

M/A Psa Mumbai Investments Pte. Limited vs The Board Of Trustees Of The Jawaharlal ... on 11 September, 2018

Equivalent citations: AIRONLINE 2018 SC 1153, AIRONLINE 2018 SC 182

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Bench: Indu Malhotra, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9352 OF 2018
(Arising out of SLP (C) No. 8166 of 2018)

M/S PSA MUMBAI INVESTMENTS
PTE. LIMITED

...APPELLANT

VERSUS

THE BOARD OF TRUSTEES OF THE JAWAHARLAL
NEHRU PORT TRUST AND ANR. ...RESPONDENT

JUDGMENT

R.F. Nariman, J.

1. Leave granted.

2. The factual matrix in which the present matter arises is that the Respondent No.1 issued a Global Invitation of Request for Qualification (hereinafter referred to as “RFQ”) in March, 2009 inviting applications from interested persons for the development of the 4th Container Terminal Project on Design, Build, Finance, Operate and Transfer Basis at Jawaharlal Nehru Port. The RFQ document of 02.03.2009 expressly contained a clause by which the bidder could be a Single Entity or a Consortium. On facts, the appellant and the Respondent No.2 before us together formed a Consortium with the appellant as the Lead Member, Technical Member and Financial Member of the Consortium. It may be pointed out at this stage that the appellant is a Company registered in Singapore, whereas Respondent No.2 is a Company registered in India.

3) Some of the salient features of the RFQ is that the RFQ itself, at the forefront, states by way of a Disclaimer that nothing in the RFQ will be construed to make the RFQ an Agreement between the

parties. Whatever is stated in the RFQ Clauses would only be by way of information to a prospective bidder as to the work to be performed. The bid itself was in two stages – the first being at the stage of eligibility, and the second being at the stage of the Request for Proposal (hereinafter referred to as “RFP”). Since the Consortium between the appellant and the Respondent No.2 qualified in the first stage, they were entitled to be considered under an RFP document floated by the Respondent No.1 dated 07.06.2010. Under this document, what was made clear was, like the RFQ, that nothing in the RFP should be construed as forming an agreement between the parties. The only idea of the RFP was that the Consortium, in making its financial bid, would know what exactly was required of it during performance of an agreement to be entered into in future. What is interesting to note is that though there is no agreement at the stage of an elaborate bid process set out in a schedule to the RFP, yet, right until a Concession Agreement is to be signed between a Special Purpose Vehicle set up for the purpose by the Consortium and the Respondent No.1, the bid process will be governed by Indian law and the Courts at Mumbai shall have exclusive jurisdiction over the disputes that may arise under or in connection with the said process. Another important clause is that the Jawaharlal Nehru Port Trust (Respondent No. 1) can annul the bid process without assigning any reason right up to the stage that a Concession Agreement is actually entered into, as stated here- in-before, between the Special Purpose Vehicle and the Respondent No.1. Equally, what is of great importance is a draft Concession Agreement, which forms part of the RFP document and is, therefore, deemed to be a part of the Consortium bid itself. This draft Concession Agreement contained an arbitration clause in the following terms:

“19.1 Amicable Settlement If any dispute or difference or claims of any kind arises between the Concessioneing Authority and the Concessionaire in connection with construction, interpretation or application of any terms and conditions or any matter or thing in any way connected with or in connection with or arising out of this Agreement or the rights, duties or liabilities of any Party under this Agreement, whether before or after the termination of this Agreement, then the parties shall meet together promptly, at the request of any Party, in an effort to resolve such dispute, difference or claim by discussion between them.

xxx
 19.3 Arbitration
 (a) Arbitrators

Failing amicable settlement and/or settlement with the assistance of Expert appointed by the Parties by mutual consent, the dispute or differences or claims as the case may be, shall be finally settled by binding arbitration under the Arbitration and Conciliation Act, 1996. Unless the Parties mutually agree otherwise, within 30 (thirty) days of invocation of the arbitration as mentioned below, the rules of arbitration prescribed by the International Centre for Alternative Dispute Resolution, New Delhi shall apply to the arbitration. The arbitration shall be by a panel of three Arbitrators, one to be appointed by each party and the third, who shall act as presiding arbitrator, to be appointed by the two arbitrators appointed by the parties. The Arbitration shall be invoked by one party issuing to the other a notice in writing invoking the arbitration and appointing an arbitrator. Upon receipt of the notice, the

other Party shall appoint the second Arbitrator.

The two Arbitrators so appointed shall appoint the third Arbitrator who shall act as the 'Presiding Arbitrator'. If the other Party fails to appoint a second Arbitrator within 30 (thirty) days from the receipt of the request to do so, then the Arbitrator so appointed by the first party shall adjudicate the disputes as 'Sole Arbitrator'.

(b) Place of Arbitration The place of arbitration shall be the headquarters of the Concessioneing Authority in India.

(c) English Language The request for arbitration, the answer to the request, the terms of reference, any written submissions, any orders and rulings shall be in English and, if oral hearings take place, English shall be the language to be used in the hearings.

(d) Procedure The procedure to be followed within the arbitration, including appointment of arbitrator/arbitral tribunal, the rules of evidence which are to apply shall be in accordance with the Arbitration and Conciliation Act, 1996.

(e) Enforcement of Award Any decision or award resulting from arbitration shall be final and binding upon the parties. The parties hereto agree that the arbitral award may be enforced against the parties to the arbitration proceeding or their assets wherever they may be found and that a judgment upon the arbitral award may be entered in any court having jurisdiction thereof.

(f) Fees and Expenses The fees and expenses of the arbitrators and all other expenses of the arbitration shall be intially borne and paid equally by respective parties subject to determination by the arbitrators. The arbitrators may provide in the arbitral award for the reimbursement to the successful party of its costs and expenses in bringing or defending the arbitration claim, including legal fees and expenses incurred by the party.

(g) Performance during Arbitration Pending the submission of and/or decision on a dispute, difference or claim or until the arbitral award is published, the parties shall continue to perform all of their obligations under this Agreement without prejudice to a final adjustment in accordance with such award."

4) Equally of importance is to notice that if there is any discrepancy between the RFP and the draft Concession Agreement, the draft Concession Agreement will override the RFP. The RFP also speaks of a Letter of Award to be given in case the financial bid of the Consortium is accepted. What is important to notice is that under the schedule that is annexed to both the RFQ as well as RFP indicating the bid process, the signing of the Concession Agreement comes after the Letter of Award as the last stage in the bid process. Since this schedule is of importance and has been relied upon by learned counsel for both parties, the schedule to the RFQ is set out herein below:

1.3 Schedule Of Bidding Process The authority shall endeavor to adhere to the following schedule :-

Event Description	Date
Qualification Stage	

1. Last date for receiving queries 30th March, 2009
2. Pre-Application conference 15th April 2009
3. Application due date 30th April 2009
4. Announcement of short list Will be announced later Bid Stage Estimated Date
1. Sale of Bid Documents To be Specified
2. Last date for receiving queries To be Specified
3. Pre-bid meeting – 1 To be Specified
4. Authority response to queries latest by To be Specified
5. Pre-bid meeting – 2 To be Specified
6. Bid Due Date (s) To be Specified
7. Opening of Bids On Bid Due Date
8. Letter of Award (LOA) Within 30 days of Bid Due Date
9. Validity of Bids 120 days of Bid Due Date
10. Signing of Concession Within 30 days of award Agreement of LOA

5) Ultimately, as the Consortium's bid dated 15.10.2010 was found to be the most favourable from a financial point of view, a Letter of Award dated 26.09.2011 was given by the Respondent No.1 to the Consortium, which was duly acknowledged by the Consortium.

6) Meanwhile, some problems as to the exact stamp duty between the parties cropped up, and since there was delay in signing the Concession Agreement, Respondent No.2 decided to opt out of the bid process. This was apprised to the Respondent No.1 by the appellant by a letter dated 02.04.2012. By a letter dated 30.04.2012, the Respondent No.1 indicated that the appellant, who would now be left as the sole bidder should be ready to indicate a Special Purpose Vehicle for entering into and executing the contract in the form of the draft Concession Agreement. However, the letter made this conditional upon the Ministry of Shipping according approval. In anticipation of such approval, by a

letter dated 30.05.2012, the appellant wrote to Respondent No.1 stating that it had, in fact, incorporated another Special Purpose Vehicle to execute and perform the Concession Agreement. Meanwhile, the appellant was informed by a letter dated 30.08.2012 that the Ministry of Shipping had not accorded approval to the change from consortium to single entity as requested by the appellant.

7) This being the case, on 18.09.2012, the bid security that was given by the Consortium was encashed by Respondent No.1 for the recovery of which, a Suit has been filed on 21.09.2015, which is still pending. At this stage, by a show- cause notice dated 12.09.2012 by Respondent No.1, the Consortium was called upon to perform its part of the bid as originally agreed to. Since this was not done, by a letter dated 16.10.2012, the Letter of Award that was accorded and acknowledged by the appellant on 26.09.2011 was “withdrawn” by the Respondent No.1. Consequent to this, Respondent No.1, in a letter dated 26.11.2014, claimed a sum of Rs.446.28 Crores by way of damages against the Consortium, and sent an arbitration notice dated 18.02.2015 stating that, according to it, Clause 19 of the draft Concession Agreement would be the arbitration clause governing the parties, and that they were appointing Retired Justice V.G. Palshikar of the Bombay High Court as their Arbitrator. The appellant and Respondent No.2 were called upon to appoint their Arbitrator within 30 days of receipt of this letter. By a reply dated 29.04.2015, the appellant stated that as no agreement was entered into between the parties, Clause 19 of the draft Concession Agreement would not govern the parties and indicated that if the Respondent No.1 agreed, an Arbitration Agreement could be entered into between the parties to sort out the disputes arising on various scores. By their reply to this letter dated 04.07.2015, the Respondent No.1 continued to reiterate that it was governed by the arbitration clause in the draft Concession Agreement and that as 30 days had elapsed and no arbitrator was appointed by the Appellant, and as the said clause provided that the Arbitrator appointed by the Respondent No.1 would now be the sole Arbitrator to decide the disputes between the parties, called upon Justice Palshikar to adjudicate the disputes between the parties.

8) An application under Section 16 of the Arbitration and Conciliation Act, 1996 was then filed before the sole Arbitrator by the appellant and Respondent No. 2, in which they argued that there was no arbitration clause entered into by way of agreement between the parties and that, in any case, the arbitration clause relied upon by Respondent No.1 would not fit the bill as the disputes that were to be adjudicated under that clause related only to a Concession Agreement which had not yet been entered into, the parties to which would be Respondent No.1 and a Special Purpose Vehicle, and not the Respondent No.1 and the appellant and Respondent No.2. The learned Arbitrator agreed with the appellant and held:

“25. The request for qualification is a request and not a Contract. Similarly request for proposal is also request for and not a contract. Both are requests made by the Claimant to the Respondents asking for their qualification and proposal. It cannot and does not have any reference to any arbitration clause. Similarly there is no such reference in the LOA and therefore there is no contract in which there is a reference to a document incorporating an arbitration clause. In fact, clause 6(1) of both RFQ and RFP provide that the Courts at Mumbai shall have exclusive jurisdiction for all disputes arising under, pursuant to or in connection with the bidding process, this

cannot be read to mean it is a document mentioning any arbitration clause.

26. It would also be necessary to consider the fact that the Letter of Acceptance was factually withdrawn by the Claimant by its communication dated 16 th October 2012.

In this letter it is observed in paragraph 4 thus:

“The Consortium has failed to abide by the provisions of the Letter of Award and has failed to sign the Concession Agreement within the time granted to it.”

27. Then in paragraph 6 it is stated as under:

“The said change constitutes a change in the offer and also constitutes a change in the Draft Concession Agreement proposed to be executed. The said deviation in the Draft Concession Agreement is not accepted by JNPT. The bid stage is over with the issue of Letter of Award and no further modification can be acceded to after issue of LOA.”

28. Then paragraph 9 says that in view of the delay and defaults by the Respondents the Letter of Award rendered null and void and is hereby withdrawal. It is therefore obvious that after such withdrawal there cannot exist any document or even request which can be said to have been incorporated in a contract, factually also the Concession Agreement is not signed by either of the parties and therefore there is no document or reference to a document or contract, the existence of which can fulfill the requirement of Section 7(5) of the Act.”

9) An appeal against the said order was filed before the High Court under Section 37 of the Arbitration and Conciliation Act, 1996 in which the learned Arbitrator’s order was set aside. The High Court held that there is a concluded contract between the parties as the Letter of Award had been accepted by the appellant, and that since the arbitration clause forms a part of the bid document between the parties, the arbitration clause would govern the parties. It may be pointed out that an alternative argument was made on behalf of the appellant that even if it was said that the parties were governed by the arbitration clause in question, yet, the clause was “inapt” in the language of our judgment in M.R. Engineers and Contractors Private Limited vs. Som Datt Builders Limited, (2009) 7 SCC 696. This argument though noticed in the judgment was not, however, answered by the judgment.

10) Mr. Amit Sibal, learned Senior Advocate, appearing on behalf of the appellant has made detailed submissions before us. According to him, on a detailed reading of the RFQ and RFP, the first thing that strikes one is that there is a disclaimer in both the documents which clearly states that neither document will be construed to be an agreement between the parties. Secondly, he strongly relies upon the schedule and the definition of “bid process” in both the RFQ and RFP showing that at least insofar as the present tender is concerned, the Letter of Award is not an unqualified acceptance of an offer made but has to await a contract to be signed in the form of a Concession Agreement

between the Respondent No.1 and another entity, namely, the Special Purpose Vehicle set up for the purpose. Equally, according to the learned Senior Advocate, it is important to bear in mind that the bid process begins with the RFQ and ends with the ultimate signing of the Concession Agreement. According to the learned Senior Advocate, until such Concession Agreement is signed, Courts in Mumbai alone will have exclusive jurisdiction to decide the disputes that may arise between the parties both under the RFQ as well as the RFP. It is only thereafter that if a Concession Agreement is entered into between the Respondent No.1 and the Special Purpose Vehicle that the arbitration clause will kick in and will govern the disputes that will arise post the Concession Agreement in the performance of the contract between those two parties. He also strongly relied upon a clause in the RFP document which further made this clear, as the Respondent No.1 could annul the bid process right till the stage of the entering into the Concession Agreement but not thereafter. He also strongly relied upon the letter dated 16.10.2012, by which the Letter of Award that was granted earlier was “withdrawn” showing thereby that there was no agreement that had been entered into between the parties, as otherwise the expression used would have been “terminated”. He strongly relied upon this Court’s judgment in *Dresser Rand S.A. vs. Bindal Agro Chem Ltd. And Anr.*, (2006) 1 SCC 751 as followed in *Bharat Sanchar Nigam Limited vs. Telephone Cables Limited*, (2010) 5 SCC 213 and stated that in a near identical fact situation, this Court has twice held that as there was no concluded contract between the parties, no arbitration clause could be said to be contained which would bind the parties. He also strongly relied upon the RFP document to show that the bid could be by a single entity or a Consortium, and then showed us a clause in the RFP document by which a change in the Consortium could be made provided the appellant remained as lead Member thereof. According to him, relying on this clause, the Respondent No.1, left to itself, would have accepted the change from Consortium to single entity, but, *de hors* the bid document, the Respondent No.1 went for confirmation to the Ministry of Shipping, which refused to confirm the same. Shri Sibal also made a without prejudice argument, on the assumption that the arbitration clause were to apply, that the said clause would be wholly “inapt” as held in *M.R. Engineers and Contractors Private Limited (supra)* as it was to decide only questions that may arise under a Concession Agreement never entered into, and between the Respondent No.1 and the Special Purpose Vehicle and not the Respondent No.1 and the appellant and Respondent No.2. He also pointed out that though this argument had been made before the High Court, the High Court has not adverted to or answered this contention.

11) Mr. Dushant Dave, learned Senior Advocate, appearing on behalf of the Respondent No.1 took us through the RFQ and RFP and relied upon various clauses of the same. He also took us through the Joint Bidding Agreement dated 21.08.2009 that was entered into between the appellant and the Respondent No.2. According to him, one very important part of the RFP is that the draft Concession Agreement would override the RFP in the case of inconsistency between the two. He, therefore, argued that since an arbitration clause between the parties governs them, the inconsistent clause of Courts at Mumbai having exclusive jurisdiction would, therefore, go out of harm’s way. He also argued that the bidder had, in the present case, not only acknowledged the Letter of Award in his favour, which was a binding contract between the parties, but had signed each page of the draft Concession Agreement signifying that they would, therefore, be governed by the arbitration clause contained therein. He relied strongly upon the fact that it could never have been conceived that if disputes arose during the bid process, the Respondent No.1 would have to be driven to a Court of

law instead of an arbitral process and asked us to look at the agreement both in accordance with its object and as a man of commerce would look at the same. He went on to state that a direct judgment of this Court in Unissi (India) Private Limited vs. Post Graduate Institute of Medical Education and Research, (2009) 1 SCC 107 would govern the facts of this case being very similar thereto. He also strongly relied upon para 24(v) of the M.R. Engineers and Contractors Private Limited (supra) judgment to indicate that, on facts, he would fall within the ratio set out in this sub-para. He also relied strongly upon this Court's judgment in Kollipara Sriramulu (Dead) by his LR vs. T. Aswatha Narayana (Dead) by his LRs & Others, (1968) 3 SCR 387 to state that merely because a future formal contract may have to be entered into between the parties, this does not mean that if such future formal contract is not entered into, then an agreement could not otherwise be established on facts. According to him, the facts of the present case fall within the ratio of this judgment. He ended by stating that even assuming that the High Court judgment were wrong, we should not exercise our discretionary jurisdiction under Article 136 of the Constitution of India given the fact that, as a result of the appellant's conduct, there has been a huge revenue loss discerned by the fact that a revenue sharing ratio of 50.8:49.2 has now been reduced, in a fresh tender between the appellant and Respondent No. 1, to 35:65.

12) Having heard learned counsel on behalf of both parties, it is important to set out some of the important provisions of the RFP.

“DISCLAIMER The information contained in this Request for proposal document (the “RFP”) or subsequently provided to Bidder(s), whether verbally or in documentary or any other form by or on behalf of the Authority or any of their employees or advisors, is provided to Bidder(s) on the terms and conditions set out in this RFP and such other terms and conditions subject to which such information is provided.

This RFP is not an agreement and is neither an offer nor invitation by the Authority to the prospective Bidders or any other person. The purpose of this RFP is to provide interested parties with information that may be useful to them in making their financial offers pursuant to this RFP (the “Bid”). This RFP includes statements, which reflect various assumptions and assessments arrived at by the Authority in relation to the Project. Such assumptions, assessments and statements do not purport to contain all the information that each Bidder may require. This RFP may not be appropriate for all persons, and it is not possible for the Authority, its employees or advisors to consider the investment objectives, financial situation and particular needs of each party who reads or uses this RFP. The assumptions, assessments, statements and information contained in this RFP, especially the {Feasibility Report}, may not be complete, accurate, adequate or correct. Each Bidder should, therefore, conduct its own investigations and analysis and should check the accuracy, adequacy, correctness, reliability and completeness of the assumptions, assessments, statements and information contained in this RFP and obtain independent advice from appropriate sources. Information provided in this RFP to the Bidder(s) is on a wide range of matters, some of which depends upon interpretation of law. The information given is not an exhaustive account of statutory requirements and should not be regarded as a complete or authoritative statement of law. The Authority accepts no responsibility for the accuracy or otherwise for any interpretation or opinion on law expressed herein.

The Authority, its employees and advisors make no representation or warranty and shall have no liability to any person, including any Applicant or Bidder under any law, statute, rules or regulations or tort, principles of restitution or unjust enrichment or otherwise for any loss, damages, cost or expense which may arise from or be incurred or suffered on account of anything contained in this RFP or otherwise, including the accuracy, adequacy, correctness, completeness or reliability of the RFP and any assessment, assumption, statement or information contained therein or deemed to form part of this RFP or arising in any way in this Bid Stage. xxx The Authority also accepts no liability of any nature whether resulting from negligence or otherwise howsoever caused arising from reliance of any Bidder upon the statements contained in this RFP.

The issue of this RFP does not imply that the Authority is bound to select a Bidder or to appoint the Selected Bidder or Concessionaire, as the case may be, for the Project and the Authority reserves the right to reject all or any of the Bidders or Bids without assigning any reason whatsoever.

The Bidder shall bear all its costs associated with or relating to the preparation and submission of its Bid including but not limited to preparation, copying, postage, delivery fees, expenses associated with any demonstrations or presentations which may be required by the Authority or any other costs incurred in connection with or relating to its Bid. All such costs and expenses will remain with the Bidder and the Authority shall not be liable in any manner whatsoever for the same or for any other costs or other expenses incurred by a Bidder in preparation or submission of the Bid, regardless of the conduct or outcome of the Bidding Process.” xxx “1.1.2 The selected Bidder, who is either a company incorporated under the Companies Act, 1956 or undertakes to incorporate itself as such prior to execution of the Concession agreement (the “Concessionaire”), shall be responsible for (Designing, engineering), financing, procurement, construction, operating and maintenance of the Project under and in accordance with the provisions of a long term Concession agreement (the “Concession Agreement”) to be entered into between the selected Bidder and the Authority in the form provided by the Authority as Part of the Bidding Documents pursuant hereto.

xxx 1.1.5 The Concession Agreement sets forth the detailed terms and conditions for grant of the concession to the Concessionaire, including the scope of the Concessionaire’s services and obligations (the “Concession”).

1.1.6 The statements and explanations contained in this RFP are intended to provide a proper understanding to the Bidders about the subject matter of this RFP and should not be construed or interpreted as limiting in any way or manner the scope of services and obligations of the Concessionaire set forth in the Concession Agreement or the Authority’s rights to amend, alter, change, supplement or clarify the scope of work, the concession to be awarded pursuant to this RFP or the terms thereof or herein contained. Consequently, any omissions, conflicts or contradictions in the Bidding Documents including this RFP are to be noted, interpreted and applied appropriately to give effect to this intent, and no claims on that account shall be entertained by Authority.

xxx 1.2.3 The Bidding Documents include the draft Concession Agreement for the Project. The Feasibility Report prepared by the Authority/consultants of the Authority (the “Feasibility Report”) is also included. Subject to the provisions of Clause 2.1.3, the aforesaid documents and any addenda

issued subsequent to this RFP Document, but before the Bid Due Date, will be deemed to form part of the Bidding Documents.

xxx 1.2.6 During the Bid Stage, Bidders are invited to examine the Project in greater detail, and to carry out, at their cost, such studies as may be required for submitting their respective Bids for award of the Concession including implementation of the Project.

1.2.7 Bids are inviting for the Project on the basis of percentage of revenue to be shared with Authority by a Bidder for implementing the Project. The Concession Period is pre-determined, as indicated in the Concession Agreement. The revenue share shall constitute the sole criteria for evaluation of Bids. Subject to Clause 2.16, the Project will be awarded to the Bidder quoting the highest revenue share.

xxx 1.3 Schedule of Bidding Process The Authority shall endeavour to adhere to the following schedule:

Event Description Date

1. Last date of receiving queries To be specified
2. Authority response to queries To be specified latest by
3. Pre-bid meeting – 1 To be specified
4. Pre-bid meeting – 2 To be specified
5. Bid Due Date(s) 22nd July 2010
6. Opening of Bids On Bid Due Date
7. Letter of Award (LOA) Within 30 days of Bid Due Date
8. Validity of Bids 120 Days of Bid Due Date
9. Signing of Concession Within 30 days of Agreement award of LOA xxx 2.1.4 Notwithstanding anything to the contrary contained in this RFP, the detailed terms specified in the draft Concession Agreement shall have overriding effect; provided, however, that any conditions or obligations imposed on the Bidder hereunder shall continue to have effect in addition to its obligations under the Concession Agreement. xxx 2.2.1 Where the Bidder is a Consortium, change in composition of the Consortium may be permitted by the Authority during the Bid Stage only where:
 - a) the Lead Member continues to be the Lead Member of the Consortium;

b) the substitute is at least equal, in terms of Technical Capacity and Financial Capacity, to the Consortium Member who is sought to be substituted and the modified Consortium shall continue to meet the pre-qualification and short-listing criteria for Applicants; and

c) the new Member(s) expressly adopt(s) the Application already made on behalf of the Consortium as if it were a party to it originally, and is not an Applicant/Member of any other Consortium bidding for this Project.

2.2.2 Approval for change in the composition of a Consortium shall be at the sole discretion of the Authority and must be approved by the Authority in writing.

xxx 2.5.2 It shall be deemed that by submitting a Bid, the Bidder has:

a. made a complete and careful examination of the Bidding Documents;

b. received all relevant information requested from the Authority;

c. acknowledged and accepted the risk of inadequacy, error or mistake in the information provided in the Bidding documents or furnished by or on behalf of the Authority relating to any of the matters referred to in Clause 2.5.1 above;

d. satisfied itself about all matters, things and information including matters referred to in Clause 2.5.1 hereinabove necessary and required for submitting an informed Bid, execution of the Project in accordance with the Bidding Documents and performance of all of its obligations thereunder;

e. acknowledged and agreed that inadequacy, lack of completeness or incorrectness of information provided in the Bidding Documents or ignorance of any of the matters referred to in Clause 2.5.1 hereinabove shall not be a basis for any claim for compensation, damages, extension of time for performance of its obligations, loss of profits etc. from the Authority; or a ground for termination of the Concession Agreement; and, f. agreed to be bound by the undertakings provided by it under and in terms hereof.

xxx 2.6.1 Notwithstanding anything contained in this RFP, the Authority reserves the right to accept or reject any Bid and to annul the Bidding Process and reject all Bids at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons therefor.

xxx 2.7.2 The draft Concession Agreement to be provided by the Authority as part of the Bid Documents shall be deemed part of this RFP.

xxx 2.11.2 The documents accompanying the Bid shall be placed in a separate envelope and marked as “Enclosures of the Bid”.

The documents shall include:

i. Bid Security in the prescribed format (Appendix – II); ii. in the prescribed format (Appendix – IV); and iii. A copy of the Concession Agreement with each page initialled by the person signing – b) Power of Attorney for signing of Bid in the prescribed format (Appendix – III); iv. If applicable, the Power of Attorney for Lead Member of Consortium the Bid in pursuance of the Power of Attorney referred to in Clause (b) hereinabove.

xxx 2.14 Contents of the Bid 2.14.1 The Bid shall be furnished in the format at Appendix – I and shall consist of a revenue share to be quoted by the Bidder. The Bidder shall specify (in Indian Rupees) the revenue share offered by him to undertake the Project in accordance with this RFP and the provisions of the Concession Agreement.

2.14.2 The Project will be awarded to the Bidder quoting the highest revenue share.

2.14.3 The opening of Bids and acceptance thereof shall be substantially in accordance with this RFP. 2.14.4 The proposed Concession Agreement shall be deemed to be part of the Bid.

xxx 2.20.7 The Bid Security shall be forfeited and appropriated by the Authority as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia, time, cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority hereunder or otherwise, under the following conditions:

a) If a Bidder submits a non-responsive Bid;

b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Clause 4 of this RFP;

(c) If a Bidder withdraws its Bid during the period of Bid validity as specified in this RFP and as extended by the Bidder from time to time;

d) in the case of Selected Bidder, if it fails within the specified time limit -

i. to sign the Concession Agreement and/or ii. to furnish the Performance Security within the period prescribed therefor in the Concession Agreement; or

e) in case the Selected Bidder, having signed the Concession Agreement, commits any breach thereof prior to furnishing the Performance Security.

xxx 3.3.5 After selection, a Letter of Award (the “LOA”) shall be issued, in duplicate, by the Authority to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Authority may, unless it consents to extension of time for submission thereof, appropriate the Bid Security of such Bidder as mutually agreed genuine pre- estimated loss and damage suffered by the Authority on account of failure of the Selected Bidder to acknowledge the LOA, and the next eligible Bidder may be considered. 3.3.6 After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall execute the Concession Agreement within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation in the Concession Agreement.

xxx 6.1 The Bidding Process shall be governed by, and construed in accordance with, the laws of India and the Courts at Mumbai shall have exclusive jurisdiction over all disputes arising under, pursuant to and/or in connection with the Bidding Process.”

13) On a conjoint reading of the aforesaid clauses, a few things become clear - (i) first and foremost a Disclaimer at the forefront of the RFP makes it clear that there is only a bid process that is going on between the parties and that there is no concluded contract between the same (ii) it is equally clear that such bid process would subsume a Letter of Award to be issued by the Respondent No.1 with two further steps under the schedule to be gone into before the draft Concession Agreement finally becomes an agreement between Respondent No.1 and the Special Purpose Vehicle that is constituted by the Consortium for this purpose (iii) that through out the stage of the bid process, the forum for dispute resolution is exclusively with the Courts at Mumbai and (iv) that right upto the stage of the entering into the Concession Agreement, the bid process may be annulled without giving any reason whatsoever by the Respondent No.1

14) In addition, it may also be pointed out, on a reading of the Letter of Award itself dated 26.09.2011, as acknowledged by the appellant, that:

“3. You are required to incorporate a Special Purpose Vehicle solely for the purpose of implementing the project (the ‘Concessionarie’) as per Clause 2.2.6 of RFQ document.

4. As per Clause 2.20.5 of RFP document, your Bid Security shall remain in force and effect till the Concessionarie furnishes the Performance Guarantee of a sum equal to Rs.3350 million (Rupees Three Thousand Three Hundred Fifty million), not later than 90 days from the date of signing of the Concession Agreement.

6. Please note that the Concession Agreement is expected to be signed within 30 days of the issue of this Letter of Award.” This would show that even after the Letter of Award, a Special Purpose Vehicle solely for the purpose of implementing the project

would have to be set up, and that this Special Purpose Vehicle would be called the Concessionarie. Further, the bid security given by the appellant shall remain in force till the Special Purpose Vehicle furnishes the Performance Guarantee for a sum equal to Rs. 3350 million, and that the Concession Agreement is expected to be signed within 30 days of the issue of this Letter of Award.

15) Under Section 7 of the Indian Contract Act, 1872 in order to convert a proposal into a promise, the acceptance must be absolute and unqualified. It is clear on the facts of this case that there is no absolute and unqualified acceptance by the Letter of Award – two or three very important steps have to be undergone before there could be said to be an agreement which would be enforceable in law as a contract between the parties.

16) Mr. Amit Sibal, learned Senior Advocate, is wholly correct in relying upon both Dresser Rand S.A. (supra) and Bharat Sanchar Nigam Limited (supra). In Dresser Rand S.A. (supra) it was found, on the facts, that unless a purchase order was placed, there would be no agreement between the parties. Everything that took place before such purchase order was placed would only be a prelude to a contract which cannot be confused with the contract itself. This was set out in para 32 of the judgment as follows:-

“32. Parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself. Similarly, agreeing upon the terms which will govern a purchase when a purchase order is placed, is not the same as placing a purchase order. A prelude to a contract should not be confused with the contract itself. The purpose of Revision 4 dated 10-6- 1991 was that if and when a purchase order was placed by BINDAL, that would be governed by the “General Conditions of Purchase” of BINDAL, as modified by Revision 4. But when no purchase order was placed, neither the “General Conditions of Purchase” nor the arbitration clause in the “General Conditions of Purchase” became effective or enforceable. Therefore, initialling of “Revision 4” by DR and BINDAL on 10-6-1991 containing the modifications to the General Conditions of Purchase, did not bring into existence any arbitration agreement to settle disputes between the parties.”

17) This judgment was followed in Bharat Sanchar Nigam Limited (supra), which is very similar to the facts of the present case. In Clause 30 of the instructions to the bidders in that case, it is stated that the Courts in Delhi will have jurisdiction to entertain disputes or claims arising out of the tender till issue of authorization letters to circles for placement of purchase orders.

It is only thereafter that Clause 20 of the General Conditions of Contract, providing for an arbitration, could kick in. This being the case, this Court held:

“23. On the other hand, Section III had nothing to do with the bidding process or selection of suppliers, but contained provisions which would govern the performance, that is, the terms and conditions of the contract, if and when contracts were entered

by placing purchase orders. The arbitration clause (clause 20) is a part of Section III of the bid documents.

24. As per the scheme of bid documents, there is a clear division of the terms that will govern the tender process, and the terms that will govern the contract, when the bids are accepted. One part regulated the tender process that led to placing of purchase orders. That part contained a provision as to what should be the forum of dispute resolution, if there was a dispute at the tender or bidding stage. The other part stipulated the terms and conditions which will govern the contract, if and when purchase orders were placed. That part also contained a provision as to what should be the forum if there was a dispute after the contract was entered into Clause 30 of Instructions to Bidders makes it clear that in regard to tender-stage disputes, the forum will be Civil Courts. Clause 20 of General Conditions on the other hand was intended to operate when contracts were made and it specified that if disputes arose in regard to the contracts, the forum for dispute resolution will be the Arbitral Tribunal.

25. Clause 1 of the General Conditions of Contract (Section III) makes it clear that the General Conditions of Contract contained in Section III of the document shall apply in contracts made by the purchaser for the procurement of goods. Clause 20 of Section III, that is the arbitration clause makes it clear that arbitration is available in regard to “any question, dispute or difference arising under this agreement or in connection therewith”.

Therefore, it is evident that the General Conditions of Contract (Section III) and clause 20 therein providing for arbitration, will not apply in regard to any dispute in regard to the tender or bid, or non-placing of a purchase order, but will apply only in regard to any contract awarded by BSNL by placing a purchase order.

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27. It is also very significant that Section II (Instructions to Bidders) and Section IV (Special Conditions) which are relevant at the bid stage do not contain any arbitration clause providing that if there is any dispute between BSNL and a bidder in regard to the bid/tender process, the dispute will be settled by arbitration. On the other hand, the Instruction to Bidders contains a specific provision that if there is a dispute or claim arising out of the tender till (issue of authorization for) placement of the purchase order, only courts will have jurisdiction. Of course, as and when appellant placed a purchase order on a bidder, the purchase order contained a term that the General conditions of contract, forming part of the bid documents would be a part of the contract documents, and consequently the arbitration clause applied to the contracts entered between BSNL and the bidders.

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29. Therefore, only when a purchase order was placed, a `contract' would be entered; and only when a contract was entered into, the General Conditions of Contract including the arbitration clause would become a part of the contract. If a purchase order was not placed, and consequently the general conditions of contract (Section III) did not become a part of the contract, the conditions in Section III which included the arbitration agreement, would not at all come into existence or operation. In other words, the arbitration clause in Section III was not an arbitration agreement in praesenti, during the bidding process, but a provision that was to come into existence in future, if a purchase order was placed.”

18) However, Mr. Dave, strongly relied upon the judgment in Kollipara Sriramulu (Dead) by his LR (supra). This judgment did indeed state that it is well-established that a mere reference to a future formal contract will not prevent a binding bargain between the parties if, in fact, there is such a bargain. The judgment then went on to state that “there are, however, cases whether the reference to a future contract is made in such terms as to show that the parties did not intend to be bound until a formal contract is signed.”

19) We are of the view that the facts of the present case would be governed by the ratio contained in the aforesaid sentence. Insofar as the judgment in Unissi (India) Private Limited (supra) is concerned, it is important to note that, in para 15 of the said judgment, it is stated that the tender of the appellant was accepted by PGI for supply of 41 pulse oxymeters. Since the tender document contained an arbitration clause, and since it was found on facts that a binding contract had been entered into by acceptance of the tender, the parties therein would be bound by the aforesaid clause. It was also stated that, in addition, performance by way of supply of material by the appellant and acceptance thereof by PGI had also taken place, which would show that the tender of the appellant, containing an arbitration clause, was admittedly accepted by the respondent. It is clear that this case is wholly distinguishable, and does not apply on facts as has been stated by us herein above. It is clear that there was no concluded contract at the Letter of Award stage and this judgment would, therefore, not apply.

20) Mr. Dave also strongly relied upon the judgment in Inox Wind Limited vs. Thermocables Limited, (2018) 2 SCC 519. This judgment in paras 17-19 thereafter made it clear that an exception to the general rule laid down in M.R. Engineers and Contractors Private Limited (supra) as to standard forms of practice containing arbitration clauses would be extended also to standard forms between individual persons and not merely standard forms of professional assessments.

21) We may hasten to add that this judgment would have no manner of application on the facts of this case for the reason that it has been found by us that there is no agreement between the parties at all in the facts of the present case, making it clear, therefore, that the arbitration clause contained in the draft Concession Agreement would not apply. Further, even the without prejudice argument of Mr. Sibal is worthy of acceptance. Mr. Sibal argued, relying strongly upon M.R. Engineers and Contractors Private Limited (supra), that assuming that there was an arbitration clause which governs the parties, the said clause would be wholly inapt as it would only cover disputes between a Special Purpose Vehicle and the Respondent No.1 arising from the Concession Agreement not yet entered into, and not between the Respondent No.1 and the appellant and Respondent No. 2. He is

correct, and we agree with this contention as well.

22) We now come to the last argument of Mr. Dave that, on the assumption that the High Court judgment is incorrect, yet we should not, in our discretionary jurisdiction under Article 136 of the Constitution of India, interfere.

23) Mr. Dave relies upon the fact that a subsequent tender has been accepted, causing great financial loss to the Respondent No.1. Mr. Sibal has replied by saying that the subsequent tender contained different tender conditions and, in any case, insofar as that subsequent tender was concerned, his bid was considered the best amongst six other bidders. Apart from this, we are of the view that the High Court judgment is wholly incorrect in holding that the Letter of Award would constitute a binding contract between the parties for the reasons given above. It would be a travesty of justice, in the facts of the case, if we were not to interfere and set aside the same. Consequently, the impugned judgment of the High Court is set aside and the order of the learned Arbitrator is reinstated.

24) The appeal is allowed in the aforesaid terms.

25) It would be open for the Respondent No.1 to pursue its claim of Rs. 436 Crores plus in an appropriate forum, which will decide the same on its own merits in accordance with law.

.....J. (R.F. Nariman)J. (Indu Malhotra) New Delhi;

September 11, 2018.