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Abuse of Bidding Process and Corruption in the Engineering, Procurement and Construction (EPC) Contracts: A Way Forward

N.S. Ravidasan,

Tata Projects Ltd. (Mumbai, India)

Vijay Kumar Singh,

SRM University (Sonepat, India)

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Abstract. The research paper majorly analyses the EPC Contracts in the Oil and Gas sector in India. Construction of oil and gas facilities consume substantial time and costs, and EPC Contract is one of the models used by the Owner for the development of the same. There are inbuilt provisions in the tender documents to ensure transparency and fairness in the tendering process. However, there is a possibility of misuse or abuse of the discretionary power by the employees to favour a bidder to the detriment of public interest. The paper first identifies the various possible means through which public officials and bidders try to circumvent the law and contract to gain business, unlawfully. Then subsequently the measures taken in tender documents to curb corruption and ensure the efficacy of the EPC Contract in the prevention and detection of the corrupt practices are analysed. The authors try to identify and analyse the provisions in the contract that build public trust and enhances public participation in the government tender process. The role of judiciary in the prevention of corrupt practises, creation of a level playing field for all bidders and encouraging competitiveness by ensuring fairness

and reasonableness in the government dealings is also discussed in this research paper. The paper concludes with recommendations to bring more transparency and equitability in the tender process.

Keywords: bid; corruption; EPC Contract; integrity; transparency; level playing field.

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Introduction

Engineering, Procurement and Construction (EPC) Contract is one of the multiple models used for the development of facilities. These types of contracts are used in large and complex infrastructure project contracts. These contracts can be further divided into different types based on the payment models, or the additional works required. However, all across the globe an EPC Contract and its underlying principles form the contractual and legal basis for the execution of complex infrastructure projects. Some of the industries that use EPC Contracts are the oil and gas industry, power generation industry, mining industry and the infrastructure industry in general.

Colloquially, the party who invites bids for the execution of the project is known as the Owner, Employer or Client. And the party who is awarded the bid and executes the EPC Contract is known as the EPC Contractor.

Most of the EPC Contracts are executed to economize natural resources and to secure economics in terms of money and time invested. The natural resources are primarily owned by the nation within the territory they are located. However, the extraction and development of natural resources, is outsourced to private companies. Since, the natural resources are public property and any development involves public

money and interest, the outsourcing of any activity relating to such natural resources needs to be done in an equitable and judicious manner.

There are several stakeholders involved in an EPC Contract, but the primary beneficiary of an EPC Contract is the general public. Hence, the exercise of discretion in the execution of EPC Contracts should be fair and reasonable. Furthermore, EPC Contracts involve large amounts of public money and finance, and to ensure that the finance is utilised for legitimate reasons, oversight over such contracts is also crucial. In most cases, EPC Contracts are executed between state parties and private parties and the state parties are bound by law to follow the principles of fairness and reasonableness. At different stages, the state parties exercise discretion in the tender, award and execution of EPC Contracts by private parties. However, in several cases such discretion is misused, and parties use corrupt means to influence such discretion to the detriment of public interest. The Owner should consider the efficiency of the bidder and ability to complete the work satisfactorily while awarding the contract¹ and the conduct of the party should generate confidence in the mind of the owner.²

Therefore, in public interest, it becomes important to monitor the activities of all the parties involved in the EPC Contract and ensure that they comply with the ethical practices prescribed by the authorities. Governments have passed legislations and appointed bodies to investigate and prosecute any allegations of corruption and unethical behaviour by any of the stakeholders.

The paper herein discusses how the discretion exercised by the Owner and its agents can be misused and influenced by interested parties to the detriment of public interest and competition in the market and industry.

Generally, Owner hires the services of Project Management Consultant (PMC) to improve the efficiency and complete the project within time and with minimum number of errors. PMC has access to sensitive and critical information relating to the project and it has technical control over the conduct of the project. It is the Owner who defines the Pre-Qualifications (PQ) in consultation with PMC, and then the PMC solicits responses to the PQ from interested contractors and licensors, assess the responses, and shortlists the Contractor or Licensor based on responses. This is followed by the PMC drafting the detailed tender/Invitation to Bid (ITB) for submission of bids by Contractor or Licensor. The PMC then evaluates the bids against various parameters like lowest cost, experience and qualifications. The PMC also has the authority to respond to pre-bid queries and to accept or reject deviations proposed by the bidders. Once the PMC evaluates the bids, the PMC then recommends to the Owner which Contractor or Licensor should be awarded the job. As a consultant for the project, PMC acts as the bridge between the Owner and the Contractor or

¹ *Prabhudasbhai Bhikabhai Patel v. State of Gujarat and Others* (1981) AIR 117 (Gujarat). (India).

² *Rajasthan Cooperative Dairy Federation Ltd. v. Mahalaxmi Migrate Marketing Service Pvt. Ltd. and Others* (1996) 10 SCC 405. (India).

Licensor, to evaluate, reject/approve the work done by the Contractor or Licensor, to approve, reject or change orders, to escalate costs, extension of time, to review the Running Account (RA) Bills, Final Bills, and to interpret contract documents in case of ambiguity.

Hence, both the Owner and the PMC are expected to exercise their discretion fairly and avoid taking advantage of their discretion to unfairly give one bidder an edge over other bidders.

EPC Contracts deliver significant value to the project Owner and they enable the Owner to manage the risks effectively. It helps the contractor to innovate and unlock efficiencies within their areas of expertise.³ The EPC Contractor is responsible for the designing, engineering, procurement, construction and commissioning activities. It is advantageous to the project Owner as it provides for a fixed contract price unless the Owner issues a change order to the work.⁴ An EPC Contract is free from market price variation and the payment terms are fixed based on the achievement of milestones prescribed under the contract.⁵ The contract completion date is also fixed at the beginning of the work. In case of delay in completion of the project, the Owner may levy liquidated damages to compensate himself for the losses arising due to the late completion.

1. Measures Taken to Curb Corruption in the EPC Contract

Generally, the following measures are taken in the tender documents to deter and detect corruption, and to enhance integrity and uphold the transparency in the bidding process.

Compliance Declaration: The Invitation to Bid (ITB) document requires the bidders to submit a declaration of compliance to the Owner along with bid. Some of the declarations to be submitted by the bidders *inter alia* include:

(i) Bidder presently or during the last three (3) years has not been placed on any blacklist or holiday list declared by the Government Department or by any public sector organisations in India or in any other country in respect of any fraudulent or corrupt practises.

(ii) There is no pending enquiry against bidder or any of its executives or employees, or its affiliates by the Government Department or by any public sector organisations in India or in any other country in respect of any fraudulent or corrupt practises.

³ Busby, N. (2020, August 19). *Build, build, build – the art of selecting the right EPC contractor*. Scottish Construction Now. <https://www.scottishconstructionnow.com/articles/nick-busby-build-build-build-the-art-of-selecting-the-right-epc-contractor>

⁴ Kolcuoğlu Demirkan Koçaklı. (2015, March 23). *EPC Contracts in the energy sector*. Mondaq. <https://www.mondaq.com/turkey/energy-law/383098/epc-contracts-in-the-energy-sector>

⁵ *Id.*

(iii) Bidder or any officers, owners, or key personnel have not been investigated for, charged with, convicted of or a party to a settlement for any allegation of fraud, bribery, or corrupt activities.

(iv) Undertaking to comply with all applicable laws, rules, regulations and shall not violate any anti-bribery or anti-money laundering laws applicable to bidder, its subsidiary and to their respective parent companies in every jurisdiction.

Owner reserves the right to reject the bid or terminate the Contract, if the bidder is (a) placed on or blacklist or holiday list, or (b) if any enquiry is pending or results in conviction or settlement of any fraudulent or corrupt practises or (c) if the bidder gives a false declaration or suppresses information in relation thereto. Owner may also forfeit the Earnest Money Deposit (EMD) or a bank guarantee to compensate the Owner for the expenses incurred by it.

Self-Declaration: Bid shall be accompanied by a Self-Certification & Declaration signed by Chief Executive Officer or Chief Financial Officer or Company Secretary of the Bidder certifying that all the details including documents pertaining to Bidder Qualification Criteria are true, authentic, genuine and exact copy of its original. This requirement is mandated to prevent fraudulent practises by submitting forged documents to satisfy pre-qualification requirements prescribed under the invitation to bid. Self-certification of the documents by the highest officer of the bidder would act as a deterrent mechanism to prevent corrupt practises in the tender process.

Integrity Pact: Transparency International launched Integrity Pact with the objective of safeguarding public procurement from corruption.⁶ The Integrity Pact seeks to ensure transparency, fairness and smooth progress of the bidding process. The Central Vigilance Commission (CVC), which was established under the aegis of the Ministry of Finance, Government of India, has directed all Public Sector Undertakings (PSUs) to make sustained efforts to realise the spirit and objective of the Integrity Pact. The Integrity Pact is an agreement between the Owner and the prospective bidder of the EPC Contract and is an important preventive vigilance tool aimed to prevent corruption and to ensure integrity in the EPC Contract.⁷ The Integrity Pact, demands commitment from the bidder to take all measures to prevent any corrupt practices or unfair means during any pre-contract or post contract stage. The grievances relating to the pre-qualification and/or other bidding process shall be decided in accordance with the Integrity Pact. All the bidders are mandatorily required to submit the duly signed Integrity Pact along with the bid proposal. The grievances relating to the pre-qualification and/or other tender process shall be decided in accordance with the Integrity Pact.

⁶ Verma, S. (2011). Integrity pacts and public procurement reform in India: From incremental steps to a rigorous bid-protest system. *Journal of Malaysian and Comparative Law*, 38, 93–136.

⁷ BEL. (n.d.). *Integrity Pact and IEMs*. <https://bel-india.in/integrity-pact-and-iems/>

Conflict of Interest: In order to ensure the transparency in the bidding process, the following provisions are incorporated to prevent conflict of interest:

(i) Declarations are obtained from the bidder to ensure that the key managerial persons of the bidder are not related to the Owner and/or key managerial person of the Owner is not a Director of the bidder firm and/or Key managerial person of the Owner or their relative is not a partner in the bidder firm.

(ii) The tender documents prohibit hiring, employment, engagement as a consultant, procure services of, or allow acquisition of any ownership interest of Contractor or any of its affiliates by any current or former employees of Owner who held key managerial position with the Owner. The restrictions pertaining to engagement of former employees shall be valid for a period of two years from the date of cessation of employment with Owner. Any violation of conflict of interest provisions shall be deemed as material breach of the Contract entitling the Owner to terminate the Contract for default and/or seek damages or any other remedy in accordance with law and Contract.

(iii) If the services of a consultant are obtained for the preparation or implementation of the project, then the consultant firm and any of its affiliates are disqualified from providing any subsequent services, supply goods or perform any works related to the project for which initial assignment was given to the consultant firm.

(iv) Bid documents exclude from the tender process all known prejudiced persons, including the process licensor and any of its affiliates from bidding. Encouraging participation of process licensors directly or indirectly through their affiliates (having common ultimate control) would lead to potential conflict of interest and unfair competitive advantage.

Multiple or alternative bids: Permitting multiple bids from any party either directly or indirectly will vitiate the tendering process and obscure the level playing field between Bidders. The Instruction to the Bidders contains a provision to the effect that the offer submitted by the bidder shall be rejected and the EMD shall be forfeited, if the bidder submits multiple or alternative bids.

Despite the incorporation of the above provisions in the tender documents, there are many instances of corruption in the bidding process, award of EPC Contract and execution of the project. However, the bidding stage is not the only stage assailed by corruption, and there are prevalent corrupt practises at different stages of the EPC Project on different scales.

2. Prequalification Stage

The selection of the contractor is an important aspect in the infrastructure project. The tender documents prescribe the pre-qualification procedure to identify the bidders qualified to execute the project. The pre-qualification criteria and supporting documents sought by the Owner and/or PMC play an important role in the selection

of the prospective contractor for the EPC Contract. The prequalification criteria are to be satisfied by the contractor as per the tender conditions. The misuse and/or abuse of position by the PMC/Owner in the preparation of pre-qualification documents may lead to the selection of bidder of their choice for the project. The preparation and evaluation of Request for Quotation (RFQ)/ITB/PQ can also facilitate an ineligible bidder to become eligible to bid for the project. A prospective Contractor may influence the Owner to lower/alter the pre-qualification criteria to suit such a contractor and allow them to qualify and participate in the tender process, when otherwise they would have been ineligible under the original and fair pre-qualification criteria.

Public Sector Undertakings (PSUs) while inviting tenders should give paramount consideration to the public interest. There should be equality in the process and all the eligible and qualified persons shall be treated equally by the Government or public authorities in the tender process.⁸ The tender conditions cannot be waived at the discretion of the public authority. However, the relaxation of tender conditions can be allowed to achieve the goals set out in Part IV of the Constitution of India.⁹ Notwithstanding the above there should be a balance between the goals of the government and the equal and fair treatment of all bidders.

The Government while exercising its contractual powers under Article 298 or 299 of the Constitution of India shall adhere to the principle of equality before law and the equal protection of the laws.¹⁰ When the Government is trading with the public, they should exercise fairness and equality. The Government cannot pick and choose individuals while entering into contractual relationships and the rule of law demands absence of arbitrariness and discrimination in the transactions of the state.¹¹ The price difference between two bidders is not the decisive factor in deciding the public interest involved in the commercial transaction of the State or public authority.¹² The government should also consider quality and the competence of a contractor while awarding tenders. Hence, the government prescribes certain pre-qualification requirements regarding the technical and financial competence of the bidders. Once the government decides upon the pre-qualification requirements, they should strictly adhere to it, so that the most appropriate bidder is selected to perform the project. However, when certain bidders or the government do not adhere to the pre-qualification requirements, the bidders who are at a disadvantaged position are compelled to seek recourse against such actions.

⁸ *Gvprel-Mee (J.V.) v. Government of Andhra Pradesh and Ors.* (2006) AIR 169 (Andhra Pradesh). (India).

⁹ *Goldstone Exports Limited and Ors. v. Government of Andhra Pradesh and Ors.* (2003) 1 ALD 336 (Andhra Pradesh). (India).

¹⁰ *Id.*

¹¹ *Raunaq International Ltd. v. IVR Constructions* (1998) 3 SCR 421 SC. (India).

¹² *Goldstone Exports Limited and Ors. v. Government of Andhra Pradesh and Ors.* (2003) 1 ALD 336 (Andhra Pradesh). (India).

At the pre-qualification stage, the Grievance Addressal procedures for the aggrieved bidders in India in relation to government contracts is to either approach Independent External Monitors (IEM) under the Integrity Pact or seek judicial review before the courts. However, there is lack of clarity of procedure and finality of the decisions of the IEMs. Therefore, recourse to the judiciary is the most common action taken by aggrieved bidders.

The role played by the judiciary to prevent the abuse of bidding process and deter corrupt practises by mandating strict adherence to pre-qualification requirements is discussed below.

The Government of Andhra Pradesh invited tenders from empanelled contractors for the improvement of irrigation facilities in the State. The rejection of the bid submitted by the petitioner, based on the withdrawal letter submitted by the joint venture partner was challenged in *Gvprel-Mee (J.V.) v. Government of Andhra Pradesh and Ors.*¹³ The High Court of Andhra Pradesh held that essential pre-qualification condition prescribed under the tender documents was to be strictly construed to prevent the unguided and arbitrary use of power by the employer to favour someone.¹⁴ The joint venture became non-existent on withdrawal of the sole partner and the High Court upheld the state action since the petitioner did not individually satisfy the pre-qualification criteria to submit the bid. Therefore, the Contractors are also expected to strictly comply with the requirements stipulated in the bid, so that they can be considered for the project. A Contractor should be allowed to bid only if the Contractor has satisfied all the conditions under the PQ.

The decision of the Sardar Sarovar Construction Advisory Committee denying pre-qualification of the petitioner joint venture for the World Bank funded Sardar Sarovar (Narmada) Project in Gujarat was challenged in *Asia Foundations & Constructions Ltd. v. State of Gujarat.*¹⁵ The High Court of Gujarat did not agree with the view of the Advocate General that the application submitted by the petitioner was un-responsive and held that Committee failed to apply their mind while deciding about the pre-qualification criteria. The Committee proceeded on imprecise information without seeking any clarification or necessary related information from the petitioner. The act of the Government was against public policy since all the eligible bidders were not given equal opportunity to compete for the execution of the project. The decision of the state rejecting the application for pre-qualification was vitiated, held to be bad in law and set aside.

From the above decisions, it is evident that the obligation to be fair and transparent is vested on the parties, the tendering agency and the bidders. The bidders shall not be allowed to bypass any requirements under the PQ and all the bidders

¹³ (2006) AIR 169 (Andhra Pradesh). (India).

¹⁴ *Gvprel-Mee (J.V.) v. Government of Andhra Pradesh and Ors.* (2006) AIR 169 (Andhra Pradesh). (India).

¹⁵ (1987) 2 GLH 510 (Gujarat). (India).

who have been pre-qualified shall be given equal consideration, before the tender is awarded.

However, there are instances when the PQ requirements contain immaterial factors that they disqualify even competent bidders, and the courts in India have interfered to ensure that all the competent bidders are allowed to participate, thereby creating a competitive bidding process for projects.

A joint venture consortium's application for pre-qualification was rejected by Government of Gujarat as "non-responsive" on the ground of non-provision of complete information and submission of incomplete documents.¹⁶ The Hon'ble High Court of Gujarat held that the authorities completely lost sight of the most relevant and material aspects and irrelevant considerations were taken into account at the time of refusal to pre-qualify the bidder. The exercise of discretion cannot be said to be reasonable since the World Bank advice was not taken into consideration by the employer.

3. Waiver of Pre-Qualification Criteria After Tender Notice

Rule of law mandates that the pre-qualification criteria prescribed and stipulated in the bidding process must be strictly adhered to by parties. Once the condition precedent for the submission of the bid is published then it is natural that only those who satisfy the pre-qualification criteria would participate in the tender process. Waiver of pre-qualification criteria at a later stage of the tender process is an indicator of favouritism and nepotism and is contrary to the rule of law and constitutional values. Tender process should maintain its sanctity at the time of evaluation of bids and arbitrary exercise of power should be avoided to encourage any bidder. There should not be any discrimination and the Owner should not relax pre-qualification criteria after tender notice. The power to waive or relax pre-qualification conditions, if any, shall be exercised in a fair and reasonable manner.

Law expects that the tender conditions issued by the State or its agencies will be strictly adhered and complied. State agencies cannot act according to their whims and manipulate while picking and choosing a bidder for awarding contracts. No act shall be done which would create a justifiable doubt in the minds of the bidder and impair the rule of transparency and fairness.¹⁷

Award of contract to a person who did not satisfy the eligibility condition prescribed under the invitation to tender published in the newspaper was challenged in *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.*¹⁸ The

¹⁶ *Chahal Engg. & Construction Company Private Ltd. v. State of Gujarat* (1986) GLH 527 (Gujarat). (India).

¹⁷ *West Bengal Electricity Board v. Patel Engineering Co., Ltd.* (2001) 1 SCR 352 SC. (India).

¹⁸ AIR 1979 SC 1628. (India).

Supreme Court of India observed that public authority at its will cannot deviate from the tender condition without reasonable justification, and there should be fairness in action and equality of opportunity in governmental activities. State should not have arbitrarily accepted the tender which denied equality of opportunity to the similarly situated person in the matter of tendering for the contract.

The High Court of Andhra Pradesh in *N. Dolendra Prasad v. Government of Andhra Pradesh and Ors.*¹⁹ held that relaxation of essential pre-qualification criteria after invitation and submission of bid is an arbitrary exercise of power. It would amount to malice in law to shortlist and selecting bidders after waiver of essential pre-qualification condition. State, its corporation and agencies have the public duty to act in a fair and reasonable manner in their transactions.

However, there have been instances where the Courts have not followed strict interpretation and allowed the Owner to exercise discretion. Such a departure, while uncommon, should be avoided by all the wings of the government. The extension of date and time for submission of bid for the Buxar Thermal Power Project after expiry of the date fixed in last amendment date was challenged before the High Court of Patna in *Larsen & Toubro Ltd. v. Sjn Thermal (P) Ltd., and Others.*²⁰ The Petitioner contended that the extension of bid submission date after expiry of the period violates tender norms and takes away the sanctity of the tender. The High Court held that there is no perversity in the extension of bid submission date and the Wednesbury principle of unreasonableness is not attracted. Level playing field is given to all the bidders or prospective bidders without any discrimination and the sanctity of the tender was not affected. The High Court observed that by extending the bid submission date, public interest is served by increasing participation and encouraging competitiveness. When the price bid was opened based on the High Court order, the petitioner was successful, and the contract was awarded to L&T.

4. Abuse of Process During Pre-Bid Stage

The non-registration of Expression of Interest (EOI) by the petitioners for Andhra Pradesh Micro Irrigation Project (APMIP) by the Technical Evaluation Expert Team was challenged in *Godavari Polymers Pvt. Ltd. v. Agricultural Products Commissioner and Principal Secretary, Agriculture and Co-operation (Horti) Department and Ors.*²¹ The High Court of Andhra Pradesh made the following observations regarding the principle of transparency and rule of law:

Principle of Transparency is an adjunct to Doctrine of fairness. Fairness requires proper treatment of the individual by public authority by known principles of

¹⁹ 2005 (1) ALD 545 (Andhra Pradesh). (India).

²⁰ (2019) 3 SCC 589 (Patna). (India).

²¹ 2004 (1) ALD 783 (Andhra Pradesh). (India).

law. Every person who approaches public authorities must know by what rules, regulations, provisions of law or instructions, he would be governed. In a way transparency in the governance and fairness in Government dealings are essential to democracy to curb nepotism, corruption and parochialism. It does not however mean that the Government at all times and in all situations must go on advertising what they are going to do. In the very nature of State Administration, it is conceded by all thinkers, the political, executive and bureaucracy should have sufficient discretion in dealing with men and material to subserve public interest. In matters relating to economic issues, Government has a right to "trial and error" as long as both are bona fide and within the authority.

The High Court held that the petitioners did not satisfy the essential criteria laid down in EOI and the decision of non-inclusion of petitioners did not suffer from any arbitrariness or unreasonableness.

Therefore, any discretion exercised while awarding tenders should be exercised with sound judgment and fairness. Bidders are also expected to comply with the PQ and are at times reproached for seeking the intervention of the court and halting the progress of the project. Despite, the need for the Government to exercise its discretion to its satisfaction, time and again, the highest courts of the country have also observed that any discretion exercised should be non-arbitrary, fair and equitable. Bhagwati, J., in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal*²² summed up the legal position as follows:

The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licenses etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

In *Ramana Dayaram Shetty v. International Airport Authority of India and Ors.*²³ the Supreme Court of India ruled that:

The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-arbitrariness is protected by Article 14 and it must characterize every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore, act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory.

The PQ stage is extremely crucial as it is the basis on which it is decided if a party can even be allowed to bid or not. HPCL Rajasthan Refinery Limited (Owner/HRRL)

²² AIR 1975 SC 266. (India).

²³ AIR 1979 SC 1628. (India).

invited bids for crude storage tanks including tank pads and associated civil works at Rajasthan Refinery complex at Pachpadra (package-5).²⁴ The Invitation for Bid (IFB), as per clause 5.4.2, prohibited submission of separate bids by affiliates either directly or indirectly.²⁵ One of the Indian prospective bidder submitted a single bid, as per the IFB, relying upon pre-qualification of its controlling overseas subsidiary wherein it holds 70% of the shares. Bid documents provide for the submission of the Parent Company Guarantee (PCG). According to the PCG form, in case the subsidiary fails to perform its obligations under the agreement, the parent company would have to perform the works. There is no specific bar, whatsoever, express or implied, in the tender document to treat the parent company along with its subsidiary as one entity. The bidder in support of its claim submitted that the experience of subsidiaries would be construable as experience of the holding company.²⁶ However the PMC rejected the bid submitted by the bidder on the ground that the bidder has to meet the pre-qualification criteria on its own and cannot rely upon the pre-qualification of its overseas subsidiary. In this case, the PMC exercised its discretion, beyond the terms of the tender documents and proceeded with the tender process, as the disqualified bidder did not challenge the order of the PMC.

Public interest requires adherence to the rules and conditions of the bid documents.²⁷ There needs to be a balance between the protection of public interests, equitable discretion, independence of the authorities to select the bidder and minimal intervention by the courts. Fairness in action by the state and non-arbitrariness is the heartbeat of fair-play and basic requirement of Article 14 of the Constitution of India.²⁸

Normally Contract should be read as it reads as per its express terms and courts cannot look for implied terms in the Contract.²⁹ The decision taken by the employer as to whether a term in the Notice Inviting Tender is essential or not should be respected. The inherent power of the employer to make deviation shall be made applicable to all bidders and potential bidders.³⁰ Therefore, notwithstanding the necessity

²⁴ Bidding Document No. DC/B224-323-MA-T-6001/4.

²⁵ Clause 5.4.2: Parties who are affiliates of one another can decide which Affiliate will make a bid. Only one affiliate may submit a bid. Two or more affiliates are not permitted to make separate bids directly or indirectly. If two or more affiliates submit separate bids, then all of them shall be summarily rejected. However, up to two affiliates may make a joint bid as a Consortium, and in which case the conditions applicable to a consortium shall apply to them.

²⁶ *M/s CRCC Corporation Ltd. v. Metro Link Express for Gandhinagar & Ahmedabad (MEGA) Company Ltd.* (2017) 8 SCC 282. (India).

²⁷ *W.B. SEB v. Patel Engineering Company Ltd.* (2001) 2 SCC 451. (India).

²⁸ *Union of India v. International Trading Co.* (2003) 5 SCC 437. (India).

²⁹ *Nabha Power Limited v. Punjab State Power Corporation Limited (PSPCL)* (2018) 11 SCC 508. (India).

³⁰ *Poddar Steel Corporation v. Ganesh Engineering Works* (1991) 3 SCC 273. (India).

to strictly abide by the PQ requirements, the Employer still has the discretion to disregard certain immaterial considerations, provided that such discretion has not been exercised to favour one party over others.

The Supreme Court of India in *I.R. Coelho v. State of Tamil Nadu*³¹ held that the doctrine of level playing field embodied under Article 19(1)(g) of the Constitution of India is subject to public interest. Discriminatory or unequal treatment would violate the doctrine of level playing field and to serve larger public interest, equally placed competitors should be allowed to bid. Hence, bidders often recourse to the judiciary to ensure that there is equal treatment between all the competitors, but the courts are cautious to take action in executive and administrative since they also have the duty to maintain the balance between all the wings of the government.

The Supreme Court of India in *Jagdish Mandal v. State of Orissa*³² held that the courts should not interfere in administrative actions, if the answers are negative for the following two questions:

1. Whether the process adopted, or decision made is mala fide, arbitrary and/or irrational;
2. Whether public interest is affected.

Even if a procedural aberration or error in assessment or prejudice to a tenderer is made out, the courts shall not interfere, if the award of the contract is bona fide and is in the public interest.

5. Bidding Stage

The corrupt practises found during the bidding stage can be further classified into:

Bid rigging: Competing parties collude with each other and decide the winner of a bid and the others submit uncompetitive bids.

The return of price bid by Maharashtra State Power Generation Company was challenged in *Shapoorji Pallonji and Company Ltd. and Ors. v. Maharashtra State Power Generation Co. Ltd. and Ors.*³³ Bid documents specifically stated that no bidder shall submit more than one bid and in case of submission of more than one bid, all the bids will be rejected. The High Court of Bombay did not accept the contention of the petitioner that bid condition does not prohibit one of the consortium members joining as consortium member of another bidder. The High Court further held that consortium members have to submit bid as a unit and a consortium member cannot submit another bid.

³¹ AIR 2007 SC 861. (India).

³² (2007) 14 SCC 517. (India).

³³ Writ Petition (Lodging) No. 1125 of 2009.

The Chhattisgarh High Court in the *Indure Private Limited v. Chhattisgarh State Power Generation Company Ltd. and Ors.*³⁴ considered the question, whether rejection of the Techno-Commercial bid of the petitioner on account of dual consortium participation by its partner was arbitrary and unreasonable? The High Court held that a competitive bid shall be responsive, fair and non-collusive. Any act of the bidder, direct or indirect, which eliminates or reduces fair competition would amount to bid rigging and is against public policy. The contention of the petitioner that the Invitation to Bid does not prohibit dual or multiple submission of bid was rejected by the Court and it held that the doctrine of “level playing field” and “legal certainty is applicable to the tender.” Permitting a consortium partner to submit more than one bid through dual or multiple consortium agreement would amount to cartelization. Considering the irrevocable nature of the consortium agreement, a consortium partner cannot enter into further consortium agreement for the project unless earlier agreement is cancelled. Execution of subsequent consortium agreement is bad in law. The participation in a tender through dual or multiple consortium would enable a consortium partner to know about the price bid of the consortium partner and it would demolish competitiveness. The interpretation of the tender documents should foster the purpose of fair competition and the court held that the rejection of the non-responsive bid by the employer is neither arbitrary nor unreasonable.

Appointment of Agent: In order to get the business, companies nowadays engage middlemen by paying “commission” to grease the wheels.³⁵ An EPC Contractor may execute a sham agency or retainer or service agreement in the guise of assisting them in the promotion of the company and/or preparation of bid. The agent or service provider may not even have relevant expertise or manpower for the intended service to be performed under the agency/service agreement. The agency or service agreement is intended to cloak the payments of bribe to the project Owner or their employees. Sometimes, the agency or service provider agreements are also executed on a “success fee” basis. Contractor may appoint an agent to bribe the employees of Owner to leak the price sensitive information of the competitor to get favourable award of the project.

A culture of corruption was pervasive in Siemens and their project calculation sheet frequently reflected a term “useful money” which employees understood to mean bribes. Cash desks were maintained at Siemens offices from where employees could withdraw up to one million Euro at a time.³⁶ In order to conceal the identity

³⁴ Comp LR 1 (2010) (Chhattisgarh). (India).

³⁵ The Telegraph. (2017, January 24). *Millions in bribes, 'success fees' and a free car for a fixer: Rolls' Royce murky past revealed*. Financial Post. <https://business.financialpost.com/news/millions-in-bribes-success-fees-and-a-free-car-for-a-fixer-rolls-royce-murky-past-revealed>

³⁶ Hunter, R. J., Jr., Mest, D., & Shannon, J. (2011). A focus on the Foreign Corrupt Practices Act (FCPA): Siemens and Halliburton revisited as indicators of corporate culture. *Atlantic Law Journal*, 13, 60–90.

of the subscriber, post it notes were used to authorise bribery payments.³⁷ Siemens established shell companies and off the books “slush funds” to acquire business and disguise bribery. Consultants and agents were used as intermediaries for the transfer of illicit payment to the ultimate recipient.³⁸ The methods adopted by Siemens and its subsidiaries to conceal the widespread corruption also include:

- a) Engagement of former employees to funnel the bribes;
- b) Execution of consultant agreements after Siemens won the relevant project and corrupt payments were disguised as consultant fees;
- c) Limiting the scope of audit in relation to consultant payments;
- d) Changing the title of the agreements to avoid review by company lawyers;
- e) Authorisation of payments through single signatures contrary to company policy;
- f) In the internal balance sheets, the accumulated profits were reserved as liabilities to enable the company to make corrupt payments.³⁹

The corrupt practises indulged by Siemens resulted in a total bribery payment of over \$1.4 billion during the period from 2001 to 2007.⁴⁰ The Siemens’ scheme began to unravel in the raid carried out by the Public Prosecutor’s office in Munich, Germany in November 2006, which resulted in the arrest of members of senior management. Thereafter, Siemens disclosed to the United States Department of Justice (DOJ) and Securities and Exchange Commission (SEC) about the Foreign Corrupt Practises Act of 1977 (FCPA) violations and initiated a global investigation of its internal practices.

In connection with the legal proceedings, Siemens paid €596 million to authorities in Germany. The Siemens AG pleaded guilty in the Federal Court in the USA for FCPA violations and paid a fine of \$450 million and in addition to that it agreed to \$350 million in disgorgement of profits. In connection with the investigation of violation of anti-corruption laws, it also paid legal fees and expenses amounting to more than €950 million and the total costs incurred by Siemens was more than €2 billion.⁴¹ Siemens also paid additional income tax of €443 million for the fiscal year 2000–2006 for the violation of Fiscal Code of Germany.⁴²

The legal proceedings against Siemens AG created awareness among the Board of Directors and Managers that non-compliance of criminal law threatens not only the existence of the company but also lead to personal criminal liability.⁴³

³⁷ Sidhu, K. (2009). Anti-corruption compliance standards in the aftermath of the Siemens scandal. *German Law Journal*, 10, 1343–1348.

³⁸ *Id.*

³⁹ Schroeder, R. M., & Haedicke, S. J. (2020). The Foreign Corrupt Practices Act: Two recent cases set new records, teach old lessons. *Jones Walker*, 8(3), 834.

⁴⁰ Hunter, Mest, & Shannon, 2011.

⁴¹ Sidhu, 2009, p. 1344.

⁴² *Id.*, p. 1345.

⁴³ *Id.*, p. 1343.

Halliburton, a former subsidiary of Kellogg, Brown & Root LLC (KBR) pleaded guilty to the FCPA anti-bribery violation charges in February 2009. In order to secure four contracts during the period 1995 to 2004, valued at approximately \$6 billion, for the construction of liquified natural gas production facility at Bonny Island, Nigeria, KBR along with its joint venture partners paid \$182 million in bribes to Nigerian officials. These bribes were funnelled through two international consultants based in Gibraltar and Japan. Consultancy contracts were executed by the joint venture through a shell company floated in Portuguese and KBR refrained from appointing any American nationals on the Board of Directors to insulate itself from the FCPA liability. KBR agreed to pay \$402 million criminal fine and settled with SEC agreeing to disgorge \$177 million in corruptly obtained profits. As part of the settlement, an independent compliance monitor was appointed for a period of three years to review the FCPA compliance program.⁴⁴

Unaoil, is a Monaco based company incorporated in the British Virgin Islands, controlled by founder and chairman Ata Ashani and his sons Cyrus and Saman. Unaoil acted as a middleman between EPC Contractor companies and the government of politically unstable regions by providing local expertise and contacts.⁴⁵ Energy majors like Halliburton, Honeywell, FMC Technologies, Samsung, Hyundai, Rolls-Royce, Man Turbo, Petrofac and Eni also gained favourable treatment as a result of Unaoil's influence.⁴⁶ Corporates indulge in corrupt practises to do business in natural resources rich countries where social volatility and political uncertainty are prevalent, allowing corruption to thrive.

Investigations under FCPA were started against the former executives of Unaoil for their roles in the payment of bribery to the public officials in the Democratic Republic of Congo, Iran, Iraq, Kazakhstan, Libya, Algeria, Angola, Azerbaijan and Syria.⁴⁷ Unaoil executives pleaded guilty for their conspiracy to facilitate bribes on behalf of companies to secure oil and gas contracts and the sentencing was pronounced by the Federal Court in Houston.⁴⁸

Similarly, the DOJ framed charges against SBM Offshore NV (SBM) a Netherland based company doing business in the manufacture and design of offshore oil drilling equipment's and its wholly owned U.S subsidiary SBM Offshore USA Inc (SBM USA) for the violation of the FCPA. SBM entered into a deferred prosecution agreement

⁴⁴ Hunter, Mest, & Shannon, 2011.

⁴⁵ Fawthrop, A. (2020, January 23). *An overview of the global corruption probe into energy consultancy Unaoil*. NS Energy. <https://www.nsenerybusiness.com/features/unaoil-investigation/>

⁴⁶ *Id.*

⁴⁷ Department of Justice. (2019, October 30). *Oil executives plead guilty for roles in bribery scheme involving foreign officials*. <https://www.justice.gov/opa/pr/oil-executives-plead-guilty-roles-bribery-scheme-involving-foreign-officials>

⁴⁸ Cassin, R. L. (2019, October 30). *Unaoil bosses have pleaded guilty to FCPA conspiracy*. The FCPA Blog. <https://fcpublog.com/2019/10/30/doj-unaoil-bosses-have-pleaded-guilty-to-fcpa-conspiracy/>

pursuant to which SBM agreed to pay a total criminal penalty of \$238 million to the United States.⁴⁹ SBM also reached an out of court settlement payment of US\$240 million with the Dutch Prosecutors Office (Openbaar Ministerie) in connection with payments to sales agents in Equatorial Guinea, Angola and Brazil during 2007 to 2011.⁵⁰ Criminal penalties in excess of US\$475 million were paid worldwide by SBM.⁵¹ An FCPA investigation was also initiated against SBM executives for bribing Brazil's Petrobras and two state owner energy firms in Africa.⁵² Two executives of SBM were sentenced to serve 36 months in prison and a fine of \$150,000 was imposed in connection with bribery of public officials in Brazil, Angola and Equatorial Guinea.⁵³

The UK Serious Fraud Office (SFO) initiated prosecution against two former Unaoil managers and an ex-sales chief of SBM Offshore NV Dutch-based energy services company for allegedly conspiring to bribe top Iraqi officials to secure lucrative oil projects.⁵⁴ In order to restructure the economy, after the fall of Saddam Hussein, the Iraqi Oil Ministry planned a huge increase in oil production capacity. In order to secure a contract worth \$800 million, SBM Offshore and Leighton Offshore paid over \$6 million in bribes through Unaoil to officials at South Oil Company and the Ministry of Oil. Unaoil earned a commission as well as a subcontract for securing the Contract by illegal means.⁵⁵ The greedy and heartless executives conspired to exploit the country reeling from dictatorship and military occupation to win the business and pocket money. After a marathon 19 days deliberation, the jury at Southwark Crown Court found two former managers of Unaoil guilty and convicted them.⁵⁶ Unaoil's territory manager for Iraq was sentenced to five years' imprisonment and

⁴⁹ Department of Justice. (2017, November 29). *SBM Offshore N.V. and United States-based subsidiary resolve foreign corrupt practices act case involving bribes in five countries*. <https://www.justice.gov/archives/opa/pr/sbm-offshore-nv-and-united-states-based-subsidiary-resolve-foreign-corrupt-practices-act-case>

⁵⁰ SBM Offshore. (2014, November 12). *SBM Offshore achieves settlement with Dutch Public Prosecutor's Office over alleged improper payments. United States Department of Justice closes out the matter*. <https://www.sbmoffshore.com/newsroom/sbm-offshore-achieves-settlement-dutch-public-prosecutors/>

⁵¹ Department of Justice, 2017.

⁵² Cassin, 2019.

⁵³ Department of Justice. (2018, September 28). *Oil services CEO and executive sentenced to prison for roles in foreign bribery scheme*. <https://www.justice.gov/archives/opa/pr/oil-services-ceo-and-executive-sentenced-prison-roles-foreign-bribery-scheme>

⁵⁴ Ridley, K. (2020). *Unaoil paid \$6 million in bribes for Iraqi oil contracts, London court hears*. Reuters. <https://www.reuters.com/article/markets/currencies/unaoil-paid-6-million-in-bribes-for-iraqi-oil-contracts-london-court-hears-idUSKBN1ZM2V6/>

⁵⁵ Serious Fraud Office. <https://www.sfo.gov.uk/2020/07/23/former-unaoil-executive-sentenced-to-five-years-for-bribery-in-post-occupation-iraq/>

⁵⁶ Ridley, K. (2020, July 13). *Former Unaoil managers convicted in Britain of Iraq bribery*. Reuters. <https://www.reuters.com/article/world/us/former-unaoil-managers-convicted-in-britain-of-iraq-bribery-idUSKCN24E20X/>

Unaoil's Iraq partner, who pleaded guilty to five offences of conspiracy to give corrupt payments. The former Vice President at SBM Offshore was also found guilty of one count of conspiracy to give corrupt payments.⁵⁷

TechnipFMC Plc and its wholly owned U.S. subsidiary Technip USA Inc conspired with others including Singapore based Keppel Offshore and Marine Ltd. (KOM) and made commission payments to Brazilian government officials to obtain and retain business with Petrobrass. Technip also paid the bribe through Unaoil to secure contracts in Iraq. Technip agreed to pay a \$296 million penalty to resolve the foreign bribery charges and KOM paid a fine of \$422 million.⁵⁸

Rolls-Royce Plc, a United Kingdom based company paid \$11 million in bribes to public officials in Thailand, \$9.2 million to Brazilian public officials, \$5.4 million to multiple advisors in Kazakhstan, \$7.8 million in bribes to Azerbaijan public officials, \$2.4 million in bribes to Angola state owned company officials and also paid bribes to Iraqi officials to prevent blacklisting of the company.⁵⁹ Pursuant to the Deferred Prosecution Agreement (DPA), Rolls-Royce agreed to pay \$170 million criminal penalty to resolve the violations of the anti-bribery provisions of FCPA.⁶⁰

The Central Bureau of Investigation (CBI) in India also filed a First Information Report (FIR)⁶¹ against Rolls-Royce, Rolls Royce India Pvt. Ltd., Aashmore Pvt. Ltd., Shri. Ashok Patni and others for offences under Section 120-B of the Indian Penal Code (IPC), Sections 13(2) r/w 13(1)(d), 7 and 8 of the Prevention of Corruption Act (PC Act) 1988. The five year-long investigation started after the Ministry of Defence (MoD) received a letter alleging Rolls-Royce's corruption. The MoD forwarded the letter to the CBI who then investigated the case. The Company had paid nearly Rs 77 crores in bribes to an agent to get contracts with Hindustan Aeronautics Ltd. (HAL), Gas Authority of India Ltd. (GAIL), and Oil and Natural Gas Corporation Ltd. (ONGC), all of them being prominent Public Sector Undertakings in India. The FIR alleged that Rolls Royce also paid 10% to 11.3% commission to Shri Ashok Patni, which was paid as kickbacks to unknown officials for securing the HAL purchase orders (POs) worth INR 4700 crores during the period from 2000 to 2013. The CBI enquiry revealed that the commission was paid to Ashmore Pvt. Ltd. to secure 73 POs worth INR 29.81 Crores for procurement of spare parts for the engines. Rolls Royce paid INR 28.09

⁵⁷ Serious Fraud Office. <https://www.sfo.gov.uk/2020/07/23/former-unaoil-executive-sentenced-to-five-years-for-bribery-in-post-occupation-iraq/>

⁵⁸ Department of Justice. (2019, June 25). *TechnipFMC Plc and U.S.-based subsidiary agree to pay over \$296 million in global penalties to resolve foreign bribery case*. <https://www.justice.gov/archives/opa/pr/technipfmc-plc-and-us-based-subsidiary-agree-pay-over-296-million-global-penalties-resolve>

⁵⁹ Department of Justice. (2017, January 17). *Rolls-Royce Plc agrees to pay \$170 million criminal penalty to resolve Foreign Corrupt Practices Act case*. <https://www.justice.gov/opa/pr/rolls-royce-plc-agrees-pay-170-million-criminal-penalty-resolve-foreign-corrupt-practices-act>

⁶⁰ *Id.*

⁶¹ FIR No. RAC AC1 2019 A00004 dt.29/07/19.

crores commission for securing the 68 POs from GAIL for procuring spare parts for the engines during the period 2007–2010.

Thus, the above cases prove the fact that use of an agent to secure the EPC Contract is one of the most commonly used methods to undermine the bidding process.

Conflict of interest: The Owner of the Project may select the Contractor without considering the conflict of interest provisions which may prejudicially affect the competition, e.g. selection of an EPC Contractor who is an associate company or related party of the licensor and/or the Project Management Consultant (PMC).

The concept of a conflict of interest is objective in nature and it does not matter that the parties concerned acted in good faith. The mere fact that there is potential of conflict of interest is enough to exclude a bidder from the tendering process.

The judgment of the Supreme Court of India in *Vidharba Irrigation Development Corporation v. Anoj Kumar Garwala*⁶² repeated and reiterated the settled position that the Owner/employer of a project who is the author of the tender document, is the best person to understand and appreciate its requirements and interpret its documents. The Courts must defer to this understanding unless there is malafide or perversity in the understanding or appreciation or application of the terms of the tender conditions. Nevertheless, there is a possibility that there might exist a conflict of interest between the parties who have prepared the tender documents and the parties who are bidding for that same tender. And such conflict of interest should be avoided to ensure that there exists a level-playing field for all the bidders.

The Central Vigilance Commission (CVC) in India has issued guidelines and advisories to ensure transparency and avoid a conflict of interest. A consultant who was hired to provide consultancy service to a Public Sector Undertaking (PSU) in a tendering process shall be disqualified from providing goods or works, or services related to the project mentioned in the consultancy assignment.⁶³ The disqualification is applicable not only to the consultants but also to its affiliates. A consultant engaged by the PSU shall act professionally, follow business ethics and is accountable to the employer for the service rendered.⁶⁴ Conflict of interest shall be avoided while discharging obligations by the consultant and primacy shall be given to the interest of the employer.⁶⁵ The Consultant should not be hired or engaged for any services, in case of conflict between consulting activities and the procurement of goods, works or non-consulting services and relationship with employer staff.⁶⁶ The PSU and the Consultant should comply with instructions of the Government of India,

⁶² (2019) SCC 89. (India).

⁶³ Central Vigilance Commission Office Order No. 75/12/04 dt.24/12/04.

⁶⁴ Central Vigilance Commission Office Order No. 01/01/17 dt.23/01/17.

⁶⁵ *Id.*

⁶⁶ Central Vigilance Commission Office Order No. 08/06/11 dt.24/06/11.

guidelines issued by Central Vigilance Commission (CVC), General Financial Rules (GFR) 2017, Manual for Procurement of Goods 2017 and Manual for Procurement of Works 2019.⁶⁷ The Integrity Pact should be strictly followed not only by the bidder, but also by all stakeholders of the project, including consultants to the project. The Integrity Pact is incorporated into the contracts to maintain transparency, fairness, efficiency, economy and equal opportunity to all the bidders.⁶⁸ The Owner should not give any competitive advantage to one contractor over others and shall disseminate equal information to all the contractors to ensure fairness and transparency in the selection process.⁶⁹

The Manual for Procurement of Goods, 2017 stipulates that conflict of interest is detrimental to the interest of Owner and would lead to anti-competitive practises. It provides for the disqualification of the bidder in case of conflict of interest. The term conflict of interest has been defined in the Manual and includes the participation by a bidding firm or any of its affiliates that are either involved in the consultancy contract to which this procurement is linked.⁷⁰ Obligation is cast upon the bidders to *suo-moto* proactively declare any conflict of interest.⁷¹

Hindustan Petroleum Corporation Ltd. ("HPCL") invited bids for tender of the Project of Residue Up-gradation Facility (RUF) EPCC-3 Package⁷² ("Tender") to enhance its refining capacity at Visakh Refinery, Vishakhapatnam, India ("Project"). The Notice for Invitation for Bids (IFB) stated that the Process Licensors providing know-how are not eligible to quote for the execution of the same Package for which they are Process Licensors to avoid conflict of Interest.⁷³ The Integrity Pact, which forms part of the Tender Documents, requires HPCL to treat all bidders alike and mandates that it shall not do any act which would give advantage to any particular bidder over others.⁷⁴ HPCL also made a commitment to take all measures to prevent corrupt practices or unfair means during any pre-contract or post contract stage.⁷⁵ The Integrity Pact also

⁶⁷ Central Vigilance Commission Office Order No. 01/01/17 dt.23/01/17.

⁶⁸ *Id.*

⁶⁹ Central Vigilance Commission Office Order No. 08/06/11 dt.24/06/11.

⁷⁰ Cl. 5.1.4 (ix) of the Manual for Procurement of Goods (2017).

⁷¹ Cl. 3.2.3 of the Manual for Procurement of Goods (2017).

⁷² Bidding Document No. AD/B016-504-PM-TN-9509/1014.

⁷³ Cl. 8.14 of the IFB: "Process Licensors providing know-how are not eligible to quote for the execution of the same Package for which they are Process Licensors to avoid conflict of Interest."

⁷⁴ Cl. 1.2 of the Integrity Pact: "The Buyer will during the pre-contract stage, treat all Bidders alike, and will provide to all Bidders the same information and will not provide any such information to any particular Bidder which could afford an advantage to that particular Bidder in comparison to other Bidder."

⁷⁵ Cl. 3 of the Integrity Pact.

provides for the exclusion of all known prejudiced persons.⁷⁶ However, an affiliate of the process licensor submitted a bid for the Project in consortium with another company and the same was objected by another bidder citing encouragement of participation of process licensors directly or indirectly through their affiliates would lead to potential conflict of interest and unfair competitive advantage. HPCL confirmed the conflict-of-interest provision and rejected the bid submitted by the affiliate of the process licensor.

No contractor can effectively be disqualified by an implied conflict of interest provision in the tender documents. Conflict of Interest provisions should also flow down to the subcontractors to prevent any form of bid rigging. The Owner must incorporate a term in the bid document to the effect that the sub-contracts which the contractor may enter into with other agencies must contain an identical provision to the main contract. Bid documents shall make it mandatory for the sub-contractors to sign the Integrity Pact and undertakings similar to those in the main contract. Moreover, the bid documents should contain conditions to disqualify all the bidders in case of conflict of interest by virtue of having been a subcontractor in respect of any part of the same project.

Multiple or alternative bid submission: The Contractor shall be permitted to submit only one proposal either individually or in association with others.⁷⁷ The submission of multiple or alternative bids by the same company through different subsidiary/affiliates shall not be permitted.

The bids for Gujarat State Highway Project, funded by the World Bank, were opened in the presence of all the participating bidders and all of them came to know about bid price and their standing in the order. Thereafter, Superintending Engineering requested confirmation of the bid price from all the participating bidders considering change in Bill of Quantities (BOQ) after submission of proposals. However, the petitioner rectified the bid price in the original bid as well as in the addendum while giving confirmation of the bid price. The rejection of the bid on the ground of multiple bid submission was challenged in *Patel Engineering Ltd. v. State of Gujarat*.⁷⁸ The High Court held that it would be unjust to permit the petitioner to choose, at its sweet will, of the prices quoted in the original bid price or in the addendum. Reduction of the price by way of confirmation would unfairly affect the other bidders and it would amount to an unfair practice.

Subcontract: It is pertinent to note that Satyendra Dubey was murdered since he made a complaint to the Prime Minister about the flouting of National Highways Authority of India's subcontracting and quality control rules in the Golden Quadrilateral project.⁷⁹

⁷⁶ Cl. 2.1 of the Integrity Pact: "The Buyer will exclude from the process all known prejudiced persons."

⁷⁷ Central Vigilance Commission Office Order No. 08/06/11 dt.24/06/11.

⁷⁸ (2004) 3 GCD 2188 (Gujarat). (India).

⁷⁹ Times of India. (2010, March 23). 6 yrs on, 3 petty thieves convicted for murder of NHAI whistleblower. <https://timesofindia.indiatimes.com/india/6-yrs-on-3-petty-thieves-convicted-for-murder-of-NHAI-whistleblower/articleshow/5714023.cms>

During the execution stage of the EPC Contract, the actual execution of the work is usually sublet or subcontracted to small petty contractors who are not at all capable to execute the project and ensure quality of the work.

In the absence of privity of contract, main contract terms do not bind the subcontractor. A subcontractor is bound only when such provision is executed in the Subcontract by the Contractor. There is ordinarily no necessity to imply that the terms of the main contract become the terms of the sub-contract. Subcontractor is not bound by the principles of trust or agency.

Suggestions and Conclusion

EPC Contracts themselves are drafted in a fair and judicious manner and the terms distribute risk and liability evenly among the parties. However, in the process of tendering and awarding the EPC Contracts, the Employer exercises extensive discretion, and more often than not, such discretion is abused. Such abuse is evident through the above instances and examples. The courts have also observed the need for the fairness and equity by governments or their agencies in the tendering process. In *Tata Cellular v. Union of India*,⁸⁰ the Supreme Court held that the Government should exercise fair play in the freedom of contract and there shall not be any bias or malafides in the decision to accept the tender or award the contract. The Wednesbury principle of reasonableness is applicable for the tender process and it must be free from arbitrariness. Rule of law and the doctrine of “level playing field” demands “legal certainty” should be incorporated in the terms and conditions of the tender documents to prevent unequal or discriminatory treatment.⁸¹

Hence, the governments of different countries have passed laws for the oversight, regulation of the bidding process and enabled investigative agencies to prosecute in case of misuse of the discretion and violation of any laws. Despite the presence of laws, there have been several transgressions by companies wherein they have indulged in corrupt practices to obtain government contracts. Therefore, there is a need to put stricter rules in place. The following principles, need to be reinforced into the tendering process:

a. **Integrity:** As an anti-corruption tool, the Integrity Pact casts suitable responsibilities on the Owner as well as the bidder. Integrity Pact should build public trust, prevent corruption, ensure fair evaluation of the bid, guarantee transparency and competition in the award of the government contracts. An effective dispute resolution mechanism should be afforded to the dissatisfied bidders in the Integrity Pact. Steps should be taken to reduce the delays in the Independent External Monitor (IEM)

⁸⁰ (1994) 6 SCC 651. (India).

⁸¹ *Reliance Energy Ltd. and Anr. v. Maharashtra State Road Development Corpn. Ltd. and Ors.* (2007) 8 SCC 1. (India).

redressal grievances and its effectiveness. Participating bidders should add value to the bidding process. Integrity Pacts need to be strictly enforced and any violation of the Integrity Pact should attract penal action for all persons involved, including the government officials. A provision should be incorporated in the tender documents mandating the prime contractor to obtain commitment from the subcontractor similar to the main Integrity Pact and submit it to the Owner at the time of signing of the Contract. Adopting project specific whistle blower policies and Integrity Pacts would reduce the corrupt practises in the execution of the EPC Contracts. These steps are necessary in order to ensure fair competition, reduce opportunities for corruption, level the playing field for businesses, and companies who have committed the integrity breaches to be excluded from the bidding process.

b. Transparency: All information regarding the tender process should be available in the public domain. The flow of public funds should be visible to the general public and independent audit services should be engaged to audit the project financials at regular intervals.

c. Access to public procurement contracts: Wide-spread advertisements of tenders and enabling participation by companies of all sizes will create a competitive environment, reducing the possibility of corruption.

d. E-procurement: Digitization of procurement and the use of Artificial Intelligence to exercise discretion will remove the human element from the selection process. It helps to detect irregularities; any breach of integrity and helps to increase transparency. In the case of Artificial Intelligence, the software should be standardized and protected from hacking.

e. Oversight and control: All the measures taken to tackle corruption and the abuse of discretion would be futile without oversight. Accountability is essential to curb corruption. Governments must aim at establishing a system of checks and balances to ensure that all the stakeholders comply with the regulatory and ethical norms. While, the courts ensure that the executive branch of the government does not act beyond its powers, any challenge before the courts involves a lot of time and investment. Hence, there should be an internal and independent mechanism of oversight to guarantee that all the decisions in the tendering process were free from bias and arbitrariness. The principles of natural justice and the Rule of Law should be the guiding factors of such oversight.

f. Agent or Service Provider: There should be strict scrutiny of agency or service provider agreements and the nature of services performed by them. The payment for the agent or service provider should be commensurate with the services provided. Every endeavour shall be taken to assess the manpower to be deployed by the agent or service provider to render the service under the agreement.

g. Tender Document: Incorporate a term in the bid document to the effect that the sub-contracts which the EPC contractor may enter into with other agencies must contain an identical provision to the main contract. Owner shall satisfy the

compliance requirements before approval of the subcontractor to ensure that subcontractor bound by the terms of the main contractor.

h. Due Diligence of PMC: Developing and utilizing in house capabilities by Owner so as to carry out an independent parallel or prior process/studies and arriving at conclusion so as to verify the veracity of PMC's report by comparing the in-house report and PMC's report. Systematic and periodic audit by third parties to confirm the veracity of PMC's reports. Stringent provisions for approving modifications to tender or contract with contractor or licensor, after the PMC has awarded it to the contractor or licensor. Fix a limit for enhancing or descoping work which can be permitted by PMC. There shall be a systematic and periodic audit by third parties to ascertain the actual requirement of modifications permitted by the PMC. Leverage technology by using monitoring software, project management software and compliance software. Adopt stringent clauses describing in detail the possible conflicts of interest and limit award or allocation of work to affiliates or subsidiaries of PMC or process licensor.

The above measures are not a comprehensive list to reduce corruption in the industry. However, they can be the first step to actually bring down the prevalence of corruption. Government contracts deal in public money and should be subject to high levels of scrutiny by the government, but also by the general public. Therefore, the general public should be made aware of the presence of such corrupt practices and the measures that can be taken to curb the corruption. Awareness of any kind has the capability of permeating beyond barriers and might even be the cause of change.

References

Hunter, R. J., Jr., Mest, D., & Shannon, J. (2011). A focus on the Foreign Corrupt Practices Act (FCPA): Siemens and Halliburton revisited as indicators of corporate culture. *Atlantic Law Journal*, 13, 60–90.

Verma, S. (2011). Integrity pacts and public procurement reform in India: From incremental steps to a rigorous bid-protest system. *Journal of Malaysian and Comparative Law*, 38, 93–136.

Information about the authors

N.S. Ravidasan (Mumbai, India) – Assistant Vice President Legal, Tata Projects Ltd. (Cignus Powai, Powai, Mumbai, 400087, India; e-mail: nedunghatravi@gmail.com) – **corresponding author**.

Vijay Kumar Singh (Sonapat, India) – Dean Law, SRM University (Rajiv Gandhi Education City, Delhi – NCR, Sonapat, Haryana, 131029, India; e-mail: vrsingh.vk@gmail.com).