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

% Reserved on: 26.07. 2021

Pronounced on: 10.09.2021

+ **W.P.(C) 5768/2021 & CM APPLs. 18096/2021 & 18781/2021**

STERLITE GRID 20 LIMITED

..... Petitioner

Through: Mr. Saurabh Kirpal, Sr. Adv. with
Mr. Gaurav Juneja, Mr. Aayush Jain, Ms. Swastika
Chakravarti, Advs.

versus

PFC CONSULTING LIMITED & ANR.

..... Respondents

Through: Mr. Tushar Mehta, Ld. SGI with
Mr. Vijay Kundal, Mr. Nitish K. Sharma, Advs.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

JUDGMENT OF THE COURT

1) The present writ petition has been filed by the Petitioner seeking amongst others the following substantial reliefs:

“PRAYER

(a) *Issue a writ of Mandamus or any other appropriate writ(s)/ order(s)/ direction(s) directing the Respondent No. 1 to produce the entire record, in so far as it pertains to the Impugned Decision dated 18.05.2021 of the Respondent No.*

1 to reject/disqualify the bid submitted by the Petitioner in the tender to select a Transmission Service Provider to establish transmission system for Construction of 400/220/132kV GIS Substation, Mohanlalganj (Lucknow) with associated 400kV lines, and other 765kV and 400kV LILO lines at 765kV GIS Substation Rampur and 400kV LILO (Quad Moose on Monopole) at 400kV GIS Substation Sector 123 Noida;

- (b) *Issue a writ of Certiorari or any other appropriate writ(s)/ order(s)/ direction(s) quashing the Impugned Decision dated 18.05.2021 taken by the Respondent No. 1 in respect of the above tender, to the extent that the bid submitted by the Petitioner has been rejected/disqualified and all proceedings/ actions consequential thereto and consequently, issue a direction to the Respondent No. 1 to allow the Petitioner to participate in the abovementioned bidding process;”*

2) Briefly stated, the facts giving rise to the filing of the present writ petition are as follows:

- i) The Petitioner company (SGL 20) is a wholly owned subsidiary of Sterlite Power Transmission Limited (“SPTL”). SPTL is a global developer of power transmission infrastructure with projects in India and Brazil.
- ii) IndiGrid 1 Limited (IGL 1 for short) is a company earlier known as Sterlite Grid 2 Limited, which was subsequently acquired by IndiGrid Trust in June 2019. The commercial objectives of IndiGrid are, *inter alia*, to plan, promote, invest, own, construct, process, develop, maintain, manage, repair, accumulate, store, trade, lease, permit, license and operate all kinds of assets, designs, technologies and resources in relation to transmission of power,

and generation and/or transmission of renewable energy.

- 3) The Respondent No. 1 is PFC Consulting Limited (hereinafter called as “PFCCL”). It is a wholly owned subsidiary of Power Finance Corporation Limited (“PFC”), which is a Schedule-A, Nav-Ratna Public Sector Enterprise.
- 4) The Respondent No. 2 is U.P. Power Transmission Corporation Limited (hereinafter called as “UPPTCL”). UPPTCL is engaged in acquiring, establishing and operating electrical transmission lines and network and associated sub-stations and connected ancillary services in the State of Uttar Pradesh.
- 5) Vide its letter no. 55/PS/DIR (W&P)/PTC/Mohanlalgunj dated 09.02.2021, UPPTCL notified the Respondent No. 1 as the Bid Process Coordinator (“BPC”) for the purpose of selecting a Transmission Service Provider to establish transmission system for Construction of 400/220/132kV GIS Substation, Mohanlalgunj (Lucknow) with associated 400kV lines, and other 765kV and 400kV LILO lines at 765kV GIS Substation Rampur and 400kV LILO (Quad Moose on Monopole) at 400kV GIS Substation Sector 123 Noida (hereinafter called “Project”) on build, own, operate and maintain basis.
- 6) The Respondent No. 1, accordingly, issued the RfQ (Request for Qualification) on 12.02.2021, inviting responses from prospective bidders for qualifying/shortlisting the bidders for the next stage of bidding i.e. Request for Proposal (“RfP”), as part of the process of selection of the prospective Transmission Service Provider (“TSP”) in accordance with the ‘Tariff Based Competitive Bidding Guidelines for Transmission Service’

and ‘Guidelines for Encouraging Competition in Development of Transmission Projects’ issued by the Government of India, Ministry of Power.

7) The Petitioner submitted its response to the RfQ on 15.03.2021. The Petitioner sought qualification on the basis of the technical and financial qualifications of its affiliate, Talwandi Sabo Power Limited (“TSPL”) for the purpose of meeting the qualification requirements under the RfQ.

8) IGL1 also submitted its response to the RfQ in joint venture with Techno Electric and Engineering Company Ltd.

9) Vide letter dated 07.04.2021 addressed to the Petitioner, Respondent No. 1 sought certain additional information/ documents/ clarification. Vide the said letter, the Respondent No. 1 sought clarification with regard to the relationship between the petitioner and IGL 1.

10) The clarifications sought by Respondent No.1 from the petitioner were as under:

- “(i) IGL 1 had claimed technical expertise of NRSS XXIX Transmission Limited (“NRSS-XXIX”), which was earlier owned by Sterlite Power Grid Ventures Limited (“SPGVL”) and subsequently acquired by the India Grid Trust (“IGT”) in June 2019 (inadvertently referred to as June 2020);*
- (ii) As per the balance sheet of IGL 1 for F.Y. 2019- 2020, SPGVL was mentioned as shareholder of IGL 1 till 31.03.2020;*
- (iii) Sterlite Grid 20 Limited (“SGL 20”) i.e. the Petitioner herein was the wholly owned subsidiary of SPGVL and had submitted a separate response to the RfQ;*
- (iv) From the balance sheet of NRSS-XXIX, the Project Management Fee and Investment Management Fee paid to*

SPGVL qualified as a 'Related Party Transaction';

- (v) *From the response submitted, it appeared that SPGVL was the shareholder for both IGL 1 and SGL 20, which amounted to a relationship in terms of the definition of Conflict of Interest under the RfQ."*

11) The Petitioner was called upon to clarify the relationship between the Petitioner, IGL 1, SPGVL and IGT along with documentary evidence, to prove that there was no conflict of interest between the Petitioner and IGL 1.

12) On 08.04.2021, the Petitioner addressed an e-mail to the Respondent No. 1, seeking time upto 13.04.2021 for the submission of its clarifications. However, on 09.04.2021, the Respondent No.1 directed the Petitioner to submit its responses latest by 11:00 AM on 12.04.2021.

13) In compliance, the Petitioner vide letter dated 12.04.2021 clarified that it was incorporated as a wholly-owned subsidiary of SPGVL. SPGVL was earlier a wholly-owned subsidiary of SPTL, but later, got merged with SPTL pursuant to the approval of a scheme of merger between SPTL and SPGVL by the National Company Law Tribunal, Mumbai on 15.11.2020. In terms thereof, all the assets and liabilities of SPGVL became the assets and liabilities of SPTL. It was further clarified that Twin Star Overseas Limited – a company incorporated under the laws of Mauritius holds 71.38% of equity stake in SPTL, and Volcan Investment Limited – a company incorporated under the laws of Bahamas holds 100% equity stake in Twin Star Overseas Limited. Thus, Volcan Investment Limited was the Ultimate Parent Company of the Petitioner/ SGL 20. The Petitioner also provided the following responses to the specific queries/clarifications sought by the Respondent No. 1 along with the relevant documents:

- “(i) IGL 1 was earlier a subsidiary of SPGVL, and was transferred by SPGVL to IGT in June 2019. Thus, as on 31.03.2020, IGL 1 ceased to be a subsidiary of SPGVL since it was already transferred way back in June 2019. Moreover, as on 02.08.2019, IGT held 100% shares in IGL 1 (earlier known as SGL 2);
- (ii) SGL 20 i.e. the Petitioner was 100% owned by SPTL and had submitted a proposal for the bid on 15.03.2021. Moreover, none of SGL 20's affiliate/ parent / ultimate parent as defined in the RfQ had submitted a separate response to the RfQ;
- (iii) Transfer of IGL 1 with NRSS-XXIX was completed in June 2019. Post June 2019, SPGVL and NRSSXXIX ceased to be related parties under the provisions of the Companies Act, 2013;
- (iv) That neither the Petitioner nor any of its parent companies had any relationship with IGL 1 or any of its parent companies, either directly or through a common company that put them in a position to access confidential information or influence the bidding of each other;
- (v) That SGL 20 and IGL 1 were not affiliates.
- (vi) That SPTL holds 0.35% stake in IGT.”

14) Respondent No. 1 after scrutinising the clarifications/ additional information submitted by the Petitioner, sought further clarification on 12.04.2021 with respect to the Petitioner's response dated 12.04.2021. The Respondent No. 1 sought the following additional information latest by 3:00 PM on 13.04.2021:

- “(i) Details of balance shareholding of SPTL given that 71.38% equity was held by Twin Star Overseas Limited;
- (ii) Board members of Volcan Investment Limited, Twin Star Overseas Limited; SPTL, the Petitioner, NRSSXXIX and the

Trustees/Key Managerial Personnel of IGT;”

15) The information as sought by Respondent No. 1 was duly provided by the Petitioner on 13.04.2021. As regards the details of Board Members/ Trustees of NRSS-XXIX and IGT, it was stated that the Petitioner had no access to the information pertaining to these entities. It was confirmed that none of the representatives of the Petitioner was on the board of NRSS-XXIX, IGL 1 or IGT.

16) On 15.04.2021, the Respondent No.1 further sought additional information from the Petitioner to be provided latest by 16.04.2021:

“(i) List of Directors/ Key Managerial Personnel of the Petitioner;

(ii) List of Directors of all the parent/affiliate companies of the Petitioner, e.g. Directors of SPTL, Twin Star Overseas Limited, Volcan Investment Limited etc.;

(iii) Key Managerial Personnel of the parent/affiliate companies of the Petitioner.”

17) The Petitioner, vide email dated 16.04.2021 and 20.04.2021, duly provided the information as sought by respondent No.1.

18) Even though no further clarifications were sought by the Respondent No. 1, the Petitioner, on its own, addressed a letter dated 11.05.2021 to the Respondent No.1 requesting for a personal hearing to present its responses on the observations of the Respondent No. 1, and clarify the issue in further detail.

19) The Petitioner has stated in the petition, and also argued before us:

A. As on 02.08.2019, IGT held 100% shares in IGL 1. IGT is

registered with the Securities and Exchange Board of India (SEBI) as an Infrastructure Investment Trust (InvIT) under Regulation 3(1) of the SEBI (Infrastructure Investment Trusts) Regulations, 2014 (“InvIT Regulations”). SPTL is a ‘sponsor’ (as defined in the InvIT Regulations) of IGT and as mentioned earlier, holds a nominal 0.35% stake in IGT.

B. Indigrid Investment Managers Limited (“IIML”) (earlier known as Sterlite Investment Managers Limited) is the ‘Investment Manager’ of IGT in terms of InvIT Regulations. SPTL holds 40% stake in IIML and the Managing Director of SPTL is also a Non-Executive Director on the Board of IIML, as a nominee of SPTL. A Bidding Committee was constituted by IIML in August 2020 specifically for taking bidding and investment decisions. IIML made sure that SPTL’s nominee was excluded from the Bidding Committee to preserve confidentiality and avoid any ‘access’ to information. As a result, SPTL’s nominee was not even on the Bidding Committee which was responsible for any bid decisions on behalf of IGT/ its subsidiaries. There could not have been any question of a Conflict of Interest between the IGL 1 Consortium and the Petitioner in these circumstances. In fact, even the Code of Conduct prescribed under Schedule VI of the InvIT Regulations mandates that the InvIT and the parties thereto (including the sponsor, Investment Manager) shall try to avoid conflicts of interest, as far as possible, in managing the affairs of the InvIT and keep the interest of all unit holders paramount in all matters.

C. The IGL 1 Consortium withdrew its bid / response to the Project on 18.05.2021. Thus, the question of conflict of interest, in any event, did not survive.

20) On the same day as IGL 1 Consortium withdrew its bid/ response, i.e. 18.05.2021, Respondent No.1 issued the impugned decision stating:

“...The bids of the following two bidders are not qualified at RfQ stage for participation in next stage of bidding i.e. RfP stage as both bidders having a conflict of interest which puts them in a position to have access to information of the other Bidder and as per clause 2.1.5 of the RfQ, the bids of both bidders are rejected:

- 1. IndiGrid 1 Limited & Techno Electric and Engineering Company Ltd. Consortium*
- 2. Sterlite Grid 20 Limited”*

21) The Petitioner has argued that the impugned decision is arbitrary, illegal and violative of Article 14 and 19(1)(g) of the Constitution of India. The Petitioner submits that there was no “*Conflict of Interest*” between the Petitioner and the IGL 1. The Petitioner further submits that Clause 2.1.5 of the RfQ categorically defines “*Conflict of Interest*”, and the Petitioner and IGL 1 were, in no way, in a position to access each other’s commercial information, or influence each other’s commercial decisions.

22) It has been further submitted that the Bid Evaluation Committee (BEC) on 28.04.2021 had taken a decision to reject the Petitioner’s response. However, the Board of Respondent No.2 took cognizance of the same after 2 weeks i.e. on 15.05.2021, clearly showing that the justification offered by Respondent No.1 is false, suspicious and concocted. The said decision was communicated to the Petitioner only on 18.05.2021.

23) It is further submitted that after withdrawal of bid by IGL 1 Consortium, there was no “Conflict of Interest” and the withdrawal of bid by IGL 1 on 17.05.2021 was not taken into account before issuance of the impugned decision.

24) The Petitioner submits that the reliance of Respondent No.1 on Clause 2.1.5 of RfQ is misplaced.

25) It has further been submitted that the Bidding Committee was formed by IIML (Indigrid Investment Managers Limited) in August, 2020 for taking bidding and investment decisions, and SPTL’s nominee was specifically excluded from the Bidding Committee formed by IIML to preserve confidentiality and avoid any access to information. As a result, SPTL’s nominee was not even in the Bidding Committee responsible for any bid decisions on behalf of the IGT/ its subsidiaries. There could not have been any question of a Conflict of Interest between the IGL 1 Consortium and the Petitioner in these circumstances.

26) The respondents have filed a counter affidavit and stated in their response, that the bids were opened online at MSTC portal on 15.03.2021 at 15:30 hrs (IST) in the presence of the representatives of the Bidders, who wished to be present. Simultaneously, the hard copies of RfQ responses were also opened by BPC. Thereafter, on evaluation of the RfQ received from IGL 1 & Techno Electric and Engineering Company Limited – Consortium (‘IGL 1 Consortium’), the Respondent No. 1 found that SPGVL was mentioned as a shareholder of IGL 1 till 30.03.2019. Further, as per the Financial Statements of IGL 1 from June, 2019, the shares which were held by SPGVL in IGL 1 have been transferred to India Grid Trust (‘IGT’).

27) On evaluation of the RfQ received from the Petitioner, BPC found that SPGVL is a 100% shareholder in the Petitioner and, subsequently, SPGVL got merged into SPTL in November, 2020. It is in this context that various queries and clarifications were sought by Respondent No.1. Similar queries were also put to IGL 1 on 07.04.2021, 12.04.2021 and 15.04.2021.

28) After examining the reply by IGL 1, it transpired that Mr. Pratik Pravin Agarwal is a Non-Executive Director of the Indigrid Investment Managers Limited ('IIML'), and also the Managing Director of SPTL. It was only then that IGL 1 disclosed the factum of Mr. Pratik Pravin Agarwal being Non-Executive Director of IIML, and also disclosed that SPTL is a sponsor of IGT.

29) It has been further stated that the Energy Department, Govt. of UP vide office order dated 04.05.2018 had intimated the constitution of Bid Evaluation Committee (hereinafter "BEC") for transmission projects to be taken by Respondent No. 2. The BEC is constituted by the State Government in case of intra-state transmission of electricity. The BEC comprises of the members who possess the technical and financial expertise for bid evaluation. The composition of the BEC has been disclosed, which comprises of the following:

- "i) Chairman, UPPTCL, Lucknow (Sh. M. Devaraj, IAS)*
- ii) Managing Director, UPPTCL, Lucknow (Sh. Senthil Pandian C., IAS)*
- iii) Managing Director, UPPCL, Lucknow (Sh. Pankaj Kumar, IAS)*
- iv) Director (P&A), UPPTCL, Lucknow (Sh. V.K. Khare)*
- v) Director (Operations), UPPTCL, Lucknow (Sh. R. K. Singh)*

- vi) *Director (Finance), UPPTCL, Lucknow (Sh. Bibhu Prasad Mahapatra)*
- vii) *Director (Commercial), UPPTCL, Lucknow (Sh. Anil Jain)*
- viii) *Director (Works & Project), UPPTCL, Lucknow (Sh. Anil Jain)*
- ix) *Director (SLDC), UPPTCL, Lucknow (Sh. Amrendra Singh Kushwaha)*
- x) *One member from IIM (Professor Prakash Singh, Director, IIM, Lucknow)*
- xi) *One member from CEA (Smt. Manjari Chaturvedi, Director (PSP & PA-I), CEA)"*

30) The BEC in its meeting dated 15.04.2021 reviewed the responses to the RfQ submitted by the 8 bidders in the context of the provisions of RfQ, and decided that the following 5 bidder met all the qualification and compliance requirements as per the RfQ:

- “i) Power Grid Corporation of India Limited*
- ii) Torrent Power Limited*
- iii) Renew Transmission Ventures Private Limited*
- iv) DBL Transmission Private Limited*
- v) Kalpataru Power Transmission Limited”*

31) As regards the remaining 3 bidders, the BEC advised the BPC as under:

- “i) Adani Transmission Limited: To seek clarification from the bidder w.r.t. board resolution authorizing Mr. Anil Kumar Sardana, MD & CEO to sign the specific format of the bid;*
- ii) IndiGrid 1 Limited (Lead Member of Consortium) and Sterlite Grid 20 Limited: To legally examine the aspects of common directors on the boards of “IndiGrid 1 Limited”,*

“Sterlite Grid 20 Limited” and their parent companies with respect to the provisions of RfQ. ”

32) Consequently, based on the examination of the issue, the BEC in its meeting dated 28.04.2021, decided on the rejection of bids of the Petitioner and IGL 1. BEC, before taking the decision, sought legal opinion from M/s SRGR.

33) The grounds for rejection given by the Committee against the Petitioner are as under:

- ‘a. As per the definition of RFQ, “Conflict of Interest – A bidder shall be considered to be in a Conflict of Interest with one or more Bidders in the same bidding process if they have a relationship with each other, directly or through company, that puts them in a position to have access to information about or influence the Bid of another Bidder.”*
- b. Mr. Pratik Agarwal, being the Non-Executive Director of Investment Manager of IGT, which is a holding company of Indigrid 1 Limited and Managing Director of Petitioner’s holding company is in a position to have access to information of both the bidders. It qualifies under “conflict of interest” as both the bidders have a relationship with each other through Mr. Pratik Agarwal.*
- c. As per Clause 2.1.5 of the RFQ if any bidder is having a Conflict of interest with other bidders participating in the same bidding process, the bids of all such bidders shall be rejected. (emphasis supplied)*

34) Thereafter, the board of Respondent No. 2 took cognizance of the decision of BEC on 15.05.2021 and informed the Respondent No. 1 of the same on 17.05.2021 and, accordingly, the Respondent No. 1 informed the

qualification status of the bidders at the RfQ level to all the bidders and uploaded the same on the website on 18.05.2021.

35) The respondents point out that the Petitioner sought to contend that Indigrid 1 Limited, vide its letter dated 18.05.2021, had informed the Respondents that they are withdrawing their proposal in response to RfQ, and their submission of RfQ should not be treated as a qualification citing COVID-19 affecting their team members. In response, the Respondent No. 1 replied vide its letter dated 27.05.2021 to the Petitioner, stating that:

“a. The withdrawal of the Bid by IGL 1 has been done on 18.05.2021, which is after the decision on qualification status had already been taken by the BEC on 28.04.2021 so the same becomes infructuous and cannot be taken into consideration.

b. Further, there is no provision in the RfQ document for withdrawal of Bid. Therefore, the letter of IGL 1 Limited dated 18.05.2021 is void.”

36) The Respondent has further stated that the project is of national importance, and the timeline of the bidding process is underway as follows:

S. No.	Event	Time from Zero Date	Actual/ Anticipated timeline for present UPPTCL Project
1.	Publication of RFQ	Zero Date	12.02.2021
2.	Submission of Responses of RFQ	30 days	15.03.2021
3.	Short listing based on responses	60 days	18.05.2021
	Issuance of RFP		27.05.2021
4.	Pre-Bid Meeting		14.06.2021

5.	<i>Bid clarification, conferences, Final clarification and revision of RFP</i>	<i>85 days</i>	<i>24.06.2021</i>
5.	<i>Technical and price bid submission</i>	<i>120 days</i>	<i>29.07.2021</i>
6.	<i>e-reverse bidding after opening of initial Price Offer</i>	<i>127 days</i>	<i>05.08.2021</i>
7.	<i>Short listing of bidder and issue of LOI</i>	<i>135 days</i>	<i>13.08.2021</i>
8.	<i>Signing of Agreements</i>	<i>145 days</i>	<i>23.08.2021</i>

And on the date of hearing, the technical and price bid submission were underway.

37) The respondents further submit that keeping in view the increasing electricity consumption load in the near future in Lucknow & its adjoining area, the substation at Mohanlalganj is urgently required to be installed, to take care of the overloading of the existing substation and lines to provide uninterrupted electricity supply.

38) We have heard learned senior counsels for the parties and the case laws cited by them.

Analysis and Conclusion of the Case:

1. The short point that arises for our consideration is: whether the reasoning adopted by BEC and, subsequently, confirmed by Respondent No.2, for disqualifying the petitioner on the ground of there being conflict of interest between the two bidders, viz., the petitioner and IGL 2, is reasonable and rational, based on the relevant information provided by the parties, and not hit by malafides, arbitrariness and the Wednesbury principle of unreasonableness.

2. At this stage, we may notice the relevant clauses of the Request for Qualification. Clause 2.1.5 of the RfQ reads as under:

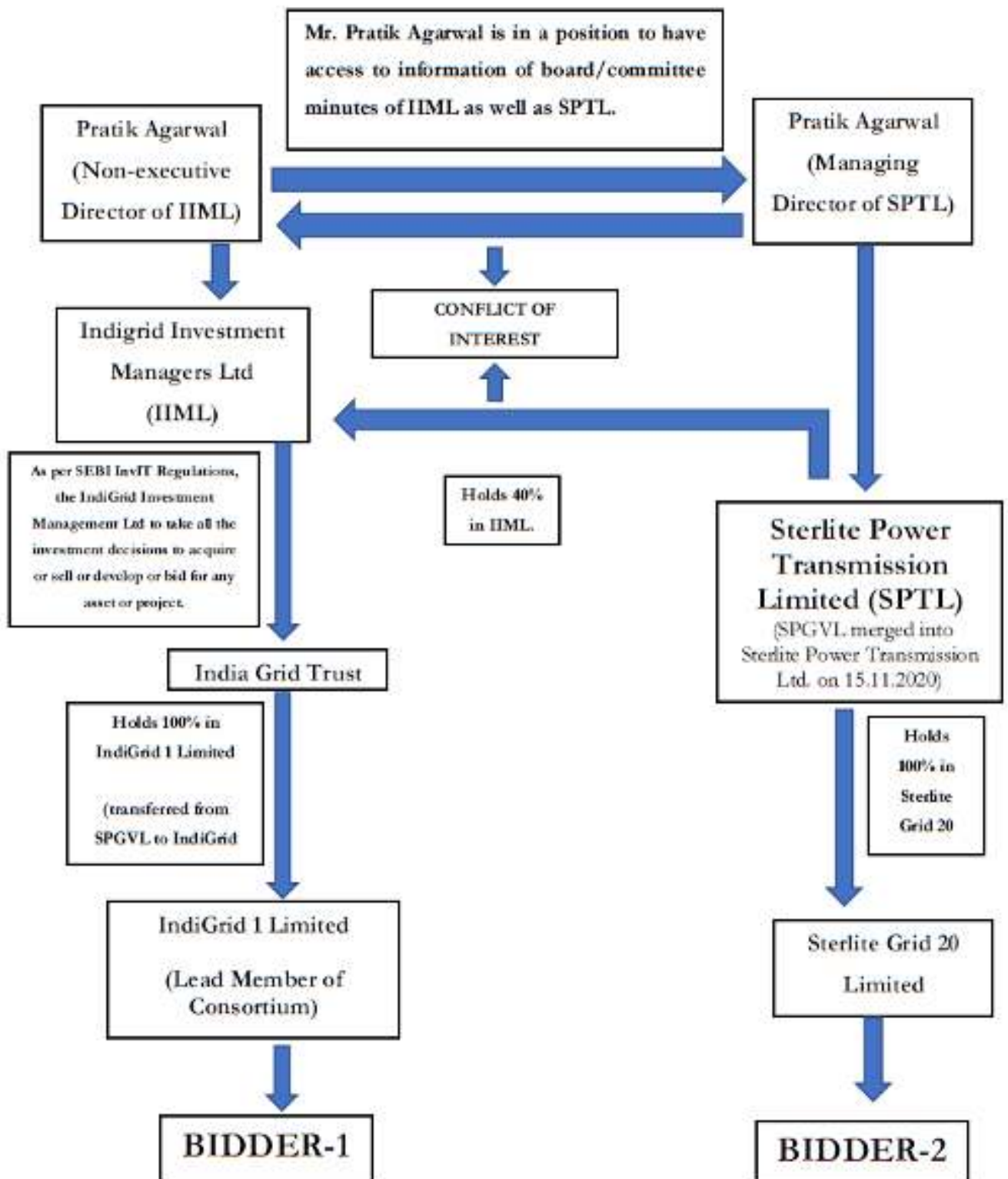
“A Bidder shall submit only one response in the same bidding process, either individually as Bidding Company or as a Member of a Bidding Consortium (including the Lead Member). It is further clarified that any of the Parent/Affiliate/Ultimate Parent of the Bidder/Member in a Bidding Consortium shall not separately participate directly or indirectly in the same bidding process. Further, if any Bidder is having a Conflict of Interest with other Bidders participating in the same bidding process, the Bids of all such Bidders shall be rejected.” (underlining supplied)

3. “Conflict of Interest” has also been defined in the RfQ as under:

“A Bidder shall be considered to be in a Conflict of Interest with one or more Bidders in the same bidding process if they have a relationship with each other, directly or through a common company, that puts them in a position to have access to information about or influence the Bid of another Bidder;” (underlining supplied)

4. On the basis of the information provided by the petitioner, the respondents have graphically depicted the *inter se* relationships between the different corporate entities. There is no dispute raised by the petitioner to the said tabulation, in so far as the structure/ relationships, as depicted, is concerned, though the petitioner claims that the said Mr. Pratik Pravin Agarwal – who was found to be a common Director on the Board of Directors (BOD) of STPL, and the BOD of IIML, was not involved in the decision making process of IGL 1 with regard to bidding and investment.

5. The relationship between Petitioner and IGL 1, highlighting the position of Mr. Pratik Pravin Agarwal in IIML and SPTL, is as under:



During course of arguments it has been submitted by the learned Solicitor General that the fact that SPTL held 40 % share in IIML was not known to the Respondent No.1 at the time of rejection of the bid of the Petitioner and hence, did not form part of the decision making process.

6. Clause 2.1.5 categorically states that in the event of “*Conflict of Interest*” the bids of the bidders shall be rejected. The bid of the Petitioner has been rejected due to conflict of interest between the Petitioner and IGL 1.

7. Conflict of interest as conceptualized in the RfQ is wide and encompassing. The key words used in the “Conflict of Interest” Clause are “**relationship with each other**” and “**that puts them in a position to have access to information about**”.

8. The scope of judicial scrutiny, in disputes arising out of rejection/ award of public tenders, is limited. We cannot examine the decision on its merits. We are primarily concerned with the decision making process. Thus, we are only to see, whether the decision of BEC – as affirmed by the Respondent, is reasonable, non-arbitrary and, if mala fides are alleged, whether the same is mala fide. Thus, we need to examine, whether the decision of the respondents to invoke Clause 2.1.5 is a plausible and reasonable view. If it is, then no interference would be called for.

9. Coming back to the facts of the present case, to determine whether the petitioner and IGL 2 had conflict of interest, on the advice of the BEC, legal opinion was sought by the respondent from M/s SRGR to the following questions:

“i) *As per the provisions of the RfQ is there a conflict of interest*

between “IndiGrid 1 Ltd. (Lead Member of Consortium)” and “Sterlite Grid 20 Ltd.” by way of Affiliate relationship?

- ii) Whether there is a direct or indirect relationship between IndiGrid 1 Ltd. And Sterlite Grid 20 Ltd. which is such that it puts them in a position to have access to information about or influence the Bid of the other?*
- iii) Access of information by Mr. Pratik Pravin Agarwal who is Non-Executive Director of the Board of IndiGrid Investment Management Limited and also Managing Director of SPTL (holding company of Sterlite Grid 2 Limited).*
- iv) What are the provisions, as per the RfQ, if there is a conflict of interest between two bidders?”*

10. On the advice of the Legal Advisor, additional clarifications were also sought from IGL 1 and Sterlite Grid 20. The Legal Advisor opined as under:

“5. BPC informed that on the advice of Legal Advisor, additional clarifications were sought from IndiGrid 1 Limited and Sterlite Grid 20 Limited. The responses received from both the bidders were examined by the Legal Advisor. The brief of the opinion is given below:

- i) As per the information submitted by IndiGrid 1 Limited and Sterlite Grid 20 Limited, it may be seen that the two bidders are not “Affiliates” within the meaning of the RFQ document. SPTL (holding company of Sterlite Grid 20 Limited) holds 0.35% unit in the IndiGrid Trust (holding company of IndiGrid 1 Limited) which is less than the threshold required as per the RFQ document.*
- ii) As per information provided by Sterlite Grid 20 Ltd., Mr. Pratik Agarwal is the Managing Director of SPTL, which is the holding company (holding 100% equity) of Sterlite Grid 20 Ltd.*
- iii) As per information provided by IndiGrid 1 Limited (Lead member of Consortium), India Grid Trust holds 100% equity in IndiGrid 1 Limited (Lead member of*

Consortium). India Grid trust is a trust established under SEBI (Infrastructure Investment Trusts) Regulations 2014. Further, as per SEBI regulations, IndiGrid Investment Management Limited (IIML), has been appointed as the Investment Manager of India Grid Trust and Mr. Pratik Agarwal is the Non-Executive Director of IIML.

- iv) As per regulation 10 of SEBI Regulations, the rights and responsibilities (relevant to the present Memorandum) of the Investment Manager inter-alia include:
 - a. **The investment manager shall make the investment decisions with respect to the underlying assets or projects of the InvIT including any further investment or disinvestment of the assets.**
 - b. **The investment manager shall submit to the trustee the decision to acquire or sell or develop or bid for any asset or project or expand existing completed assets or projects along with rationale for the same;**
- v) Further, IndiGrid 1 Limited (Lead member of Consortium) clarified that “Mr. Pratik Agarwal is not involved in any manner relating to IndiGrid/ IGL1’s participation in the bid. In course of being on Investment Manager and rendering investment management services to IndiGrid, IIML has constituted an independent bidding committee which is responsible for taking all decisions with respect to participating in bids for transmission projects by IndiGrid. This committee has no representative from Sterlite Power. Consequently, Mr. Pratik Agarwal not privy to any documentation or discussion that transpires at the bidding committee.”
- vi) **As per the Companies Act, 2013 read with SS-1, the Directors have right to inspect the minutes of the board meeting as well as the committee meetings and there are no specific provisions which provide for**

exclusion of an interested Director from inspecting Minutes of Board and Committee meetings. A Director is privy to the Minutes of Board and Committee Meeting in view of statutory provisions and is entitled to inspect Minutes of meetings”.
(emphasis supplied)

11. Hence, as per the opinion of the Legal Advisor, Mr. Pratik Pravin Agarwal was in a position to access information of the two bidders, and this “amounts to a conflict of interest between Sterlite Grid 20 Ltd. and IndiGrid 1 Ltd”.

12. Mr. Saurabh Kirpal, Ld. Senior Counsel for the Petitioner had raised twin questions before us—

- a. Whether, in case of common directors in two corporate entities, flow of information of one company, to the other company, can be imputed?
- b. Whether any information had been disclosed between the two companies in question i.e. the petitioner and IGL1?

13. Mr. Kirpal has relied upon the following judgments to substantiate his arguments – *The Texas Company v. The Bombay Banking Company, Limited (Privy Council)*¹; *T.R. Pratt (Bombay) Ltd. v. E.D. Sassoon & Co Ltd. (Bombay High Court)*²; *T.R. Pratt (Bombay) Ltd. v. E.D. Sassoon & Co. Ltd. (Bombay High Court)*³; *Halifax Mortgage Services Ltd. v. Stepsky and Anr. (Chancery Division)*⁴; *Halifax Mortgage Services Ltd. v. Stepsky and*

¹ AIR 1919 PC 20.

² ILR (1936) 60 Bom 326.

³ ILR (1938) Bom 421 (PC).

⁴ 1995 (3) WLR 701.

*Another (Court of Appeal)*⁵; *Young v. David Payne (Court of Appeal)*⁶; *Sri Meenakshi Mills Ltd., and Other vs. Commissioner of Income-Tax, Madras*⁷; and *Commissioner of Income Tax, Madras vs. Sri Meenakshi Mills Ltd. & Others*⁸.

14. Mr. Saurabh Kirpal, by relying on these judgments, argues that just because there is a common director of two companies, it does not mean that the information/ knowledge of one company can be imputed to the other company.

15. He has taken us through the observations in the cases cited above. In *The Texas Company v. The Bombay Banking Company Limited (Privy Council)* it was observed, by relying on *Cave v. Cave* and *Young v. David Payne & Co.* that –

“I understand the law to be this: that if a communication be made to an agent which it would be his duty to hand on to his principals.....and if the agent has an interest which would lead him not to disclose to his principals the information which he has thus obtained, and in point of fact he does not communicate it, you are not to impute to his principals knowledge by reason of the fact that their agent knew something which it was not his interest to disclose, and which he did not disclose.”
(emphasis supplied)

16. *Young v. David Payne & Co.*, was also relied upon in *Sri Meenakshi Mills Ltd., and Other vs. Commissioner of Income-Tax, Madras* and the same position was accepted in *Commissioner of Income Tax, Madras vs. Sri Meenakshi Mills Ltd. & Others*. In the former case, the Madras High Court

⁵ 1996 (2) WLR 230.

⁶ (1904) 2 Ch. 608.

⁷ (1963) 50 ITR 769.

⁸ (1967) 1 SCR 934.

observed the following –

*“20. Mr. Venkataraman, learned counsel for the assessee, has referred to In re David Payne & Co. Ltd.¹ That was a case where it had to be considered **whether when a director of a company knew in his private capacity that another company to which money was to be advanced intended to utilise that money outside the scope of its business, such knowledge could be imputed to the company of which he was a director. It was held that it could not be so imputed.** It is not necessary to refer to the details of the reasoning of the learned judges. The position here is analogous and even if Thyagaraja Chettiar as one of the directors of the assessee mills knew in his capacity as the director of the Madurai Bank that the money placed in fixed deposit by the mills would be transferred to the taxable territory, that knowledge could not be imputed to the assessee mills; much less can it be said that the transfer was part of the integral arrangement of the loan transaction.” (emphasis supplied)*

17. Reliance placed by Mr. Kirpal on the aforesaid decisions is misdirected and misplaced. This is for the reason that the benchmark for the existence of conflict of interest – in terms of the definition contained in the RfQ, is not that the two bidders must, as a matter of fact, have shared/exchanged the relevant commercial information. In the present context, it was not necessary for the respondent to establish that the petitioner and IGL1 accessed information of each other with regard to the bidding process in question. The benchmark, to determine the conflict of interest, is *“if they have a relationship with each other, directly or through a common company, that puts them in a position to have access to information about or influence the bid of another bidder”* (emphasis supplied). There is no denying the fact that as per the Companies Act, 2013 read with SS-1, the Directors have a right to inspect the Minutes of the Board Meetings as well

as the Committee Meetings, and it has not been shown by Mr. Kirpal that there is any specific legal provision, which provides for exclusion of an interested Director from inspecting the Minutes of the Board of Directors, and Committee Meetings. A Director has access to the Minutes of the Board and Committee Meetings under the statutory scheme contained in the Companies Act, 2013 and, therefore, the potential of transfer/communication of information relating to bidding in commercial/investment matters between the petitioner and the IGL1 was very much present on account of the presence of the common Director Mr. Pratik Pravin Agarwal on the Board of the petitioner company, as well as on the Board of Directors of the investment company, i.e. IIML, which was managing investments of the Indiagrid Trust, and which, in turn, wholly owns and controls IGL1.

18. The Division Bench of Calcutta High Court in *M/s Sharma Transport v. Coal India Limited and Other*⁹ has succinctly described the extent of judicial review in tender matters. Following is the observation of the Ld. High Court –

“41. Tender matters are not decided by running a fine tooth-comb over the process to discover which ‘i’ has not been dotted or which ‘t’ not crossed. The writ court always maintains a dispassionate distance from the process and, in course of the adjudication, does not imagine itself being in the position of the tender committee or as evaluators of the bids. It is only if the writ court finds the decision or the decision-making process to be utterly illegal or patently irrational or totally unreasonable that it would seek to intervene. If an executive authority has acted within its jurisdiction, has adopted a reasonable

⁹ FMA No. 2119 of 2018 with CAN No. 3176 of 2018, dated 14.12.2018.

procedure and has rendered a cogent decision at the end of the process: the writ court will ask for nothing more.....”

19. Additionally, the Supreme Court in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. & Anr.*¹⁰, while relying on *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)*¹¹ observed that *“the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision making process is mala fide or is intended to favour someone.....In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous.”*

20. We have examined the decision making process undertaken by the respondents in the present case. Various letters were exchanged between the Respondents and the Petitioner, for the Respondents to be able to acquire the relevant information for its purpose of examination and decision making on the issue considered. The BEC had also sought legal opinion from M/s SRGR on the conflict of interest aspect. M/s SRGR had provided its detailed opinion. The deliberate process had culminated into the finding that the common director Mr. Pratik Pravin Agarwal puts the Petitioner, and also IGL, in a position to access information of each other and, thus, there arose conflict of interest between the two.

21. For the purpose of the RfQ, it was necessary to determine whether the relationship between the two companies puts them “in a position” to have access to information about, or influence the Bid of another Bidder. Having

¹⁰ 2016 (16) SCC 818.

¹¹ 2016 (8) SCALE 99/ (2016) 8 SCC 622.

a common director, i.e. Mr. Prateek Agarwal as the Non-executive Director of IIML (that holds 100% in IGL 1) and also as Managing Director of SPTL (that holds 100% in Sterlite Grid 20 and 40% in IIML) indeed puts both the companies in a position to access information of each other.

22. It is important to reiterate that the respondent was not called upon to examine the situation at hand with a microscopic lens, and determine whether, as a matter of fact, information was exchanged. All that the respondent was required to examine was, whether, the two companies were in a position so as to have access to information of the other company with regard to their bids. In the light of the discussion above, we are of the view that the conclusion drawn by the respondent that both companies were in a position to access information of each other, was reasonable, well informed and justified.

23. Hence, we do not find any unreasonableness, arbitrariness, malafides or perversity in either the decision-making process, or the decision of the Respondent. We find the decision of the respondents to be well considered, based on a study and understanding of the relevant facts, and based on the legal opinion. The same is reasonable and rational, and within the ambit of clause 2.1.5 of the RfQ.

24. Therefore, for the reasons stated above, the petition is dismissed for lack of merit in the present petition. The parties are left to bear their respective costs.

VIPIN SANGHI, J

JASMEET SINGH, J

SEPTEMBER 10, 2021/‘ms’