

Research Paper

Swiss Challenge Method explained. (A case study)



Business Laws

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RESEARCH PAPER



1. BRIEF FACTS OF THE MATTER (HYPOTHETICAL SITUATION)

In line with the decision of the Board of Directors of ABC Ltd Limited (the “**Company**” or “**PGL**”) in its meeting, for providing state of the art technology based bio-gas up-gradation along with operation and maintenance of existing plant on lease basis, through the Swiss Challenge Method, a notice inviting tender (“**NIT**”) and detailed notice inviting tender (“**DNIT**”) containing specifications and terms of the tender had been prepared based on the proposal submitted by original proposer company, XYZ Ltd India Private Limited (“**DSM**” or the “**Original Project Proposer**”). The Swiss Challenge Method was also outlined in the publication made by the Company making it clear that the Original Project Proposer, who has given the proposal, would have first right to match an external or counter proposal. In respect of the tender in question, PGL received a bid from another private limited company (“**Opposing Party**”). The bidder accepted knowledge of initiator of proposal and following of Swiss Challenge Method and that the Original Project Proposer shall be given an opportunity to take up the project on the highest eligible bid offer. They were also informed that only in case the Original Project Proposer does not agrees to match the highest bid, then the project shall be awarded to the external bidder. Additionally, in order to give it wide publicity and in compliance with various statutory guidelines, PGL also published a tender in various leading national newspapers.

Common issue involved in this matter revolves around the validity of the Swiss Challenge Method adopted by the Company and allegations that PGL is being unfair, nontransparent and arbitrary in the entire bidding / tender process. This research paper seeks to analyse the Swiss Challenge Method (“**SCM**”), the recent judgment of the Supreme Court and whether PGL has followed the SCM in fair spirit contrary to allegations of the Opposing Party.

2. APPLICABLE LAWS

The Opinion, *inter-alia* comprises of interpretation of the Indian Contract Act, 1872, the tender document and other ancillary legislations intertwined directly or indirectly with the above legislation.

3. THE SWISS CHALLENGE METHOD – BRIEF EXPLANATION

The Swiss Challenge Method is an innovative method adopted by governments for awarding contracts, wherein a private participant can submit a project proposal and even draft contract terms for undertaking a project initiated by a government. The government then invites competitive bids from other interested parties. If the government finds a competing counter proposals more acceptable, the original project proposer will be given an opportunity to match the competing counter proposal and win the project. In case the original project proposer is not able to match the more attractive counter proposal, the project will be awarded to the competitor. In other words as per the Swiss Challenge Method the developer who has given the original proposal has the right of refusal, provided the said developer has matched or raised his bid (rate) when the highest proposal is tendered. The original proposer shall have the opportunity to take up the project on highest offer, and in the event he refuses, the highest bidder shall have right to implement the project. Swiss challenge methods have increasingly gained popularity in all parts of the world. In countries such as Philippines and South Korea, most of the public projects are executed using this method. In India too, the governments both at the Centre and the States have begun to embrace the concept albeit with certain reservations, which though are likely to be dispelled with the recent Supreme Court's validation on this method of awarding public contracts.

4. PROCEDURE FOLLOWED BY THE COMPANY AND CONCERNS ECHOED BY THE OPPOSING PARTY

Having understood briefly the Swill Challenge Method of awarding contracts, let us now understand the procedure followed by PGL and whether its tender process was fair and transparent:

- I. The Company invited bids from reputed and experienced companies through the Swiss Challenge Method, for providing state of the art technology for bio-gas up-gradation along with operation and maintenance of existing plant.
- II. The Company, in its e-tender clearly mentioned that the tender is based on the proposal submitted by Original Project Proposer company, namely DSM and that DSM will be given the first right to match a counter proposal to win the project. Only if the Original Project Proposer is not able to match the counter proposal, the project will be awarded to competitor.
- III. The e-tender document further mentioned the pre-bid conference, last date of submission of bid-document and the opening date of financial bid. Bidders were also asked to inspect and examine the plant conditions at the plant premises.
- IV. The objective of this tender was to provide a hybrid model as proposed by the Original Project Proposer to make the plant economically viable. The Company clearly also mentioned in its tender document that the Original Project Proposer was currently doing the operation and maintenance of the plant on lease basis.
- V. Since a lot was at stake for the Company, it was expected that the bidders should have at least 2 years of experience in operation and maintenance of power generation on cow dung / animal waste based biogas plants, sufficient managerial and technical capabilities and financial stability under their belt to take the project forward.
- VI. It was also imperative that bidders have state of the art technology comprising of robust safety features, excellent environment credentials, complete automation and controls, optimum efficiency and quality infrastructure comparable to relevant national and international standards. Minimum investment criteria was also sought by the bidders as a pre-requisite, besides the bidder being a profitable company having a turnover of at least Rs 28 (twenty eight) crore and surplus funds of Rs 7 (seven) crore.
- VII. Keeping in mind the scale and importance of the project; above criteria, bid procedure, financial threshold limits and selection criteria was outlined.

- viii. Additionally, in order to prevent financial mal-practice and also for ease of verification, the Company as a pre-requisite required the bidders to have a bank account with an Indian bank of repute. Bank accounts in foreign banks were not accepted.
- ix. With respect to the above procedure and pre-conditions for potential bidders, the Opposing Party *inter-alia* had the following concerns:
- a. that counter-bidders did not get much time to submit a counter-proposal;
 - b. that the Original Proposer did not have much prior experience in the proposed project;
 - c. that PEDDA has indulged in mal-practice, whereby no company except that has experience in PEDDA plant itself can stand a chance to bid for this tender;
 - d. that, a bank account with an Indian bank should not be a mandatory provision. A bank account anywhere in the world should be permitted; and
 - e. since the bid is mainly for gas up gradation; all sorts of experiences have been asked for except for work that needs to be done.
- x. Additionally the Opposing Party had the following concerns with respect to the Swiss Challenge Method adopted by PGL:
- a. Swiss Challenge Method is generally not preferred by the government and therefore should not be adopted in this case as well;
 - b. this method is used in exceptional situations either in sectors not associated with PPP or where proprietary technology is involved;
 - c. two bench of Supreme Court echoed a number of concerns on Swiss Challenge Method;
 - d. asymmetry issues with unsolicited proposals is a major concern;
 - e. the project is not innovative; and
 - f. if the competitive bidding process results in a superior proposal, the Original Proposer should be given an opportunity to match the competing counter proposal only if the proposal initiator's bid is within 15 percent of the superior bid-value.

5. THE APEX COURT'S COMMENTS ON THE SWISS CHALLENGE METHOD

Before we address concerns of the Opposing Party, and whether PGL has conducted the tender process in a legitimate manner, let us first understand the views of Supreme Court of India on what it has to say on the Swiss Challenge format of awarding government contracts. In a leading judgment of *Ravi Development Vs Shree Krishna Prathishthan and Others*¹ (attached as Annexure I) the Apex Court endorsed the legality of awarding contracts using the Swiss Challenge Method. Let us briefly study the judgment:

- I. Ravi Developers (“the **Appellant**” or “**Developer**”) presented a proposal to the Maharashtra Housing and Area Development Authority (“**MHADA**”) to develop certain plots of land in the Mira Road area in Maharashtra.
- II. The MHADA decided to use the Swiss Challenge Method on a pilot basis with respect to the project. The project details circulated by the MHADA clearly stated that a suo-motu proposal had been received from a Developer and that such Developer would have a right of first refusal with respect to the project, which would require the Developer to match the highest bid received by the MHADA. It further clarified that the project would only go to the highest bidder in the normal bidding process if the Developer turned down the project. The project, in this case, was awarded to the Developer who decided to match the highest bid.
- III. The award of the project was, however, challenged by some of the other bidders on the ground that the bidding process and final award of the project to MHADA was unfair, arbitrary, and ambiguous and the SCM was invalid. It was on these grounds that the Bombay High Court struck down the bid process. The Supreme Court, however, reversed the High Court’s order, and, on the various issues, held:
 - a. The contention of the SCM being unfair, and not transparent was false as the public notice for tender issued by MHADA had clearly mentioned about the said method, the rule of “First right to refusal” to the “originator of the proposal.” So it was concluded that the existence of the “originator of the proposal” was very much in the knowledge of the other builders at the time of applying for the said bidding.

¹ 2009 INDLAW SC 637

- b. The decision to apply Swiss Challenge Method clearly fell within the realm of executive discretion and in this case, exercised after due application of mind. The Courts should not interfere in such situations as there was neither arbitrariness nor unreasonableness in the process and, in fact, the new initiative of awarding contracts was laudable.
- IV. Finally, the Supreme Court provided broad parameters to be followed by the state/authority for smooth implementation of SCM or any other similar method while awarding contracts to ensure there are no allegations of arbitrariness or ambiguity. These were:
- a. the state/authority should publish in advance the nature of SCM and particulars;
 - b. publish the nature of projects that can come under such method;
 - c. mention/notify the authorities to be approached with respect to the project plans;
 - d. mention/notify the various fields of the projects that can be considered under the method;
 - e. set rules regarding time limits on the approval of the project and respective bidding;
 - f. the rules should be followed after a project has been approved by the respective authorities;
 - g. all persons interested in such developmental activities should be given equal and sufficient opportunity to participate in such venture and there should be healthy inter-se competition amongst such developers.
- v. Surely, every system has certain inevitable flaws, but prudence lies in minimizing the negatives and capitalizing on the positives.
- vi. The Apex Court further went on to say, “Though the government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate, it is open to the government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.”

6. LEGAL STANDPOINT

A careful study of the above Apex Court judgment, modalities of the SCM and procedure adopted by the Company, it is clear that though the Company cannot be arbitrary or unfair, it has the right to even reject the highest bidder at a tender where such rejection is not arbitrary, unreasonable and the bidding is done in a transparent manner. There have been several decisions rendered by the Apex Court on the question of tender process, the award of contract and have evolved several principles in regard to the same. Ultimately what prevails in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus.

- I. PGL was free to enter into any contract with citizens and it is open to PGL to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.
- II. It must also be pointed out, that the tender notice issued by PGL clearly specified details of the Swiss Challenge Method, and that the Original Project Proposer shall have the first right of refusal.
- III. In line with Apex Court's verdict, and in order to give it wide publicity, PGL also published the tender in leading national newspapers.
- IV. Additionally, in line with PGL's commitment towards providing transparency, the Opposing Party was asked to furnish details of its company, including business experience as well as financial strength.
- V. Since operation and maintenance of the plant was more important than just up-gradation, it was considered mandatory for bidders to have at least two years of experience in operation and management of power generation on cow dung / animal waste based biogas plant(s). Also for financial capability criteria, the bidding company should have had an annual turnover of Rs 28 (twenty eight) crore in the preceding three years.
- VI. Also, since this was a Swiss Challenge Method and the Original Project Proposer had more than two years of experience, PGL invited, and in fact was more than happy if

any bidder was able to match or better the above-mentioned criteria of experience and financial strength.

- viii. Keeping the above in mind, it is clear that the manner and approach of PGL is exactly the way Swiss Challenge Method is to be followed, in a manner adhering to Supreme Court's guidelines on awarding tenders under the Swiss Challenge Method. Excerpts of the judgment have been attached for reference. The Apex Court further went on to say, *"These suggestions are not exhaustive and the State is free to incorporate any other clauses for transparency and proper execution of the scheme."* Lastly, the court concluded by stating that, *"The impugned pilot project or initiation taken by the Government of Maharashtra in the above mentioned judgment, along with MHADA to encourage public-private participation by adopting the Swiss Challenge Method is in accordance with the need of the time as well as a laudable effort."*