

Mep-ideal Toll Consortium Vs. Mcd and ors.

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Court : Delhi

Decided On : May-29-2011

Judge : Badar Durrez Ahmed; Veena Birbal, Jj.

Appeal No. : W.P.(C) No.2603/2011

Appellant : Mep-ideal Toll Consortium

Respondent : Mcd and ors.

Advocate for Def. : Mr Rajiv Nayar; Mr Sudhir Nandrajog; Mr Gaurang Kanth; Mr Rahul Kumar, Advs.

Advocate for Pet/Ap. : Dr Abhishek M. Singhvi; Mr Neeraj K. Kaul; Mr Sandeep Sethi; Mr Rudreshwar Singh; Mr Deepak Chitnis; Ms Nidhiram Ram; Mr Mohit Choudhry, Advs.

Judgement :

1. By way of this writ petition, the petitioner has sought a writ of Certiorari or any other writ, order or direction calling for the records of the instant tender matter from the respondents and for setting aside the decision of the respondent no. 1 conveyed to the petitioner by a letter dated 23.04.2011 whereby the Technical Evaluation Committee of the respondent no. 1 has declared the petitioner no. 1 consortium as having failed in the technical evaluation. A writ of Mandamus has also been sought directing the respondents to consider the Financial Bid submitted by the petitioner in relation to the Request For Proposal Document dated

01.03.2001 calling for bids for „Engagement of the Contractor by the MCD for Toll Collection at border points from specified commercial vehicles entering Delhi.

2. The impugned letter dated 23.04.2011 reads as under:-

"MUNICIPAL CORPORATION OF DELHI TOLL TAX DEPARTMENT

14th Floor, „E Block, Dr. S.P.M. Civic Centre, New Delhi- 110002

(Tel:011-23226422)

No: AC(TT)/HQ/2011/41 Dated : 23.4.2011 To

M/s MEP-IDEAL TOLL CONSORTIUM

410, Boomerang, Near Chandivli Studio,

Chandivli Farm Road, Andheri (East),

MUMBAI- 400 072.

(Emai : feedback@meptollroad.com)

Sub: ENGAGEMENT OF A CONTRACTOR BY MCD FOR TOLL COLLECTION AT BORDER POINTS FROM SPECIFIED COMMERCIAL VEHICLES ENTERING DELHI.

Sir,

The Technical Evaluation Committee after examining the Technical Bid submitted by your consortium declares you as "FAIL".

The reason for your disqualification briefly is due to the applicability of Clause 1.5(a) and 1.5(d) of Section -2-B, (page-21) of Volume-I of RFP document, which pertains to the „Conflict of

Interest and opinion of the Solicitor General of India on the subject.

Yours faithfully,

(Vinay Kumar)

Asstt. Commissioner

(Toll Tax)"

3. It is apparent that the reason for disqualification has been briefly stated to be due to the applicability of Clauses 1.5(a) and 1.5(b) of Section 2-B of Volume-I of the RFP document which pertains to „Conflict of Interest. Of course, another reason for disqualification has also been mentioned and that is the opinion of the Solicitor General on the subject.

4. The relevant portion of clause 1.5 of Section 2-B of Volume-I of the RFP Document reads as under:-

"1.5 Any Applicant/Bidder shall not have a conflict of interest (the "Conflict of Interest") that affects the bidding process. Any Applicant/Bidder found to have a Conflict of Interest shall be disqualified. An Applicant shall be deemed to have a Conflict of Interest affecting the bidding process, if:

(a) the Applicant/Bidder, its member or associate (or any constituent thereof) and any other Applicant, its Member or any Associate thereof (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of an Applicant, its Member or an Associate thereof (or any shareholder thereof having a shareholding of more than 5 per cent of the paid up and subscribed share capital of such Applicant, Member or

Associate, as the case may be) in the other Applicant, its Member or Associate is less than 5 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 4A of the Companies Act, 1956.

(b) XXXX XXXX XXXX XXXX

(c) XXXX XXXX XXXX XXXX

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

(e) XXXX XXXX XXXX XXXX"

5. Initially, the learned counsel for the petitioner had pointed out that the disqualification was on the ground that one Mr Dattatray P. Mhaiskar owned shares in the companies constituting two consortiums who have applied separately. The two consortiums involved in the present petition are - (1) MEP-Ideal Toll Consortium which is comprised of (a) MEP Toll Road Pvt Ltd and (b) Ideal Toll and Infrastructure Pvt Ltd; and (2) IRB-MIPL Consortium which, in turn, is comprised of (a) IRB Infrastructure Developers Ltd and (b) Mhaiskar Infrastructure Pvt Ltd. The initial objection and disqualification was with regard to the allegation that the said Mr Dattatray P. Mhaiskar had shares in each of the four constituent companies of the two consortiums and that insofar as IRB Infrastructure Developers Ltd is concerned, he had a shareholding of 7.63 per cent which was in excess of the 5 per cent limit prescribed in Clause 1.5(a). However, this argument has been given up by the respondents inasmuch as a plain reading of Clause 1.5(a) would show that the disqualification qua Mr Dattatray P. Mhaiskar could only apply if he held more than 5 per cent shares in a constituent of both the consortiums and not just in one of the consortiums.

6. The other ground for disqualification under Clause 1.5(a), according to the learned counsel for the respondent-MCD is that Ideal Toll and Infrastructure Pvt Ltd which is a constituent of MEP-Ideal Toll Consortium itself holds 7.63 per cent of the shares of IRB Infrastructure Developers Ltd which is a constituent of IRB-MIPL Consortium and this, in itself, disqualifies the petitioner consortium (MEP-Ideal Toll Consortium) on the ground of „Conflict of Interest as contemplated under Clause 1.5(a) which has been set out above.

7. The learned counsel on behalf of the petitioner submitted that unless and until there was a countervailing ownership interest of a constituent of the other consortium in the petitioner consortium in excess of 5 per cent, the deeming provision of „Conflict of Interest would not get triggered.

8. We have heard the counsel for the parties on this aspect of the matter and upon a plain reading of Clause 1.5(a) we feel that the only interpretation that can be given to it is that when an applicant or its constituent, itself, has an ownership interest in another applicant or its constituent and that ownership interest is in excess of 5 per cent of the subscribed and paid up equity share capital then it shall be deemed to have a „Conflict of Interest. Admittedly, Ideal Toll and Infrastructure Pvt Ltd which is a constituent of MEP-Ideal Toll Consortium has an ownership interest of 7.63% in IRB Infrastructure Developers Ltd which is a constituent of the other consortium - IRB-MIPL Consortium. Hence, the deemed conflict of interest is triggered. It is with regard to this aspect of the matter that the MCD has ultimately disqualified the petitioner consortium on the basis of „Conflict of Interest.

9. Insofar as the plea of the disqualification under Clause 1.5(d) is concerned, we find that at this stage it would be very difficult to come to a concrete conclusion as to whether the „Conflict of Interest as stipulated therein is made out or not because there is no material before us to ascertain as to whether constituents of the consortiums had access to each others information or were in a position to influence the bidding of each other. Therefore, we are not in agreement, prima facie, with the submissions made by the learned counsel for the MCD on the applicability of Clause 1.5(d) of Section 2-B of the RFP Document. However, on the basis of the view taken by us in respect of Clause 1.5(a) we feel that the fact

that Ideal Toll and Infrastructure Pvt Ltd holds 7.63 per cent shares of IRB Infrastructure Developers Ltd and thereby holds shares in excess of the 5 per cent shares stipulated in Clause 1.5(a), is sufficient ground for disqualification of the petitioner consortium.

10. We may also point out that an identical provision (except that the stipulation with regard to shareholding was 1% and not 5% as in the present case) was considered in the case of Navinya Buildcon Private Limited v. Union of India & Others, W.P.(C) No. 7181/2009, decided on 08.04.2009, by a Division Bench of this court and a similar view was taken.

11. In view of the foregoing, the writ petition is dismissed and the interim order stands vacated. Dasti.

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