

Improving clarity and objectivity in PQ / Eligibility Criteria

1. Need for System Improvement:

For any tendering process to succeed one of the essential requirements is to frame various conditions, technical specifications and scope of works in the bid-document and the resulting Contract in clear and unambiguous terms. Lack of clarity in the language in such documents becomes prone to differing interpretations at later stage giving rise to disputes that not only can jeopardize contract-execution but may also result in adverse financial consequence for the contracting parties if they decide to go down the litigation route. Not surprisingly, the following is mentioned in one of the CVC's Guidelines :

“An ambiguous agreement leads to poor contract performance and litigations. It also gives an opportunity to a contractor to make profit out of ambiguous conditions. It has been observed that the tender documents are prepared in a hurried manner without checking the conformity among the schedule of items, drawings, specifications, and contract conditions etc.”

While clarity is an desirable requirement for framing any condition of a tender, it's impact is perhaps felt most in one particular Tender Condition/Clause called **“Eligibility Condition or/and Pre-Qualification (PQ) criteria”**. This is all the more important for Government Tenders/Contracts which, unlike those between private parties, must also conform to attributes of rationality, equality and non-arbitrariness projected by Article 14 of Constitution.

2. Drawing upon analysis done by Vigilance during investigation of tenders of KoPT, this System Improvement Note aims to improve understanding on this vital tender clause i.e Eligibility Condition or/and Pre-Qualification (PQ) criteria.

3. Case Study in KDS and HDC:

PQ criteria or Eligibility Criteria as stipulated in a bid document are commonly known to be framed in objective terms with no scope for subjectivity or ambiguity. It is like a go / no-go area in the bidding domain. If a bidder does not fulfill such PQ / Eligibility Criteria in toto, their offer gets ejected out of zone of consideration. Once an Eligibility/PQ Criteria” is stipulated in the bid document the same cannot undergo modification / relaxation after bids get opened. However, Vigilance Department has noticed that the stringency and importance of this vital condition i.e PQ / Eligibility Criteria has not been duly appreciated in certain cases as illustrated below :

Tender Case 1 : In a high value tender of KDS, the bid document stipulated a Pre-qualification Criteria requiring bidders to have a specified average turn-over during the past 3 years .

After the bids got opened, one bidder was an Indian company incorporated barely a year before the bid opening date and therefore could not have fulfilled the required experience / turn-over stipulated in the Pre-qualification criteria. However, the company claimed that since they were the “subsidiary” of another “holding company” (located abroad) who owned 100% of them, the credential of the “holding company” should be counted towards satisfying satisfied the PQ Criteria. Incidentally the holding company , who had not participated in the KoPT’s tendering process happened to satisfy the PQ criteria of this tender. The Tender Committee could not decide what to do, declined to open the price bid and sought legal opinion. Opinion collected from a High Court Advocate was to give benefit of the credential of foreign based holding company if they stood guarantee for their Indian subsidiary’s performance and subject to some other safeguards. However the Head of Kolkata’s own Legal Branch opined that the same cannot be done since the “eligibility condition” stipulated in the bid document was meant to be fulfilled by the “bidder” only i.e in this case the Indian Subsidiary and not anyone else. Ultimately the High Court Advocate’s opinion was opted for and the Indian subsidiary was declared “eligible” on this relaxed/altered criteria.

Tender Case 2 : However, in a similar high value tender case in Haldia, in a similar scenario, the Tender Committee took a diametrically opposite stand i.e they rejected the offer of a bidder because the said “bidder” (an Indian subsidiary) did not possess the required experience but attached the credential of their foreign Principal who did satisfy the PQ Criteria. This revealed the existence two contradictory stances on a identical tender evaluation issue within the same KoPT system.

A question arises as to what should be done in the above situation. Can the PQ Criteria be relaxed or altered after bid opening?

4. Analysis:

One way is to analyze the decision on the touchstone of “equity” and ask what other potential bidders could question in such a situation. They would simply say “if the intention of the organization was to accept the credential of a holding company for their subsidiary then why the tenderer did they not stipulate so in their bid document upfront? In other words, if the intention was to consider the credential of holding entity with any type of safeguard for their subsidiary, then nothing forbade the organization to incorporate the same in any bid document with the approval of Competent Authority of that organization.

4.1 Advice of CVC

The Commission has issued guidelines vide circular No12-02-1-CTE6 dated: 12.12.2002 and 07.05.2004 advising the organizations to frame the pre-qualification criteria in such a way that it is neither too stringent nor too lax to achieve the purpose of fair competition. During intensive examinations of the works of the organizations dealing with the power projects, following deficiencies were observed:

- *Stringent PQ Criteria resulting in poor competition.
- *Unduly restrictive criteria, creating entry barrier for potential bidders.
- *Evaluation criteria not notified to the bidders, making the PQ process non-transparent.
- *PQ Criteria relaxed during evaluation, thus creating entry barrier to the other potential bidders fulfilling the relaxed criteria.**
- *Credentials of the bidders not matched with the notified criteria.
- *Credentials of the bidders not verified.

4.2 Verdict of Supreme Court

Following the detection of such contradictory procurement practice in two different units under the same administration system, Vigilance Department made further research into the legality of the same. **It was then found out that the matter had been resolved in a landmark judgment passed by Hon'ble Supreme Court in the case of Ramana Dayaram Shetty –Vs- The International Airport , Bombay 1979 AIR 1628,1979 SCR (3) 1014.** Very briefly the case was as follows :

International Air port, Bombay (1st Respondent) floated invited tender with the eligibility criteria that stated that the bidder must be registered second class hoteliers having at least five years' experience for putting up and running a second class restaurant. Out of the six tenders received only one tender was complete and offered the highest amount as licence fee (The 4th respondent) . All the other tenders were rejected because they were incomplete. Since the lone bidder who remained in the fray did not satisfy the description of "registered second class hoteliers having at least 5 years' experience" prescribed under the eligibility" clause of the tender notice, International Air port, Bombay called upon this company to produce documentary evidence whether they were registered second class hoteliers having at least 5 years' experience. The company stated once again that they had considerable experience of catering for various reputed commercial houses; clubs, messes and banks and that they had Eating Houses Catering Establishment (Canteen) Licence. Satisfied with the information given by the fourth respondents, the first respondent accepted their tender on the terms and conditions set out in its letter. The decision of International Airport, Mumbai was later challenged by a petitioner who alleged that being a Government Unit they had considered an offer in deviation to the stated eligibility criteria laid out in the bid document. After running the full gamut of judicial discourse the case ultimately landed up before Supreme Court who stated as below:

“ HELD: The action of the first respondent in accepting the tender of the fourth respondents, who did not satisfy the standard or norm, was clearly discriminatory since it excluded other persons similarly situate from tendering for the contract and it was arbitrary and without reason. Acceptance of the tender was invalid as being violative of the equality clause of the Constitution as also of administrative law inhibiting arbitrary action.

(a) What paragraph (1) of the notice required was that only a person running a registered second class hotel or restaurant and having at least 5 years' experience as such should be eligible to submit the tender. The test of 1) eligibility laid down in this paragraph was an

objective test and not a subjective one. If a person submitting the tender did not have at least five years' experience of running a second class hotel, he was eligible to submit the tender and it would not avail him to say that though he did not satisfy this condition he was otherwise capable of running a second class restaurant and therefore should be considered. This was in fact how the first respondent understood this condition of eligibility. The first respondent did not regard this requirement as meaningless or unnecessary and wanted to be satisfied that the fourth respondents had fulfilled this requirement. The fourth respondents were neither running a second grade hotel or restaurant nor did they have five years' experience of running such a hotel or restaurant. Therefore the fourth respondents did not satisfy the condition of eligibility laid down in paragraph(1) of the notice.

.... Admittedly the standard or norm was reasonable and non-discriminatory and once such a standard or norm for running a IIInd Class restaurant should be awarded was laid down, the 1st respondent was not entitled to depart from it and to award the contract to the 4th respondents who did not satisfy the condition of eligibility prescribed by the standard or norm. **If there was no acceptable tender from a person who satisfied the condition of eligibility, the 1st respondent could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of the 4th respondents.** When the 1st respondent entertained the tender of the 4th respondents even though they did not have 5 years' experience of running a IIInd Class restaurant or hotel, denied equality of opportunity to others similarly situate in the matter of tendering for the contract. There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years' experience of running a IIInd Class restaurant, but who were otherwise competent to run such a restaurant and they might also have competed with the 4th respondents for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years' experience. **The action of the 1st respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other person similarly situate from tendering for the contract and it was plainly arbitrary and without reason.** The acceptance of the tender of the 4th respondents was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."

5. Keeping in view CVC's guidelines and Apex court Judgments on the above subject, the following System Improvements **were accepted and implemented through an administrative order** in the designing of Eligibility Conditions / PQ Criteria in the Tendering Processes followed in Kolkata Port Trust

Proposed System Improvement

- 1) While framing PQ /Eligibility Criteria the following must be kept in view :
 - a. PQ Criteria should be neither be too stringent nor too lax to achieve the purpose of fair competition.
 - b. Unduly restrictive criteria should be avoided as it can create entry barrier for potential bidders.
 - c. Evaluation criteria should be duly notified to the bidders making the PQ process non-transparent.
 - d. Credentials of the bidders not matched with the notified criteria.
 - e. Credential of a bidder should be properly verified.
- 2) Eligibility criteria given in a tender is on objective test for determining the admissibility of the offer submitted by a bidder. Since this is not a subjective criterion, formulation of the same should be done with utmost care. Once, the eligibility criteria is adopted by a Tendering Authority which is not arbitrary then, relaxation of same must not be granted at a post –

tender stage. For that reason words/expressions like “*bidder should have ..*”, “*submit necessary document*” “*bidders should preferably perform ...*” under eligibility condition must be avoided. Only the requirement which is non-negotiable in nature for decision making should be included under this condition.

- 3) Eligibility criteria *must be fulfilled by the bidding entity only and not on the strength of any of their sister / associate / holding company. If it is consciously desired by the Tendering authority that fulfilment of eligibility criteria can be done either by the bidder or their Subsidiary / Holding Company then the same should be specified well in advance in the eligibility clause of the bid document , recording appropriate reasons and with the approval of the authority competent to sanction such bid document. However in such case the exact entity who would bear the risk of failure, contractual disputes or any such liability etc. should be spelt out clearly in the bid document. Should such an eligibility criteria be felt inevitable and if approved so by the Competent Authority, then formulation of such contractual safeguard must be stipulated upfront in the bid document in consultation with Legal and Financial Branch.*

NOTE : THE SUGGESTED SYSTEM IMPROVEMENT HAS BEEN ACCEPTED AND IMPLEMENTED THROUGH AN ADMINISTRATIVE ORDER.
