

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 11.01.2010

+ W.P.(C) 8210/2009

**PARIVAR SEVA SANSTHA** ..... Petitioner  
Through: Mr. Rajeev Sharma, Advocate

-versus-

**UNION OF INDIA & ORS** ..... Respondents  
Through: Mr. Pranay Nath Jha for Mr. Neeraj Chaudhari, Advocate for respondents no. 1 and 2.  
Mr. Abhay Singh, Advocate for respondent no. 3.  
Mr. S. Sukumaran with Mr. Anand Sukumar, Advocates for respondent nos. 4 and 5.

**CORAM:-**

**HON'BLE MR. JUSTICE SANJAY KISHAN KAUL**

**HON'BLE MS. JUSTICE VEENA BIRBAL**

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

**SANJAY KISHAN KAUL, J (ORAL)**

1. Rule D.B.
2. Learned counsel for the respondents accept notice. At the request of learned counsel for the parties, petition is taken up for final disposal.
3. The National Aids Control Organization – respondent no.2 issued an Expression of Interest (EOI) on 18.11.2007 for implementation of the Targeted Condom and Social Marketing

Programmes under NACP-III. The EOI stated that the Ministry of Health and Family Planning and the NACO were keen on engaging social marketing organizations and private marketing companies in expanding the access/demand and use of condoms. Under the public-private partnership, the social marketing programme was to be launched in different parts of the country in various stages. The implementing organization was required to have an effective corporate marketing structure. The EOI was to be sent along with the capability statement including a profile of the implementing organization.

4. In pursuance to the receipt of the EOI's, a Request For Proposal (RFP) in the form of a limited tender was floated to six shortlisted consultants as under:-

	<b>Agency</b>
1.	HLFPPT
2.	HLL
3.	PHS India
4.	PSI
5.	PSS
6.	TTK Health Care Ltd

The petitioner is at Serial no. 5 in the aforesaid list. This RFP floated on 30.07.2008 was examined and the tenders were awarded to respondents no. 3 to 5 who are at Serial List no. 4, 1 and 2. The tender is stated to have been awarded on 26.03.2009.

5. The petitioner was of the view that the award of tender was under suspicious circumstances, more specifically, on account of an association of certain persons with the process of selection of the tender who were directly linked to or were interested in the tendering companies. The petitioner, thus, sought certain information under the Right to Information Act which was made available to him.

6. The sum and substance of the grievance of the petitioner in the present petition is that the tenders were evaluated by a committee of eight persons and two of such persons were ex employees of respondent no. 3 and were being paid their emoluments by respondents no. 4 and 5 at the relevant stage of time. It is also the submission of the petitioner, albeit, averred in the rejoinder, that two other members who were nominees of the Government of India never signed the evaluation.

7. Learned counsel for the petitioner has taken us through the terms and conditions of the RFP, more specifically, Clauses 1.6.1 (iii) and 1.6.2 which read as under:-

“1.6.1 (iii) A Consultant (Including its Personnel and Sub-Consultants) that has a business or family relationship with a member of the Client’s staff who is directly or indirectly involved in any part of (i) the preparation of the Terms of Reference of the assignment, (ii) the selection process for such assignment, or (iii) supervision of the Contract, may not be awarded a Contract, unless the conflict stemming from this relationship has been resolved in a manner acceptable to NACO throughout the selection process and the execution of the Contract.

1.6.2 Consultants have an obligation to disclose any situation of actual or potential conflict that impacts their capacity to serve the best

interest of their Client, or that may reasonably be perceived as having this effect. Failure to disclose said situations may lead to the disqualification of the Consultant or the termination of its Contract.”

8. Learned counsel for the petitioner thus submits that the consultants having conflict of relationship could not have been part of the Evaluation Committee and were, in fact, duty bound to disclose their interests. It is further submitted that as per Clause 5.1, there was, in fact, a bar to the consultants to contact the clients during the consideration of the technical and financial bids of the proposal. The petitioner claims that it had no opportunity to earlier find out this process of selection as in terms of Clause 8, there is a confidentiality clause.

9. The first submission of the learned counsel for the petitioner is that one of the members of the Evaluation Committee, Mr. Gaurav Jain was not only an ex employee of respondent no. 3, but had attended an international seminar “World Social Marketing Conference, 2008” at Brighton, USA in September, 2008 as a representative of respondent no. 3. In support of this plea, the petitioner annexed to the writ petition an extract of presentation made by the said Mr. Gaurav Jain on behalf of respondent no. 3, the successful tenderer. The Union of India in its counter affidavit however has sought to explain away this position by stating on affidavit that the said visit was at the expense of Union of India and not of respondent no. 3. It has been further averred that though the papers were originally submitted by Mr. Gaurav Jain, who was employed by respondent no. 3, he had subsequently resigned and

the Government in its wisdom thought it fit to send him to participate in the conference. The stand of the Union of India is also that there are few experts in the concerned field who have the technical and specialized knowledge and thus, there is bound to be some association with the entities participating in the bid. The said Mr. Gaurav Jain is part of an expert group for the technical support (TSG) for which assistance was provided by respondent no. 5.

10. The other grievance of the petitioner is that Mr. Gaurav Jain and Mr. Pritpal Marjara were both employed by respondent No.5 which was participating in the bid. Learned counsel for the petitioner has drawn our attention to the formats of the appointment letters issued to said persons including these two persons (which is not disputed by respondent no.5) in terms whereof a contractual appointment has been given to them for a period of two years. The said letter provides that the terms and conditions of employment and employee related guidelines would, thus, be as applicable to all employees of respondent no.5. The remuneration is payable by respondent no.5. The persons are required to abide by the service rules and regulations of respondent no.5 including personal conduct guidelines and their appointment and services may be terminated by giving adequate notice. Learned counsel for the petitioner, thus, submits that there is a direct financial interest of these two persons who are members of the Evaluation Committee and, thus, even if it is assumed for the sake of arguments that they can function as part of TSG, the evaluation should have been done by independent persons, who

had no interest in the entities which applied in pursuance to the RFP. Mr. O.P. Shashank, Procurement Specialist of respondent no.2, is present in the Court and has admitted that the allegation of the petitioner made in the rejoinder that two of the members of the Committee appointed by the Union of India had not given any assessment of the bids, is correct. He, however, states that since the other six people who are part of the Evaluation Committee gave their individual marking, the successful bids were issued on that basis. He further states that the selection process was not even signed by the said two representatives of the respondent no.1/Union of India.

11. We find it strange, to say the least, that the Evaluation Committee has not evaluated the bids as a full forum as two representatives of Union of India have chosen not to pen their signatures to the selection process nor assigned any marks to the various parties who have submitted their tenders. Out of the remaining six persons who are members of the Evaluation Committee, two are persons who are ex-employees of respondent no.3. That aspect may not be very material since those persons have left the services of respondent no.3 and the issue of participation of one of them in an international conference has been explained by the Union of India, affirming on affidavit, that the expenses for the same were borne by the Union of India. However, what is material is that these two persons have been employed by the respondent no.5, which is a participant in the bid. If the averments of the Union of India on affidavit are to be accepted that

there are limited experts in the field and, thus, the TSG would require the experts in the field, the same would not imply that such persons should also be part of an Evaluation Committee to select the successful bid, in view of their direct financial interest in respondent no.5 company, they being on contractual employment with respondent no.5 at the relevant time.

12. Learned counsel for the petitioner has drawn our attention to the commentary on Administrative Law (10<sup>th</sup> Edition) of H.W.R. Wade & C.F. Forsyth where on page 381 it has been observed as under:-

**“AUTOMATIC DISQUALIFICATION IN CERTAIN CASES**

The case concerning Lord Chancellor Cottenham, just described, is an example of the rule that a direct pecuniary interest disqualifies the decision-maker. It became the rule that any direct pecuniary interest, however, small, was a disqualification, and this rule was applied rigorously. Indeed, in a prominent modern case, the House of Lords has affirmed that the principle of automatic disqualification in fact extends beyond pecuniary and proprietary interests. It applies equally where the judge is himself a party or has a relevant interest in the subject matter of the litigation, even if he has no financial interest in its outcome.”

13. Learned counsel has also referred to the observations of the Constitution Bench of Supreme Court in ***Gullapalli Nageswara Rao & Others v. Andhra Pradesh State Road Transport Corporation and Another***, AIR 1959 SC 308, in para 30 as under:-

“...The aforesaid decisions accept the fundamental principle of natural justice that in the case of quasi-judicial proceedings, the authority empowered to decide the dispute between opposing parties must be one without bias towards

one side or other in the dispute. It is also a matter of fundamental importance that a person interested in one party or the other should not, even formally, take part in the proceedings though in fact he does not influence the mind of the person, who finally decides the case. This is on the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The hearing given by the Secretary, Transport Department, certainly offends the said principle of natural justice and the proceeding and the hearing given, in violation of that principle, are bad.”

14. It is trite to say that the selection process should not envisage a person sitting on judgment of tenders and its award who has any financial interest in the companies which have submitted tenders. It is not only a question of the marks to be assigned by such a member of the Evaluation Committee, but also the ability and opportunity available with such a person to persuade the other members. Our view is fortified by the observations in **Gullapalli Nageswara Rao** (*supra*).

15. The undisputed facts of the present case are that two persons who were on contractual employment of respondent No.5 at the relevant time, were part of the Evaluation Committee with limited RFP and awarded the contracts to respondents no. 3, 4 and 5. The award is clearly vitiated by an element of financial bias. It is not unreasonable for the petitioner to apprehend that the objectivity of the Committee would be lost in such a situation. The matter is further compounded by the facts that the two nominees of the Government of India did not sign the minutes or assign any marks. It is, at this stage, pointed out to us that the factual position is slightly different as one of the nominees did not participate in the

meeting while the other did not assign the marks but on seeing the marks assigned by other members, appended his signatures.

16. The Apex Court in **J. Mohapatra and Co. and Anr. v. State of Orissa and Anr.**, AIR 1984 SC 1572, rejecting the contention as to whether the author member is only one of the members of the Assessment Sub-Committee and that the ultimate decision rests with the State Government which may reject any book out of the list of approved books, held as follows:-

“...It is not, therefore, the actual bias in favour or the author-member that is material but the possibility of such bias. All these considerations require that an author-member should not be a member of any such committee or sub-committee.”

17. The very objective of floating the tender or a limited tender is to bring about transparency in the system of award of contracts. This would also require that any person having interest in the tender should be kept away from the process of tender. In the present case, there is direct participation of a contractual employee of respondent no.5 in the award of tender. In view of the aforesaid, there is no option but to quash the selection made by the evaluation committee pursuant to the RFP dated 30.07.2008 and the consequent award of the contract to respondents no. 3 to 5. The Rule is accordingly made absolute. The petitioner is also entitled to costs of these proceedings against respondents no. 1 and 2 quantified at Rs. 15,000/-.

The petition stands disposed of.

**CM No.4968/2009**

In view of the orders passed in the writ petition, no orders are required on the application. The same stands disposed of.

**SANJAY KISHAN KAUL, J.**

**VEENA BIRBAL, J.**

JANUARY 11, 2010  
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