

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

Decided on: 05.01.2018

+ **W.P.(C) 11348/2017, C.M. APPL.46382-46383/2017**

VAAAN INFRA PVT. LTD.

..... Petitioner

Through : Sh. Sandeep Sethi, Sr. Advocate with
Sh. Devashish Bharuka and Sh. Ravi Bharuka,
Advocates.

versus

SOUTH DELHI MUNICIPAL CORPORATION Respondent

Through : Sh. Sanjay Poddar, Sr. Advocate with
Sh. Sriharsha Peechara, Sh. Govind Kumar and Sh.
Shivam Goel, Advocates, for SDMC.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHALWA

MR. JUSTICE S. RAVINDRA BHAT

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1. In this writ petition, under Article 226 of the Constitution of India, a conflict of interest clause in a tender condition has been challenged. The tender (also “impugned RFP”) was issued by the respondent i.e. the South Delhi Municipal Corporation (hereafter referred to as “SDMC”) for the rehabilitation and upgradation of the associated existing infrastructure, supply, installation, testing and commissioning of complete RFID-based electronic toll collection system, and maintenance of systems and infrastructure. The project, which is the subject matter of the impugned RFP, includes the setting-up of a new infrastructure with all the necessary software, hardware and other equipment, required for the project (hereafter referred to as ‘the project’). The RFID (acronym for Radio-frequency identification) is an electronic system for identification and tracking of objects- in this case, vehicles, which are to ply into the city of Delhi and are required to pay Environment Compensation Cost (ECC) collected by the Government of NCT of Delhi (“GNCTD”).

2. The facts in brief are that the petitioner specializes in RFID and related services. It claims to be one of the most reputed companies in the field in the country. It also provides for survey services and allied activities; it is a credible and known name in the field. It was awarded the work for installation, commissioning and operation of ATC systems across all plazas in India by the National Highways Authority of India (NHAI) in December 2014. It also conducted a survey for the NHAI in Zone 1, in the States of Gujarat and Maharashtra using portable automatic traffic counter and classifiers. The petitioner was also awarded an LOA for a period of 5 years on 10.02.2015 in this regard.

3. The petitioner alleges that on 15.12.2016, SDMC issued a Request for Proposal (hereafter called “first RFP”) for designing, building, developing, financing, operating, maintaining and transferring of integrated RFID-based tool management systems at 13 road entry points covering 65 toll lanes in the NCT of Delhi. For various reasons, this bid process was terminated. The petitioner draws notice of the Court and relies upon the “conflict of interest” clause contained in the first RFP of December 2016, specifically to para 3.1.16 clause (i). It is submitted that the conflict-of-interest clause was concerned essentially with the bidder or its associates’ interrelationship in terms of shareholding or common control/share ownership or other ownership interest. That condition also stipulated certain restrictions with respect to receipt of direct or indirect subsidy, grant, concessions, loans etc. from other bidders or their associates. The first RFP, as noticed earlier, was not pursued for some reasons, by the SDMC.

4. On 10.07.2017, SDMC invited tenders for 15 day-long traffic count on real-time basis through video-based systems at 20 major entry point of Delhi and one day (i.e. 24 hours) origin destination survey of traffic, (related to the ECC) levied by it at these locations for segmenting the traffic into exempt and non-exempt vehicles in terms of the ECC collection. The petitioner highlights that the conditions stipulated in this tender (NIT) of 10.07.2017 nowhere indicated any conflict-of-interest with respect to the bidders of the kind contained in the impugned RFP *or for that matter pointed to the likelihood of the successful bidder being in any manner prevented from tendering for other projects in the future*. Simultaneously on 12.07.2017 the SDMC issued an Expression of Interest (EOI) for the purpose of setting-up RFID infrastructure for the collection of toll and ECC.

The petitioner made presentations which were widely appreciated and praised by SDMC officers, as it fulfilled the criteria of the latter's requirements. The petitioner was informed that a fresh RFP replacing the previous one, i.e. the first RFP could be issued soon. The petitioner was awarded the work of the 15 day-long traffic count on real-time basis – for which the tender was floated (hereafter known as the “traffic survey contract”) on 28.09.2017. It completed the survey and furnished its reports on 03.11.2017 and 04.12.2017.

5. It is submitted that in this background, the SDMC issued the present impugned RFP for the supply, installation, testing etc. of RFID-based electronic toll systems, including upgradation of associated existing infrastructure. This in effect replaced the first RFP which had been issued on 15.12.2016. The petitioner complains that the stipulation in clause 2.1.37 (g) which delineated the conflict-of-interest condition caught the petitioner by surprise as it imported fresh elements that did not exist either in the previous RFP, i.e. the first RFP of December 2016 or in the Expression of Interest issued on 12.07.2017.

6. The impugned RFP condition, it is argued, is arbitrary and unfair as it prevents the petitioner and any such entity, which had participated in a project of the kind it was awarded for the survey project, from bidding in the impugned RFP. The impugned condition reads as follows:

...."2.1.37. 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 as the may be. Without limiting the generality of the above, a Bidder shall be considered to have a 'Conflict of Interest' that affects the Bidding Process, if:

[g] Such bidder or any of its associate and/or affiliates has participated/is participating/has been appointed as a consultant to the authority in the preparation of any documents, including but not limited to drawings, reports, traffic surveys, technical estimates, designs and/or technical specifications of the project and/or any project conceived by SDMC for the MCD and ECC toll collections."

7. Mr. Sandeep Sethi, learned senior counsel for the petitioner argues that the above tender condition is arbitrary and unfair. It was highlighted that when the survey project contract was tendered, no bidder was informed that in the event the RFID contract was to be issued, a successful bidder for the survey project would be debarred from participating in it.

8. It is urged that the stipulation with respect of “conflict of interest” in the impugned RFP besides is irrelevant and has no nexus with the object, i.e. setting-up, designing, building, development, financing and operating RFID-based toll management system. It is submitted that the previous RFP dated 15.12.2016 did not outline any such bar and that had the petitioner been aware about the restrictive condition, it would not have participated in the traffic survey project for which the tender was floated on 10.07.2017. It is urged that such restrictive conflict of interest conditions violate Article 14 and also the petitioner’s freedom and liberty under Article 19(1)(g) of the Constitution of India. Learned counsel emphasizes that any conflict of interest, which traverses beyond concerns, such as the interrelationship between the bidders, the shareholding patterns etc. or the ongoing processes which are intrinsically connected with the services sought to be obtained, would be arbitrary and necessarily result in lowering the level of competition.

9. This Court had issued notice on 21.12.2017 and recorded the petitioner’s contentions briefly. At that stage, the Court had recorded a satisfaction that clause 2.1.37 was *prima facie* arbitrary as it restricts competition and excludes those who might possess necessary technology. After that order, the SDMC filed its affidavit and has also produced the concerned file during the course of the hearing. According to the SDMC, the tender conditions in the present case were designed in consultation with the EPCA [Environment Pollution (Prevention and Control) Authority]. The SDMC relies upon an order dated 22.08.2016 by the Supreme Court, entrusting the execution of the work that is the subject matter of RFID to the SDMC. It, however, submits that pursuant to the directions of the Supreme Court, the management of the appropriate system and procurement of services from the interested party was decided by the EPCA which was consulted by the SDMC.

10. The SDMC's affidavit has produced the EPCA's observations contained in its order dated 02.01.2018; the affidavit also relies upon previous directions of the Supreme Court made in W.P.(C) 13029/1985 (*M.C. Mehta v. UOI*) on 09.01.2015. Mr. Sanjay Poddar, learned senior counsel for SDMC relies upon the EPCA report/observations dated 02.01.2018 highlighting that clause 3.1.16 of the first RFP dated 15.12.2016 barred participation of the consultants who were involved in the preparation of any documents, designs or technical specifications of the RFID project. It was submitted that the petitioner was aware of the possibility that such restrictive conditions could be placed in the RFID. Nevertheless, it chose to participate in the NIT issued for the survey contract/project.

11. The SDMC urges that the first RFP was cancelled. A fresh draft RFP preceded the issuance of the impugned RFP; it was submitted to the EPCA. In the meanwhile, the SDMC invited the Expression of Interest (EOI) from prospective integrators to assess various types of technological modalities etc. A meeting was thereafter held and in the light of the inputs obtained, the RFP was reviewed and finalized by the High Level Committee and its recommendations were accepted on 09.10.2017. It was in these circumstances that the NIT/impugned RFP was finally issued on 08.11.2017. Various queries were received from prospective bidders and replied to. The petitioner's query was considered and taken into account by the High Level Committee which specifically considered whether the expression, "traffic survey" should be deleted from clause 2.1.37. However, the Technical Committee and the EPCA ultimately decided to retain that condition.

12. It is submitted that the traffic survey conducted pursuant to the contract awarded to the petitioner was for the purpose of ascertaining the quantum/number of commercial vehicles entering the city and for effectively monitoring the system. The petitioner's report, in fact, has been made a part of the NIT. It has played a vital role. Thus, it is contended that the petitioner played a vital role in procuring the documents necessary for the tender. It is submitted that in the opinion of the SDMC, this amounts to a conflict of interest that should be avoided. The SDMC relies upon the decision of the Supreme Court in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. &Anr.* 2016 (16)

SCC 818 in support of its contention that the tender stipulations ought not to be easily held to be arbitrary.

13. Before analyzing the rival contentions, it would be essential to notice the condition in the first RFP dated 15.12.2016. The said condition reads as follows:

“3.1.16 *In the event of disqualification under Clause 3.1.15, SDMC shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, up to 25% of the Bid Security as pre-estimated Damages, without prejudice to any other right or remedy that may be available to SDMC under the Bidding Documents and/or the Concession Agreement or otherwise. Without limiting the generality of the above, a Bidder shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:*

i The Bidder or its Associate (or any constituent thereof) and any other Bidder or their associate (or any constituent thereof) have common shareholding or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of a Bidder or its Associate thereof (or any shareholder thereof having a shareholding of more than 5% (five per cent) of the paid up and subscribed share capital of such Bidder or Associate, as the case may be) in the other Bidder or its Associate, is less than 5% (five per cent) of the subscribed and paid up equity share capital thereof: provided further that this disqualification shall not apply to any ownership by a bank, Insurance Company, Pension Fund or a Public Financial Institution referred to in section 2(72) of the Companies Act, 2013.

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v. such Bidder or any Associate thereof has participated as a consultant to SDMC in the preparation of any documents, design or technical specifications of the RFID Project."

14. In this case, the respondent SDMC produced the relevant file containing the notings, which led to the issuance of the impugned RFP. Interestingly, the observations of 11.10.2017 (in paras 17 and 18) note the project undertaken by the petitioner. The proposal of the department was approved by the Chairman of the Standing Committee on 31.10.2017 and finally concurred on the same date. The noting in the SDMC's file indicate that at one stage, based upon the queries of the petitioner and other bidders, a proposal to amend the RFP was mooted. That was the stage at which the petitioner

approached this court. After notice was issued in these proceedings, the matter was referred to the EPCA to take a final decision. The EPCA pointed out that the first RFP contained a similar condition. The EPCA, therefore, recorded its conclusions in the following manner on 02.01.2018:

“11. Based on the above readings of clauses the following is clear:

a. That the NHAI guidelines duly approved by Niti Aayog, on conflict of interest clearly define that any consultant/agency that has worked on any aspect of the project, including technical studies, cannot be considered as a bidder for the same project. Traffic study is one aspect of a technical study.

b. The December 2016 RFP issued by SDMC had mirrored this clause and had also defined that the consultant/agency that has worked on any document, design or technical specifications would not be eligible as a bidder. This clause has been drafted with clarifications in the fresh RFP issued on November 15, 2017 to ensure that there is complete integrity in the bid process.

c. It was also clear that the traffic study was being carried out as a part of the process to finalise the RFID project and M/s Vaaan Infra Pvt. Ltd. had bid for the traffic study project and had won the tender, which clearly specified this.

Given the above, EPCA is of the firm opinion that conflict of interest is a critical clause that must be adhered to in all project documents. Therefore, EPCA is clear that this clause as defined in the fresh bid document issued on November 15, 2017 must be initiated upon.

Furthermore, this project is extremely sensitive as it involved moving the system from cash collection to e-collection. As explained above, this project is being done under orders of the Hon'ble Supreme Court to avoid the leakages and other transactional losses because of cash collection. This electronic system is needed to ensure improvement in enforcement and compliance with the orders of the Hon'ble Supreme Court.

We would therefore humbly submit for the consideration of the Hon'ble Court that this petition must not be entertained. EPCA is monitoring this project closely as it is important for ensuring monitoring of traffic entering into Delhi. The final date for opening of the bids (after much delay) is now January 9, 2018. EPCA hopes that this process will be

successfully concluded, and that the new concessionaire will set up the RFID project before the onset of next winter, when pollution levels turn severe.”

15. There is no doubt that the conflict of interest condition that the petitioner impugns in these proceedings is restrictive and limits a number of otherwise eligible bidders. The question, however, is whether the Court, in its discretion under Article 226 of the Constitution – can interdict the said condition. The EOI – which is relied upon by the petitioner, and clause 3.1.16(i) (of the first RFP) on which too much emphasis has been placed, are silent as to the conflict of the kind that this Court is called upon to decide. No doubt, clause 3.1.16 (i) (of the first RFP) dealt with the interrelationship of a bidder with its subsidiaries or with rival bidders, the tolerable limits of shareholding *inter se* as far as different bidders that were subsidiaries are concerned etc. At the same time, an inkling of the impugned RFP clause 2.1.37(g) was clearly present in the first RFP, which stated in sub-clause v (of clause 3.1.16) as follows:

*“3.1.16 In the event of disqualification under Clause 3.1.15, SDMC shall be entitled to forfeit and appropriate the Bid Security or Performance Security, as the case may be, up to 25% of the Bid Security as pre-estimated Damages, without prejudice to any other right or remedy that may be available to SDMC under the Bidding Documents and/or the Concession Agreement or otherwise. Without limiting the generality of the above, a Bidder shall be **deemed to have a Conflict of Interest** affecting the Bidding Process, if:*

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v. such Bidder or any Associate thereof has participated as a consultant to SDMC in the preparation of any documents, design or technical specifications of the RFID Project.”

16. The contention that the petitioner was caught unawares, in the opinion of the Court, is unconvincing. Clause 3.1.16 (v) clearly was wide enough to bar participation of consultants of all hues. No doubt, the later EOI did not mention any conflict of interest of the kind that the Court has to deal with. Nevertheless, the petitioner was aware of the possibility that in the event an RFP was issued, it was likely to be barred in the event it

participated in the consultancy project for traffic survey having regard to the terms of clause 3.1.16 (v) of the first RFP.

17. Furthermore, this Court is of the opinion that the petitioner's argument as to the relevance of the project survey with the RFID contract, which is a subject matter of the impugned RFP, is not something that can be gone into in judicial review. The tender documents did not expressly state or refer to the report prepared by the petitioner. However, the bidders were informed that the necessary documents in the form of data provided in the report would be available to enable them to submit their bids or to house them in the contracts. Thus, there is a linkage of sorts between the project survey report furnished by the petitioner, and the subject matter of the impugned RFP, as it were. Moreover, as to the kind and degree of participation that the petitioner's services provided, through its report, and how relevant they were in drawing-up the tender for RFID services are not issues that the Court can delve into. An examination of these aspects would amount to a judicial scrutiny of matters, akin to descending in the proverbial "rabbit hole", i.e. a slippery slope for which the Court is not equipped technically, i.e. to decide the extent of linkage between the data procured and to be used, in the impugned RFID. These matters are left to the judgment of the public agency which seeks or procures such services. The judgment in *Afcons (supra)* is an authority on this point. In *Master Marine Services (P) Ltd v. Metcalfe Hodgkinson (P) Ltd & Anr.* (2005) 6 SCC 138, the legal position was reiterated in the following words:

"12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It

was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

18. In *Afcons Infrastructure (supra)* the Supreme Court stated as follows:

"24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

19. Further, in *Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) rep. by its Chairman & Managing Director and another v. CSEPDITrishe Consortium, rep. by its Managing Director & Anr.* 2016 (10) SCALE 69, the

Court, taking note of complex fiscal evaluation by public agencies, and other aspects, held:

“36. ... At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultant’s assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd.”

20. This Court is of opinion that the limited role and discretion it possesses, under Article 226 in adjudging issues relating to award of public contracts, from the lens of public law parameters, is insufficient for it to don the role of evaluating whether the tender conditions, which facially bar the petitioners, were unfairly drawn. The Court or the adjudicating judge’s perspective is not relevant; what is relevant is whether the perspective, reflected by the conditions, drawn to procure services from the best available source at the most competitive rates, are patently arbitrary or manifestly unfair. There are no allegations of *mala fides*, or illegality, or procedural irregularity. In these given circumstances, the decision of the SDMC, to go ahead with the tender, containing the impugned condition (Clause 2.1.37 (g) of the impugned RFP) is neither arbitrary, nor unfair nor unreasonable. The writ petition accordingly fails and is dismissed. There shall be no order on costs. Order *dasti* under the signatures of the Court Master.

S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

JANUARY 05, 2018