to notice of the cross holding merely on the ground of having furnished documents in this respect at the time of applying for the tender. In so far as the submission with regard to the NHAI not having followed the principles of natural justice in disqualifying the Petitioner is concerned, suffice to observe that under the provisions of the RFQ as well as the RFP, the NHAI could forthwith disqualify an applicant or a bidder at any time upon discovery or uncovering of any material misrepresentation or violation of any condition stipulated by the RFQ or the RFP. Even otherwise in the present case, before the NHAI could seek an explanation in this respect from the Petitioner, based on the representations of the other bidders, the Petitioner itself wrote a letter dated 8th January, 2009 to the NHAI clarifying its stand in this regard.

15. The Petitioner also contended that it did not suffer any disqualification at the stage of the RFP, since the consortium led by IDFC with Abertis as a partner did not participate in the stage of submission of RFP. In this behalf it is observed that under the provisions of Clause 1.2.2 of the RFP, all the shortlisted applicants remained 'bidders' regardless of whether they had submitted the RFP or not.

16. Lastly, on behalf of the Petitioner, it was urged that the stipulations contained in the tender ought to read pragmatically and consequently read down. In this behalf it would serve us well to

remember the observations made by the Supreme Court in ***West Bengal State Electricity Board vs. Patel Engineering Co. Ltd.(Supra)***, where it was held that *"It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract..... In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided..... We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed, which is also in the best public interest"*.

17. It is also observed that in the event of any disqualification under the provisions of Clause 2.6.2, the NHAI had reserved the power and authority to invite the remaining Bidders to submit bids in accordance with Clause 3.3.3 of the tender.

18. For the foregoing reasons we find that the present writ petition is devoid of merits and accordingly dismiss the same. However, the Petitioner shall deposit the actual cost incurred by the NHAI towards

litigation expenses in the sum of Rs.7,36,670/- with the Registry of this Court within a period of four weeks from today.

19. List for compliance on 11th May, 2009.

SIDDHARTH MRIDUL, J.

MADAN B. LOKUR, J.

April 08, 2009
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