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IN THE HIGH COURT OF DELHI AT NEW DELHI**Judgment reserved on: 03.01.2022**

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Judgment delivered on: 04.03.2022

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W.P.(C)13640/2021 and CM No. 43063/2021**HFCL ADVANCE SYSTEMS PRIVATE LIMITEDPetitioner**

Through: Mr. Bishwajit Bhattacharyya, Senior
Advocate with Mr. Rohit Khurana,
Advocate.

versus

**CENTRE FOR DEVELOPMENT OF ADVANCE COMPUTING
(C-DAC) Respondent**

Through: Mr. Sanjay Jain, ASG with Mr. Sanjoy
Ghose, Senior Advocate and Ms. Meenakshi
Ogra, Mr. Abhijeet Deshmukh, Mr. Vikram
Singh & Mr. Keshav Singh, Advocates.

CORAM:**HON'BLE MR. JUSTICE VIPIN SANGHI****HON'BLE MR. JUSTICE JASMEET SINGH****J U D G M E N T****JASMEET SINGH, J**

1. The present petition has been filed seeking quashing of communication dated 16.11.2021 issued by respondent No. 1, whereby the petitioner has been communicated its disqualification in respect of RFP tender No. CDACP/Safety City/MSI/2020/313, for selection of Master System Integrator (MSI) for Implementation, Operation and Maintenance of Surveillance System under Safe City Project of Delhi Police.
2. The case of the petitioner in a nutshell is that the petitioner– HFCL Advance Systems Private Limited (hereinafter called “HASPL”) is a Joint Venture (JV), with M/s HFCL Limited holding 90% shares in the



Petitioner company, and M/s Polixel Security Systems Private Limited, holding 10% share. M/s HFCL Limited and M/s Polixel Security Systems Private Limited are both incorporated companies under the Companies Act, 1956/2013.

3. Respondent, C-DAC is a Scientific Society of the Ministry of Electronics and Information Technology, Government of India, registered under Societies Registration Act, 1860, with administration and management of the Society vesting in the Governing Council of the Society, chaired by Union Minister of Communication and IT.
4. On 18.12.2020, the respondent floated RFP/ tender No. CDACP/Safety City/MSI/2020/313, for selection of Master System Integrator (MSI) for Implementation, Operation and Maintenance of Surveillance System under Safe City Project of Delhi Police.
5. On 30.06.2021, Pre-Bid Corrigendum was issued by the respondent, wherein, the definition of Joint Venture was given for the first time. As per the petitioner, the petitioner was entitled to bid for this tender/ RFP as a Joint Venture.
6. The petitioner company was originally incorporated on 23.02.2015 under the Companies Act, 1956/2013, as a wholly owned subsidiary of M/s HFCL Limited. For the purpose of convenience, HFCL Advance Systems Private Limited for the period from 23.02.2015 till 13th August 2021—when HFCL limited transferred 10% equity to Polixel Security System, is referred to as “HASPL Pre”, and not the Petitioner company.
7. Towards making petitioner a Joint Venture on 13.08.2021, M/s HFCL Limited divested its 10% shareholding in HASPL Pre, and transferred 10,000 equity shares of face value of Rs. 10/- each— comprising 10% of



the paid-up equity share capital of the HASPL Pre, to M/s Polixel Security Systems Private Limited. As per the petitioner, with the transfer of equity shares on 13.08.2021, the status of HASPL Pre-changed to a Joint Venture (herein after referred to as 'JV') within the requirement of the RFP document, and within the meaning of Section 2(6)(b) of the Companies Act, 2013.

8. In compliance of Form-13 of the RFP, on 17.08.2021, the petitioner ensured execution of JV documents/undertakings/agreement by the members of JV, duly signed by the petitioner, M/s HFCL Limited and M/s Polixel Security Systems Private Limited.
9. On 20.08.2021, the petitioner submitted its bid as a JV. On 02.10.2021, the Technical Evaluation Committee of respondent raised certain Pre-Qualification queries, which were responded to by the petitioner on 07.10.2021.
10. On 12.10.2021, the respondent raised further queries, which were again responded to on 13.10.2021, along with clarificatory documents. Further queries were raised by the respondent on 12.10.2021, which were also responded by the petitioner on 18.10.2021. The petitioner sent further communications to the respondent on 26.10.2021 and 27.10.2021.
11. Eventually, the petitioner was disqualified by the Respondent on the ground that the petitioner did not meet various terms of RFP on 16.11.2021.
12. Consequently, the Petitioner has preferred this petition being aggrieved by its technical disqualification. When the matter came up before this Court on 02.12.2021, while issuing notice, we directed filing of the



counter-affidavit within a week, and also directed that *‘though the processing of the bids received may be continued in the meantime, the same shall not be finalised’*.

13. The respondent has filed a detailed counter-affidavit, wherein, the respondent has defended its decision to disqualify the Petitioner by stating that Clause 1.6 defines JV for the purpose of the RFP, and Clause 1.9 defines eligible bidders. As per the respondent, a combined reading of Chapter 1 Part 1.9(b)(iv), 1.9(b)(v) and 1.9(b)(vii), along with the Chapter 2 Part 2.1.3 Appendix-II, makes it is clear that a JV bidder is mandatorily required to submit following documents, as part of its bid documents, in support of its claim to being a “JV entity”, which has come into existence before the bid is submitted, and is not a facade put forth, only to obtain the tender contract by falsifying documents:

- a. Copy of the JV agreement, which states the %age of shareholding and roles and responsibilities of each member;*
- b. Relevant documents towards registration/incorporation of JV*
- c. Memorandum of Association and Articles of Association of the Company (JV Company)”*

14. The respondent states that these documents were not submitted by the petitioner. These documents were required to be submitted as a part of the bidding documents by the JV, as is clear from Part 1.9.7 of Chapter 1, titled "Contents of Bid,”. The submission of these documents was essential and the bid was liable to be disqualified, as the petitioner’s bid, without these documents, was incomplete in terms of Clause 1.9.1 of the RFP.



15. The respondent submits that even though the petitioner chose to submit its bid as a JV entity, the petitioner did not submit the Memorandum of Association (MOA) and Articles of Association (AOA) of the newly founded JV entity, and what was filed was only the MOA and AOA of the original Company i.e., HASPL Pre, prior to transfer of 10% share to M/s Polixel Security.
16. The sum and substance of the respondent's submission is that there is no JV agreement between the JV partners i.e. HFCL Ltd. and Polixel Security Systems Private Ltd. filed by the petitioner, and the undertaking filed by the petitioner dated 17.08.2021 cannot be termed or interpreted as a JV agreement, as various shortcomings are found in the said document, such as:
- (i) Preamble failing to show JV entity distinct from its shareholder, promoter, ;
 - (ii) No Shared responsibilities regarding capital investment and other financial arrangement, such as funding provision;
 - (iii) No Shared management structure- JV's management structure- composition of Board of Directors, appointment and changes in Chairman, quorum of meeting, casting vote provision in Board meeting, appointment of CEO/ MD, deadlock resolution mechanism; General meeting provision.
 - (iv) No Shared profit and losses – (%age of profit or loss allocated to each party).
17. The above deficiencies lead to the conclusion that this document was simply executed to be able to bid for the tender in question as a JV.



There is no genuine and workable JV formed, incorporating the essential terms and condition of a JV.

18. The petitioner has filed a rejoinder, reiterating its submissions made in the petition.
19. We have heard Mr. Bishwajit Bhattacharyya, learned Senior Counsel appearing for the petitioner, and Mr. Sanjay Jain, learned ASG appearing for the respondent.
20. The submission of Mr. Bhattacharyya is that the disqualification of the petitioner dated 16.11.2021 is totally wrong, misconceived and contrary to the terms of the RFP. The Bid document provides a draft format of the undertaking that the JVs are required to furnish in terms of Clause 7.13 of the RFP. The Petitioner has furnished the same, and the members of the JV have agreed to be bound by the said undertaking.
21. It has been further submitted that the respondent itself defined JV in the Pre-Bid corrigendum dated 30.06.2021, for the first time, and hence, there was no requirement for the petitioner to incorporate a Joint Venture prior to the said date. Each and every term of the undertaking format given in the RFP has been complied with by the Petitioner. There is no set format of a JV agreement given— either in the RFP, or prescribed in law, or elsewhere. The undertaking of the Petitioner dated 17.08.2021 is also in compliance of Section 2(6)(b) of Companies Act, 2013, which defines a Joint Venture.
22. Lastly, the learned Senior Counsel for the petitioner has relied on Clause 1.9 (b) (vii) of the RFP (eligible bidder), which mandates that in case the joint venture agreement is not acceptable to the respondent, the



JV will modify the same so as to be acceptable to the Respondent. The relevant Clause reads:

“vii. The JV agreement covering (but not limited to) all the above mentioned provisions should be submitted to C-DAC along with the technical bid. In case JV agreement is not acceptable to C -DAC, the JV will modify same so as to be acceptable to C-DAC.”

23. Learned Senior Counsel for the petitioner has submitted that if the JV agreement as submitted by the petitioner was not acceptable, an opportunity should have been granted to the Petitioner, requiring the petitioner to modify its JV in terms of Clause 1.9 (b) (vii) of RFP (eligible bidder). Since, there was no further communication received from the Respondent's side after the clarification dated 27.10.2021 regarding Joint Venture Agreement, the Petitioners reasonably and *bonafidely* believed that all the Respondent's queries regarding Joint Venture Agreement have been fully met to Respondent's satisfaction, as mandated under the RFP terms.
24. Mr. Jain, learned ASG has defended the respondents' decision. He submits that in the present case, HFCL Limited has merely transferred 10% of its shareholdings in HASPL Pre, to M/s Polixel Security Systems Private Limited, but there is no underlying Joint Venture agreement between HFCL Limited and Polixel Security Systems Private Ltd., setting out their agreement with regard to the terms, conditions and responsibilities that each of them would undertake and discharge in the execution of any contract awarded to the Petitioner. There has been no change in the Memorandum and Articles of the



Petitioner company post divestment of 10% equity by HFCL Limited in favour of Polixel Security Systems Private Ltd.; there is no JV agreement which describes the role and responsibility of JV partners. Despite the Respondent repeatedly pointing and asking the Petitioner to submit various documents to show existence of a JV entity, no satisfactory response was forthcoming from the Petitioner.

25. Mr. Jain submits that the Preamble of the undertaking executed by members of the so called JV dated 17.08.2021, shows that both HFCL Limited and Polixel Security Systems Private Limited are claiming to act through the Petitioner company only. There is no Board resolution authorizing the Petitioner to act for and on behalf of HFCL Limited, or on behalf of Polixel Security Systems Private Limited. Thus, there is no risk or responsibility being undertaken by either of the so called JV partners.
26. He submits that the respondent, on 02.10.2021 and 12.10.2021, asked the petitioner to supply a copy of the Joint Venture agreement as well as the Memorandum and Articles of Association of the Joint Venture entity. But the petitioner did not comply, and stuck to its original mis-conceived assumption.
27. We have heard learned Senior Counsels for the parties and have gone through the record.
28. It will be relevant to quote the relevant portions of the RFP as well as the corrigendum which are as follows:-

The RFP document defines a 'Joint Venture' as follows:

Part 1.6. Definitions



j. “JV”: For the purpose of this RFP, Joint Venture (“JV”) is defined as an association with a legal entity distinct from that of its partners, **incorporated prior to the submission of bids either as a company under Companies Act 2013 or as a LLP under LLP Act 2008, and where the partners of the JV are jointly and severally liable to the Client for the performance of the Contract.**

(emphasis supplied)

.....

29. The relevant terms and conditions of the RFP may also be noted:

1.9. Eligible Bidders

a. Bids can be submitted by either a sole bidder or by a Joint Venture registered in India.

b. In case, the bid is submitted by a JV, the following conditions must be fulfilled:-

i. A JV should not consist of more than three partners. The partner of the JV holding highest stake shall be the Principal Partner. The principal partner shall hold at least 51 % stake in JV and shall hold it till exit management milestone of the project.

ii. The partner of the JV holding highest stake shall be the Principal Partner and shall be nominated as such and this authorization shall be evidenced by submitting a power of attorney. An undertaking from the Principal partner who has majority share in the JV shall be submitted stating that they will continue to hold at least 51 % share in the JV Company till the end of contract period with CDAC and / or Delhi Police.



iii. All the partners of JV should accept joint and several responsibilities towards discharging all obligations under project.

iv. A JV agreement clearly indicating the rolls and responsibilities of each partner must be submitted along with the Bid.

v. The relevant documents towards registration / incorporation of JV and the Memorandum of Association and Articles of Association of the company (MOARR) must be submitted along with the bid.

vi. There shall be a separate Bank Account in the name of JV (distinct from the bank accounts of constituent members). All the financial obligations will be discharged through same JV account and all the payments received by the JV from the buyer will be through said bank account only.

vii. The JV agreement covering (but not limited to) all the above-mentioned provisions should be submitted to C-DAC along with the technical bid. In case JV agreement is not acceptable to C-DAC, the JV will modify same so as to be acceptable to C-DAC.

viii. No member of the Joint Venture shall have the right to assign or transfer the interest right or liability in the contract without the written consent of the other members and that of CDAC in respect of the said tender/contract.

ix. The JV agreement shall be valid during the entire currency of the contract including the period of extension if any and the maintenance period after the work is completed.

x. Once the tender is submitted, the JV agreement shall not be modified/altered/terminated during the validity of the



tender. In case the tenderer fails to observe/comply with this stipulation, CDAC reserves the right to take appropriate action as per GFR.

c. The Sole Bidder or Joint Venture must comply the Eligibility/Pre-Qualification criteria as stipulated at Para 2.1.3 of Appendix-II of this document.

d. A bidder applying individually or as a member of a JV shall not be entitled to submit another proposal either individually or as a member of any other JV, as the case may be.

e. Bidders / JV partners can neither claim project experience of sister concerns / parent firms/network firms nor propose key experts from such sister concerns / parent firms/ networkfirms unless such firms are part of the bidding JV or unless expressly permitted in this RFP including TOR.

f. The Bidder or Joint Venture must comply with the Eligibility/Pre-Qualification criteria as stipulated at Para 2.1.3 of Appendix-II of this document.

g. The Sole Bidder or a Joint Venture as the bidder shall hereafter be referred as 'bidder' for the purpose of this RFP.

h. For the purpose of prequalification criteria Para 2.1.3 (A) as given in Appendix-II of this document, the financial standing credentials of a holding company can be clubbed with only one of the fullyown subsidiary company. The bidding firm shall submit appropriate legal documents proving such ownership."

(emphasis supplied)

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"2.1.3. Pre-Qualification/ Eligibility Criteria

Appendix-II



The bidder must comply with the Pre-qualification/ Eligibility criteria stipulated below. CDAC reserves the right to disqualify the bidder in case the bidder does not meet any one or more of the following criteria.

A. Bidder (MSI) Pre-Qualification Criteria

Sl. No.	Minimum Eligibility Criteria	Documents Required to be submitted
(i)	The Sole Bidder or members of JV should be: • A company incorporated in India under the Companies Act, 1956/ 2013 and subsequent amendments thereto or LLP ACT 2008. • Registered with GST Authorities in India. • Should have been operating for the last three years in India as on the date of opening of technical bid (including name change /impact of mergers of acquisitions). • Maximum three companies shall be allowed in JV including Lead Member. • The lead member should have minimum 51% stake in the JV.	• Copy of Certificate of incorporation. • Copy of PAN • Copy of Registration Certificate with GST Authorities. • Copy of Balance Sheet & P&L Statement for the FY2017-18, 2018-19 and 2019-20. • JV agreement stating the %age of shareholding and roles and responsibilities of each member.
XXX	XXX	XXX
XX	XXX	XXX

(emphasis supplied)

.....

***“1.9.1. Compliant Bids/Completeness of Response***

- a. Bidders are advised to carefully study all instructions, forms, terms, requirements and other information in the RFP document. Submission of the Bid shall be deemed to have been done after careful study and examination of the RFP document with full understanding of its implications.*
- b. Failure to comply with the requirements of the Clause No.2.1.3 may render the Bid non-compliant and the Bid may be rejected*

Bidders must:

- i. Include all documents specified in this RFP, in the Bid*
- ii. Follow the format of this RFP while developing the Bid and respond to each element in the order as set out in this RFP*
- iii. Comply with all requirements as set out within this RFP”*
- ...

1.9.17.:Non-Conforming bids

A Bid may be construed as a non-conforming bids and ineligible for consideration:

- a. Non-Compliance of any clause(s) of this RFP.*
- b. If a Bid does not follow the format requested in this RFP or does not appear to address the particular requirements of the solution.*

....

1.9.20. Bid Disqualification

The Bid is liable to be disqualified/ a proper explanation may be called in the following cases or in case Bidder fails to meet the bidding requirements as indicated in this RFP:



- a. During validity of the Bid, or its extended period, if any, the Bidder increases its quoted prices;*
- b. The Bidder's Bid is conditional and has deviations from the terms and conditions of RFP;*
- c. Bid is received in incomplete form;*
- d. Bid is not accompanied by all the requisite documents;*
- e. Information submitted in Technical Bid is found to be misrepresented, incorrect or false, accidentally, unwittingly or otherwise, at any time during the processing of the contract (no matter at what stage) or during the tenure of the contract including the extension period if any;*
- f. Financial Bid is enclosed with the same document as Technical Bid;*
- g. Bidder tries to influence the Bid evaluation process by unlawful/corrupt/fraudulent means at any point of time during the Bid process;*
- h. In case any one of the parties of the JV [Lead and/or the JV member(s)] submits multiple Bid(s) or if common interests are found in two or more Bidders, the Bidders are likely to be disqualified, unless additional Bids/Bidders are withdrawn upon notice immediately;*
- i. If the bidder applying individually or as a member of JV submits another proposal/bid either individually or as a member of any other JV then all the affected bids will be disqualified Refer 1.9 (d) of corrigendum"*

2.1.8 Evaluation Process

The steps for evaluation are as follows:

a. Stage 1: Pre-Qualification



i. C-DAC shall carry out the preliminary examination of the technical bid documents submitted in e-packet 1 to check the compliance with pre-qualification requirements/ Eligibility Criteria stipulated at para 2.1.3 of Chapter 2 of this document.

ii. **Each of the Pre-Qualification Criteria mentioned in the RFP is MANDATORY.** In case, the Bidder does not meet any one or more of the criteria, the bid shall be disqualified.

iii. The detailed technical evaluation of the bids shall be carried out only for the bidders who comply with the pre-qualification Requirements/Eligibility Criteria.”

30. After having reproduced the relevant provisions of the RFP, it will now be relevant to reproduce the reasons of rejections for the bid of the Petitioner, contained in letter dated 16.11.2021:

“Dear Sir /Madam,

*The Bid submitted by M/s HFCL Advance Systems Pvt Ltd against RFP No CDACP /Safe City /MSI/2021/313 for selection of MSI for the Safe City Project of Delhi Police has been evaluated for Pre-Qualification criteria as per the RFP and **the bid is disqualified on the following grounds:***

From the Bid and clarification documents as received from the M/s HASPL it is observed:

- **No joint venture agreement entered into between the parties has been provided.**



- The Articles of Association of HFCL Advance Systems Pvt. Ltd. incorporating the Joint venture agreement is not provided.

The bid submitted by M/s HFCL Advance Systems Pvt. Ltd does not comply with the provisions stipulated at clause 1.9 (Eligible Bidder) of the RFP, which states that:

- a. Bids can be submitted by either a sole bidder or by a joint Venture registered in India.*
- b. In case, the bid is submitted by a JV, the following conditions must be fulfilled:*
 - iv. A JV agreement clearly indicating the rolls and responsibilities of each partner must be submitted along with the Bid.*
 - v. The relevant documents towards registration/ incorporation of JV and the Memorandum of Association and Articles of Association of the company (MOARR) must be submitted along with the bid.*
 - vii. The JV agreement covering (but not limited to) all the above-mentioned provisions should be submitted to C-DAC along with the technical bid. In case, JV agreement is not acceptable to C-DAC, the JV will modify same so as to be acceptable to C-DAC."*

Further Clause 1.9.20 lays down the provisions for Bid Disqualification wherein clause c and d provides that the Bid is liable to be disqualified/ a proper explanation may be called in the following cases or in case Bidder fails to meet the bidding requirements as indicated in this RFP:

- c. Bid is received in incomplete form;*



d. Bid is not accompanied by all the requisite documents

Further clause 1.9.1 of the RFP provides that:

a. Bidders are advised to carefully study all instructions, forms, terms, requirements and other information in the RFP document. Submission of the Bid shall be deemed to have been done after careful study and examination of the RFP document with full understanding of its implications.

*b. Failure to comply with the requirements of the Clause No.2.1.3 may render the Bid noncompliant and the Bid may be rejected **One of the requirements of the bidders Pre-Qualification criteria Clause No.2.1.3 was that the "JV agreement stating the% age of shareholding and roles and responsibilities of each member" to be submitted in the bid document.***

Thanking you and looking forward to your participation in future as well.

Regards

Prasad K. Bhingarkar”

(emphasis supplied)

31. As per the petitioner, the petitioner company is a JV and the undertaking dated 17.08.2021 is a Joint Venture agreement as it incorporates all the essentials of the JV.

32. We are unable to agree for the reasons below:

A. **The Prescribed Format of the Undertaking presupposes the existence of a Joint Venture**

The prescribed form (clause 7.13) in which the JV Partners are required to provide their undertaking reads as under:



“Draft Understanding executed by members of the JV

7.13. Annexure – 13: JV Agreement

[On Non-judicial stamp paper of INR 100 duly attested by notary public]

This Undertaking executed into this day of [Date] [Month] [Year] at [Place]

*M/s.....having registered office at.....
acting through_____ (hereafter referred to as JV
Member 1, which expression shall, unless repugnant to the context
include its successors and permitted assigns)*

*And M/s.....having its registered office
at.....acting through _____(hereafter
referred to as JV member 2 which expression shall, unless repugnant to
the context include its successors and permitted assigns)*

*And M/s.....having its registered office
at.....acting through _____(hereafter
referred to as JV member 3 which expression shall, unless repugnant to
the context include its successors and permitted assigns)*

***WHEREAS JV member 1, JV member 2 and JV member 3 are the
constituent members of the JV company / LLP_”_____”._***

*WHEREAS C-DAC, Pune, India has issued a Request for Proposal
No_____*
_____ (RFP) inviting Bids/proposals from interested
Bidder for Selection of Master System Integrator for Delhi Safe City
Project:

***AND WHEREAS we the JV members have had discussions and have
decided for bidding for the above said Project and reached an
understanding with respect to the Parties' rights and obligations***



towards each other and their working relationship. Accordingly, we have submitted a response jointly to the Bid for the “Request for Proposal for surveillance system under Delhi Safe City Project” as a JV

Thus, on the basis of the mutual understanding JV members inter se, we undertake as follows:

- a. Sign Contract in case of award.*
- b. Provide and perform the supplies and services which would be ordered by C-DAC pursuant to the execution Contract.*
- c. Each of the JV members, as the case may be, shall be solely, jointly and severally responsible and bound towards C-DAC for the performance of the works in accordance with the terms and conditions of the RFP document, and Contract. All the JV Members shall support the Principal Partner of JV in successful implementation of the objectives.*
- f. Nominate and authorise ----- (Name of Party) to act as the Principal Partner for this bid. As such, it shall act as the coordinator of the Party’s combined activities and shall carry out the following functions:*
 - i. To ensure the Technical, Financial and administrative co-ordination of the Project work and the services to be rendered in relation thereto*
 - ii. To lead the contract negotiations of the Project work with C-DAC.*
 - iii. The Principal Partner for this bid is authorized to receive instructions and incur liabilities for and on behalf of JV and all other JV Members.*
 - iv. In case of an award, act as channel of communication between C-DAC and the other members of JV.*



- v. Entire execution of the contract including coordination for payments shall be carried out exclusively through the principal partner.
- g. The Principal Partner shall be responsible for the successful completion of the Contract / Agreement and C-DAC shall be communicating with the Principal Partner for all necessary actions. The Principal Partner and/or all the JV members, as the case may be, shall be held liable and responsible for any breach of any of the terms and conditions of the Contract /Agreement.
- h. That we all the JV members shall carry out all responsibilities jointly and severally as Master System Integrator in terms of the Contract.
- i. That the broad roles and the responsibilities of each Party at each stage of the Bidding shall be as below:**
- Party A:** _____
- Party B:** _____
- Party C:** _____
- j. That the JV agreement shall be valid during the entire currency of the contract including the period of extension if any and the maintenance period after the work is completed.
- k. We affirm that we will implement the Project in good faith and take all necessary steps to see the Project through expeditiously.
- l. That no member of the Joint Venture Firm shall have the right to assign or transfer the interest, right or liability in the contract without the written consent of the other members and CDAC in respect of the said tender/contract.**
- m. Once the tender is submitted, the JV agreement shall not be modified/altered/terminated during the validity of the tender.**



n. That this Undertaking shall be governed in accordance with the laws of India and courts in Delhi shall have exclusive jurisdiction to adjudicate disputes arising from the breach of the same.

In witness thereof I on behalf of M/s _____ have executed this Undertaking on the date and year above mentioned.

Authorised Signatory of M/s _____

Witness:

Witness: ”

(emphasis supplied)

The following aspects emerge from a reading of the above format of undertaking:

- i. The Undertaking stipulates the existence of a Joint Venture even before the format is filled. The 3rd recital of the format reads as under:

AND WHEREAS we the JV members have had discussions and have decided for bidding for the above said Project and reached an understanding with respect to the Parties' rights and obligations towards each other and their working relationship. Accordingly, we have submitted a response jointly to the Bid for the “Request for Proposal for surveillance system under Delhi Safe City Project” as a JV.

Thus, on the basis of the mutual understanding JV members inter se, we undertake as follows...”

From the above, it is clear that the parties signing the undertaking must have already arrived at an understanding, and that the JV entity has had already come into an existence, prior to signing of the said undertaking. The reading of the undertaking clearly suggests that the JV partners have had discussions and after



discussions, they were desirous of participating in the bid. Pursuant to the said discussions, and in order to participate in the bid, the undertaking, as in the bid document, is signed by the JV partner.

- ii. Clause (l) of the undertaking refers to the *"no member of the Joint Venture Company shall have the right to assign or transfer the interest, right or liability in the contract without the written consent of the other members and CDAC in respect of the said tender contract."*

This clause also indicates that prior to signing and executing of the document (an undertaking), a JV company has already come into existence. However, in the present case, as per the petitioner's own showing, the so-called JV came into existence only on 17.08.2021 for the purpose of submission of the bid. The 10% equity shares are stated to have been acquired on 13.08.2021 by Polixel resulting in the alleged JV entity.

- iii. The Petitioner Company was also given ample time to submit all requisite proof vide letters dated 02.10.2021 and 12.10.2021. Despite repeated opportunities, the Petitioner failed to provide supporting document to show the joint control and joint respective rights and obligations, by not producing the JV agreement/ mutual understanding between HFCL Limited and Polixel Security Systems Private Limited; the amended AOA of the Petitioner Company-incorporating the terms of the alleged understanding between HFCL Limited and Polixel Security Systems Private Limited. Since, the Petitioner had participated as a JV, Clause (v) of Clause 1.9 of the RFP required MOA & AOA of the JV. However, the MOA & AOA submitted by the Petitioner, despite repeated requests of the respondent, was of HASPL Pre, and not of the newly incorporated JV.

B. The Undertaking submitted by the Petitioner is not the JV agreement



- i. The essentials of Joint Ventures have clearly been defined in two judgments of the Supreme Court. In the matter of ***New Horizons Ltd. v. Union of India***, (1995) 1 SCC 478, the expression "joint venture" has been interpreted as follows:

“24. The expression “joint venture” is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p. 839) According to Words and Phrases, Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p. 342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See Jacques Buhart : Joint Ventures in East Asia — Legal Issues (1991).] There has been similar growth of joint ventures in our country wherein foreign companies join with



Indian counterparts and contribute towards capital and technical know-how for the success of the venture.

(emphasis supplied)

- ii. In ***Faqir Chand Gulati v. Uppal Agencies (P) Ltd.***, (2008) 10 SCC 345, the Supreme Court laid down the scope of a JV:

22. *The following definition of “joint venture” occurring in American Jurisprudence (2nd Edn., Vol. 46, pp. 19, 22 and 23) is relevant:*

“A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement that there shall be a community of interest among the parties as to the purpose of the undertaking, and that each joint venturer must stand in the relation of principal, as well as agent, as to each of the other coventurers within the general scope of the enterprise.”

Joint ventures are, in general, governed by the same rules as partnerships. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships. Since the legal consequences of a joint venture are equivalent to those of a partnership, the courts freely apply partnership law to joint ventures when appropriate. In fact, it has been said that the trend in the



law has been to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that does not apply to the other. Thus, the liability for torts of parties to a joint venture agreement is governed by the law applicable to partnerships.

A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation.”
(emphasis supplied)

23. *To the same effect is the definition in Corpus Juris Secundum (Vol. 48-A, pp. 314-15):*

“Joint venture’, a term used interchangeably and synonymous with ‘joint adventure’, or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit or a special combination of persons undertaking jointly some specific adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are : (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control



over, and active participation in, management and direction of business enterprise; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement.”

(emphasis supplied)

24. *Black's Law Dictionary (7th Edn., p. 843) defines “joint venture” thus:*

“Joint venture.—A business undertaking by two or more persons engaged in a single defined project. The necessary elements are : (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project.”

(emphasis supplied)

- iii.** The above judgments and dictionary meanings lend credence to the interpretation that the document creating a joint venture must incorporate essential terms/clauses that reflect the true intention and nature of the understanding between the parties. Moreover, each entity/party in the joint venture keeps its separate legal status, and the agreement setting up the JV outlines the resources, such as money, properties, other assets, knowledge or skill/expertise that each party will bring to the venture. Thus, both parties in a joint venture contribute resources, share ownership of the joint venture's assets and liabilities, and share responsibilities in the implementation of the project. The contract also, establishes how the venture will be managed and how controlled as well as profits and losses from it will be divided. Importantly, both parties must contribute to the JV, and share opportunities and risk involved therein. In the present case, the mere acquisition of 10% stake in the Petitioner company by M/s Polixel Security Systems Private Ltd. does not bring out any terms and conditions that HFCL Ltd. and Polixel Security Systems Private Ltd. have entered into in



relation to the conduct of the businesses of the Petitioner. On the face of it, it is merely an investment by Polixel in the Petitioner company by them picking up 10% stake therein.

- iv. The undertaking dated 17.08.2021 submitted by the Petitioner is merely a paper reproduction of the format. It is an undertaking reproduced in form, rather than substance—devoid of the pre-supposed preparatory steps. It is devoid of the essentials of the JV. The essence of the undertaking, and the essence of the pre-existing JV has been lost by the Petitioner. The Petitioner has confused “the form” and “the substance” of the undertaking, and the JV agreement. The JV agreement is a document which circumscribes the roles in management, the profit sharing, the responsibilities, the investments, etc in the Joint Venture. The undertaking as required by the RFP was required to ensure that the Joint Venture continues during the performance of the work. Hence, undertaking and JV agreement were both required by the RFP, but both operate in separate spheres. There was no overlap or commonality between the document.
- v. The undertaking signed is simply an undertaking signed by the two equity shareholders in the Petitioner Company, which has been signed and submitted by the members in order to fulfil the condition laid down in Clauses 1.9(b)(ii) and 1.9(b)(iii) of the RFP document. Post the mention of the requirement of the undertaking to be submitted, RFP requires submission of the JV agreement as stated in Part 1.9(b)(iv) and 1.9(b)(vii). In fact, perusal of Part 1.9(b)(vii) shows that the Respondent intended the bidder to submit a JV agreement, which was distinct from the other undertakings and acceptance of joint and several liability clauses preceding the said clause. "

C. None of the Documents required by Clause 1.9 are submitted by the Petitioner:

Clause 1.9 requires the Petitioner to submit:



- (a) Joint Venture to be registered in India
- (b) The documents towards registration/incorporation of JVs Memorandum of Association, Articles of Association of the company to be submitted.
- i. None of these documents were submitted by the petitioner, despite the respondent clearly asking for the same in its e-mail of 02.10.2021 and 12.10.2021. The relevant portion of the e-mail of 02.10.2021 reads as under:

“Date: 02/10/2021

To: M/s HFCL Advance Systems Private Limited

Subject: Queries against the bid submitted by M/s HFCL Advance Systems Private Limited

Ref. RFP No.: CDACP/Safe City/MSI/2020/313, Dated: 18 December 2020 for Selection of Master System Integrator (MSI) for Implementation, Operation & Maintenance of Surveillance System under Safe City Project of Delhi Police

Dear Sir,

Please refer to your bid submitted against the RFP No.: CDACP /Safe City/MSI/2020/313, Dated: 18 December 2020 for Selection of Master System Integrator (MSI) for Implementation, Operation & Maintenance of Surveillance System under Safe City Project of Delhi Police.

Below are the observations/queries raised by the Technical Evaluation Committee:



Sr. No.	RFP Clause	Query /Observation seeking clarification
XXX	XXX	XXX
13.	Maximum three companies shall be allowed in JV including Lead Member.	Please provide the documents/ agreement on the basis of which the said JV company was formed and MOA, AOA of the JV company. (Ref: Point no iii on Page no -245 of corrigendum dated 30-06-2021 from para 2.1.3 of Appendix-H)

Please submit the clarifications of the above queries by Email at prasad@cdac.in by Thursday, Dt. 07th October 2021 upto 17.00 Hrs. to avoid rejection of bid.” (emphasis supplied)

ii. The Response of the petitioner is as under:

“Date: 7 October 2021

To,

*Executive Director,
Centre for Development of Advanced Computing(C-DAC)
Innovation Park, Panchavati,
Pashan Road, Pune- 411008*

Subject: Reply to Post bid queries dated 2 October 2021

*Ref: RFP No CDACP/Safe City/MSI/2020/313, Dated: 18
December 2020*

Dear Sir,

*Please find attached our reply to post bid queries dated 2
October 2021.*

We hope that we have replied to all your queries satisfactorily.



NEUTRAL CITATION NO: 2022/DHC/000813

Please feel free to contact us should you have any further query.

*Thanking you,
Yours sincerely,
(sign)*

Signature of the Sole Bidder/ JV Bidder Members)

Printed Name: ATUL YAGNIK

Designation: Associate Vice President Seal

Place: New Delhi

*Business Address: 8 Commercial Complex, Masjid Moth, GK-2,
New Delhi: 110048*

Reply to post bid queries dated 2.10.2021 against bid submitted for RFP No. CDAC/ Safe City/ MSI/ 2020/ 313 dated 18 December 2020

<i>Sr. No.</i>	<i>RFP Clause</i>	<i>Query /Observation seeking clarification</i>	<i>M/s HFCL Advance Systems Private limited Reply</i>
<i>XXX</i>	<i>XXX</i>	<i>XXX</i>	<i>XXX</i>
<i>13.</i>	<i>Maximum three companies shall be allowed in JV including Lead Member</i>	<i>Please provide the documents/agreement on the basis of which the said JV company was formed and MOA, AOA of the JV company. (Ref: Point no iii on Page no -245 of corrigendum dated 30-06-2021 from para 2.1.3 of Appendix-H)</i>	<i>Bid has been submitted by HFCL Advance Systems Private limited, a Joint Venture Company formed between HFCL limited and Polixel Security Systems Private Limited.</i> <i>AGREEMENT/ UNDERTAKING EXECUTED BY MEMBERS OF THE JV</i> <i>Annexure- 13:</i> <i>Covering Letter: Bid pdf page no.: 406 to 408.</i> <i>2) Undertaking by HFCL limited that HFCL Limited has majority stake > 51% in the JV: Bid pdf page no. 409</i>



			<i>3a) MOA & AOA of HFCL Advance Systems Private Limited: Bid pdf page no 410 to 416 3b) MOA & AOA of HFCL Limited: Bid pdf page no 417-509 3c) MOA & AOA of Polixel Security Systems Private Limited: Bid pdf page no 510-542</i>
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(emphasis supplied)

- iii. The relevant portion of e-mail dated 12.10.2021 of the respondent reads as under:

“Date: 12-10-2021

To: M/s HFCL Advance Systems Private Limited

Subject: Queries against the bid submitted by M/s HFCL Advance Systems Private Limited

Ref. RFP No.: CDACP /Safe City /MSI/2020 /313, Dated: 18 December 2020 for Selection of Master System Integrator (MSI) for Implementation, Operation & Maintenance of Surveillance System under-Safe City Project of Delhi Police

Dear M/s HFCL Advance Systems Private Limited

Please refer to your bid submitted against the **RFP No.: CDACP / Safe City/MSI/2020/313, Dated: 18 December 2020 for Selection of Master System Integrator (MSI) for Implementation, Operation & Maintenance of Surveillance System under Safe City Project of Delhi Police.**

We have sent Pre-Qualification (PQ) related queries on 02nd October 2021 and received the response towards the same on 07th October 2021. The committee evaluated the clarifications given against the queries. Based on the evaluation



the committee seek further clarifications on the following points.

Below are the observations/queries raised by the Technical Evaluation Committee:

<i>Sr. No.</i>	<i>RFP Clause</i>	<i>Query / Observation seeking clarification</i>
1.	A company incorporated in India under the Companies Act, 1956/ 2013 and subsequent amendments thereto or LLP ACT 2008.	The date of incorporation of the company as reflected from the incorporation certificate is 23-02-2015. It is not clear from the document submitted by you that the said company "M/s HFCL Advanced Systems Ltd." was incorporated as a JV company at the time of its incorporation Or before the submission of the bid. You are requested to submit documents to evidence the aforesaid fact. You may submit the certificate from the statutory auditor certifying the share holding pattern of the company and the fact that it was a JV company before submission of the bid.
XXX	XXX	XXX
XXX	XXX	XXX

iv. The Petitioner in mail dated 13.10.2021, replied the following:

"Date: 13 October 2021

To,

Executive Director,

Centre for Development of Advanced Computing(C-DAC)

Innovation Park, Panchavati,



Pashan Road, Pune- 411008.

Subject: Reply to Post bid queries dated 12 October 2021

Ref: RFP No CDACP/Safe City/MSI/2020/313, Dated: 18 December 2020

Dear Sir,

Please find attached our reply to post bid queries dated 12 October 2021.

We hope that we have replied to all your queries satisfactorily. Please feel free to contact us should you have any further query.

*Thanking you,
Yours sincerely,
(sign)*

Signature of the Sole Bidder/ JV Bidder Members)

Printed Name: ATUL YAGNIK

Designation: Associate Vice President

Seal

Place: New Delhi

Business Address: 8 Commercial Complex, Masjid Moth, GK-2, New Delhi: 110048

<i>Sr. No.</i>	<i>RFP Clause</i>	<i>Query /Observation seeking clarification</i>	<i>M/s HFCL Advance Systems Private limited Reply</i>
<i>1.</i>	<i>A company incorporated in India under the Companies Act, 1956/2013 and subsequent amendments thereto or LLP ACT 2008.</i>	<i>The date of incorporation of the company as reflected from the incorporation certificate is 23-02-2015. It is not clear from the document submitted by you that the said company "M/s</i>	<i>Please refer MOA of HFCL Advance Systems Private Limited at page no 410 of our bid. Para (A) on page 410 is" The objects to be pursued by the company on its</i>



		<i>HFCL Advanced Systems Ltd." was incorporated as a JV company at the time of its incorporation Or before the submission of the bid. You are requested to submit documents to evidence the aforesaid fact. You may submit the certificate from the statutory auditor certifying the share holding pattern of the company and the fact that it was a JV company before submission of the bid.</i>	<i>Incorporation". Sub-para (A) 5 states that the company can acquire, form joint ventures among other objectives Further, 1) Please find attached our clarification to the same. 2) Certificate from statutory auditor clarifying the same is attached, as desired. 3) Share certificate of HFCL Advance Systems Private Limited transferred in the name of Polixel Security Systems Private Limited, JV partner is attached as a proof of JV partner's holding in JV Company before the date of bid submission. We are in full compliance of RFP requirement.</i>
XXX	XXX	XXX	XXX
XXX	XXX	XXX	XXX



- v. A combined reading of the respondent's e-mails, and the responses of the petitioner clearly show that the respondent was, time and again, asking for the Memorandum and Articles of the newly incorporated JV company, reflecting the change in the management structure consequent to transfer of 10% shareholdings in favour of Polixel Security Systems Pvt. Ltd. Despite asking twice, the petitioner was unable to provide the same.

D. Clause vii of Pre-Bid Corrigendum

- i. As regards Clause vii of Pre-Bid Corrigendum, wherein the Respondent was obligated to remove defects, we find force in the argument of the respondent that, only if a JV agreement had been filed, the clause vii would be applicable. The respondent was obligated to ask for defects to be removed in the JV Agreement, if one were produced. In the present case, there was no JV Agreement filed, despite the respondent asking for the same and, therefore, Clause vii is not attracted in the facts of the present case.
33. From the discussion above, we are clear that the petitioner has not filed its JV agreement, and has been rightly disqualified by the respondent vide the impugned communication dated 16.11.2021.
34. Consequently, we do not find any reason to interfere with the rejection given of the petitioner's bid vide the impugned letter dated 16.11.2021, since the same is not shown to be perverse, mala-fide or arbitrary, or violative of Wednesbury principle of unreasonableness.



35. For the reasons stated above, there is no merit in the writ petition, hence it is dismissed.

(JASMEET SINGH)
JUDGE

(VIPIN SANGHI)
JUDGE

MARCH 04, 2022/DM

