

\$~56

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

Decided on: 12th December, 2018

+ **W.P.(C) 13430/2018 & CM APPL. 52303-52304/2018**

CONCOR BATS AIRPORT SERVICES Petitioner
Through: Mr. Sudhir Nandarajog, Sr. Adv.
with Mr. Rishi K. Awasthi, Adv.

versus

AIRPORTS AUTHORITY OF INDIA Respondent
Through: Mr. Abhinav Vashisht, Sr. Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J (ORAL)

%

1. This writ petition concerns a Global Request for Qualification [hereinafter referred to as 'RFQ'] dated 01.06.2018, issued by the respondent inviting proposals for providing ground handling services at various airports (divided into Group A, B and C airports). The petitioner is aggrieved by three communications dated 20.11.2018 issued by the respondent (one for each group of airports), wherein the respondent has stated that the petitioner does not meet the qualification requirements under the RFQ.

2. The petitioner is an association of persons ["AOP"] consisting of two entities, namely Container Corporation of India Ltd. ["CONCOR"] and Bangalore Airport Terminal Services Pvt. Ltd. ["BATS"]. Under a Joint Working Agreement dated 12.06.2018 [hereinafter referred to as "JWA"], CONCOR and BATS agreed to work together on a pan-India basis for providing various airport related services. The petitioner entity was constituted as an AOP pursuant to this JWA. For the purposes of the RFQ, the petitioner entered into a further consortium arrangement with another entity, viz. National Aviation Services WLL, a company based in Kuwait ["NAS"].

3. The grounds on which the petitioner's consortium has been held to be disqualified are contained in the aforesaid communications dated 20.11.2018, the contents of which are reproduced below:

*“Your submitted tender and clarifications/replies have been evaluated with reference to RFQ vide Tender ID-No.AAI_13740_1 and other references given above. After evaluation of the tender, you were given **two times opportunities for clarifications**. However, amongst other, the following reasons are given below for disqualification of your application from further participation in the Bidding process:-*

A Member of the Consortium is Concor BATS which is an Association of Person (AOP) and does not meet the requirement under the RFQ.

- a. Security clearance of the lead member or its affiliate has not been provided.*
- b. The Member of the Consortium Concor BATS AOP does not meet the requirement for forming a SPV as required under the RFQ.*

c. As response to email dated 13 November, 2018, the Applicant has mentioned that the shareholding of NAS will be 24% in the Consortium. The Applicant has used technical experience of NAS. However, technical experience of those entities which hold 26% stake in the Consortium is considered as per the RFQ.

In view of the above, we regret to inform you that you have been disqualified under this tender process.”

4. Mr.Sudhir Nandrajog, learned Senior Counsel submitted that none of the reasons mentioned in the said communications are valid grounds for rejection of the petitioner's consortium at the qualification stage. He contended that the tender conditions required the parties to form a special purpose vehicle [“SPV”] only in the event the contract was awarded in their favour. Consequently, he submits that grounds (b) and (c) enumerated in the impugned communication are premature. With regard to the requirement of security clearance, Mr.Nandrajog submitted that the petitioner had provided the requisite security clearance of BATS, issued by the Bureau of Civil Aviation Security dated 26.11.2014, and the impugned communication had incorrectly recorded that security clearance of the lead member of the consortium or its affiliate had not been provided.

5. Mr.Abhinav Vashisht, learned Senior Counsel for the respondent defended the impugned decision principally on the ground that the petitioner's consortium did not provide the security clearance as required. He submitted that the tender was liable to be rejected on this ground alone, particularly in view of the fact that the successful tenderer would have access to airport facilities where security is a paramount consideration.

6. At the outset, we may note that by virtue of Clause 2.2.2(A) of the RFQ, failure to comply with any of the conditions contained in the threshold eligibility criteria enumerated in Clause 3.2 rendered a party liable for disqualification. Clause 3.2 of the RFQ enumerated various "threshold eligibility criteria" and provided that fulfillment thereof was a pre-requisite for eligibility. Amongst the conditions stipulated under the heading "technical capacity", a requirement for security clearance was included, which was identical for all three categories of airports. It reads as follows:

“(v) To be eligible to take part in the Bidding Process, the Applicant must have security clearance/approval from their operating country for ground handling operations. In case of a Consortium, security clearance/approval of the Lead Member only shall be evaluated. Appropriate proof from BCAS or from appropriate authority for the foreign Applicants to be provided.”

7. As stated above, the applicant in the present case was a consortium of the petitioner and NAS. The security clearance required was, therefore, of its “lead member”. The definition of “lead member” in the RFQ provides as follows:

*“**“Lead Member”** in respect of an Applicant where the Applicant is a Consortium, shall mean such entity, which is named and identified as such in the Application and as described in 2.2.4(iii). ”*

The petitioner [namely, the AOP formed by CONCOR and BATS] was the designated lead member of the consortium in question. The documents submitted by the petitioner to the respondent including the Joint Bidding Agreement signed by the petitioner and NAS provided that at least 51% of

the share capital of the proposed SPV would be held by the lead partner. Consequent thereupon, in correspondence with the respondent, the petitioner stated that it would hold 74% of the share capital of the SPV. This was in accordance with Clause 2.2(iii) of the RFQ, which stipulated that only a member holding more than 50% of the equity of the SPV could be designated as the lead member:

*“(iii) Members of the Consortium shall nominate 1 (one) Member as the lead member (“**Lead Member**”) who shall have the highest equity share holding of more than 50% (fifty Percent) of the paid up and subscribed equity of the SPV at all times during the Concession Term. The nomination(s) shall be supported by a power of attorney, as per the format at Appendix 3, signed by all the other Members of the Consortium. ”*

8. It is undisputed that the petitioner [as a composite entity of CONCOR and BATS] did not have the requisite security clearance. The only entity which did have security clearance was BATS. Mr.Nandrajog, therefore, contended that BATS was an "affiliate" of the petitioner within the meaning of RFQ. Although the clause in question required the lead member to have security clearance, and not its affiliate, Mr.Nandrajog's submission is based upon the impugned communication of the respondent wherein the lack of security clearance of an affiliate has also been referred to. The RFQ defined the term “affiliate” in the following manner:

*““**Affiliate**” shall mean in relation to any Applicant or Member, a person who controls, is controlled by, or is under the common control with such Applicant or Member. As used in this definition, the expression “control” means: (a) with respect to a company, corporation or LLP the ownership, directly or indirectly, of more than 50% (fifty per cent) of the economic or voting rights of such person, b) with respect to a*

person which is not a company, corporation or LLP the power to direct the management and policies of such person by operation of law; ”

9. In view of the fact that the petitioner is an AOP, BATS can be regarded as its “affiliate” only if it is “a person who controls, is controlled by or is under the common control with” the petitioner, in the sense that it has “the power to direct the management and policies of such person by operation of law”. We do not find such a contention to be tenable upon a reading of the JWA under which the petitioner entity has been constituted. It is clear therefrom that the CONCOR and BATS are equal stakeholders in the AOP, in terms of financial as well as managerial control. They have equal representation on the management committee and steering committee in which decision making powers are vested. Looking at it from another angle also, BATS’ ultimate stake in the consortium would be about 37%, being half of the share of the petitioner – AOP in the consortium. BATS, therefore, on its own also does not meet the minimum shareholding required for an entity to be a lead member in a consortium, whose security clearance could be regarded as sufficient. Consequently, we are of the view that the security clearance furnished by the petitioner was inadequate to qualify it in terms of the RFQ conditions and its bid was liable to be rejected on this ground alone. It is, therefore, unnecessary to examine the correctness of other grounds mentioned in the impugned communications.

10. As held by the Supreme Court *inter alia* in *Jagdish Mandal vs. State of Orissa* (2007) 14 SCC 517, the jurisdiction of the Court to interfere with a tender evaluation by the procuring entity is limited to situations of mala

fides or arbitrariness of a dimension that eludes any reasonable explanation. The present case does not meet that high standard.

11. For the reasons aforesaid, the writ petition is dismissed, but without any orders as to costs.

PRATEEK JALAN, J

S. RAVINDRA BHAT, J

DECEMBER 12, 2018

'hkaur'



नित्यमेव जयते