

ITEM NO. 50 (E-02)

1. Name of the subject / project

Repair/Renovation, Maintenance and Management of Public Conveniences on BOT basis with advertisement rights – North of Rajpath.

2. Name of the Department

Health Department

3. Brief History of the subject / project

The New Delhi Municipal Council (NDMC) had invited the interested parties having adequate experience in this field and adequate financial strength, for the Renovation/Construction, Operation and Maintenance of Public conveniences at specified locations in its area with advertisement rights on specified area of the toilets. The concession period was kept as 10 years, commencing from commencement date without permission for any renewal thereafter.

Total PTUs were 113 nos. which were further sub divided into two groups – Group 'A' & 'B'. The PTUs in group "A" (Total 69 nos.) were primarily the old toilet blocks constructed by NDMC. Group A had some new locations for PTUs. Based on the area available at each site, NDMC had provided standard designs that were to be constructed. The PTUs in group "B" (Total 44 nos.) were the ones which were earlier developed by NDMC on BOT basis and are now in the possession of NDMC. These PTUs require relatively lesser repairs. However, these PTUs have to be modified for persons with disabilities. After call of tenders by Dir. (Projects) and due deliberation M/s City Life Line Travels Pvt. Ltd. emerged as the highest bidders.

Scope of Work:

The project scope was comprised of the following major activities:

a) Construction Works:

The successful bidders were required to renovate/construct the PTUs and create facilities for persons with physical disabilities, as per the drawings / details issued with the RFP document at its own cost.

b) Operation & Maintenance:

This includes operation of the PTUs i.e. regular cleaning of the PTUs and its surrounding areas, functioning of user amenities, Provision of dedicated personnel, supervision, availability of basic infrastructure requirements such as electricity, proper drainage, sewage, waste removal were formed part of the operations.

c) Transfer of PTUs to NDMC at the end of CONCESSION period in good working condition.

d) Regular Payment of concession fee to NDMC.

4. Details proposal on the subject/project

The primary objective of NDMC was to ensure that a suitably high standard of maintenance is ensured in the public toilets and accordingly bids were invited from the eligible candidates.

The following three Bidders were found technically qualified:-

1. M/s City Life Line Travels Pvt. Ltd.
2. Hythro Power Corporation Ltd.
3. M/s J.C. Decaux Advertising India Pvt. Ltd.

The Financial Bids of all the three (3) technically qualified bidders were opened on 06/06/08 in the Chamber of Director (Projects) in the presence of all the bid evaluation members and the representatives of the bidders:

The status is under:

Name of the bidder	M/s City Life Line Travels Pvt. Ltd.	Hythro Power Corporation Ltd.	M/s J.C. Decaux Advertising India Pvt. Ltd.
Rates Quoted			
Group "A"	Rs.36,00,000.00	NIL	Rs.10,00,000.00
Group "B"	Rs.1,19,00,000.00	Rs.35,80,000.00	Rs.20,00,000.00
Total	Rs.1,55,00,000.00	Rs.35,80,000.00	Rs.30,00,000.00

All the quoted rates are the Concession Fee offered by the bidders, on monthly basis + applicable taxes with an increase of 5% every year after the first year.

M/s City Life Line Travels Pvt. Ltd. had quoted the highest concession fee per month i.e., Rs.1.55 Crore + applicable taxes.

Concession fee was payable to NDMC from the commencement date till the transfer date. Concessionaire was to deposit the Performance security in the form of Demand Draft or Bank Guarantee equivalent to Six (6) months concession fee on or before signing of the agreement.

After considering the above details, the Council vide its Resolution No. 4 (E-4) dated 18.06.08 resolved as under,

Resolved by the Council to accept the Highest Bid, quoted by M/s City Life Line Travels Pvt. Ltd., @ Rs.1.55 Crore + applicable taxes per month, with an escalation of 5% every year, after first year, for a period of 10 years subject to the following conditions :

- i) That the advertisements will be allowed only after completion/renovation of the toilet in all respects.
- ii) That the department will ensure that the advertisements are displayed within the earmarked space.
- iii) That no advertisement will be allowed in 'B' category toilets until and unless all the toilets in category 'A' are completed.
- iv) The department should ensure that the work is completed as per schedule.
- v) That the department to ensure that the space provided for advertisement is not violated or misused in any manner.

The project was awarded to M/s City Life Line Travels Pvt. Ltd.

As per the concession agreement the concessionaire was supposed to deposit the concession fee @ Rs.1.55 crore + applicable taxes per month for the entire lot of PTUs to be paid monthly in advance to NDMC by the concessionaire (Clause 3.1 (i)).

Certain clarifications were sought by the department in connection with the concession agreement and accordingly the Chairman, NDMC directed to place the case before the Empowered Committee.

The case was placed before the Empowered Committee and the empowered committee after discussing the case in detail felt that the item covers various departments and their views and recommendations have not been reflected in the note and it was decided that a committee consisting of Dir. (Projects) – In Chair, MOH, C.E. (C-I) and Addl. F.A. will discuss / examine this item and give its view / recommendations. Thereafter, if needed, the item may be placed before the Empowered Committee.

The case was sent to the Chairman, NDMC for his consent and he took the view of L.A. before approving the sub committee. L.A. in its remarks has suggested to put up the case before the committee consisting of Dir. (Projects), C.E. (C-I), Addl. F.A. and MOH for its view / recommendations and after obtaining the approval of the Chairman, the case was placed before the sub committee.

The sub committee holds its meetings on 19.02.2009, 27.02.2009 & 05.03.2009 to discuss the issues. In the first meeting the members of the sub committee heard the concessionaire and took on record the representation provided by the concessionaire dated 19.02.09. The issues raised by the concessionaire were primarily on difficulties in carrying out work at 38 sites as per a list enclosed with his letter dated 19.02.09. These issues were considered by the sub committee with a view to understand the root of the problem, if any. The committee noted that the 69 toilets had earlier been taken for the project by the Project Department based on detailed surveys carried out by the concerned departments. Therefore in order to verify the issues raised by the concessionaire, the sub committee decided that the Health Department should first inspect the sites and pin point the locations where the work can or cannot be carried out so as to decide the future course of action within the provisions of the concession agreement for reduction in the scope of work.

In the meeting held on 05.03.09, the inspection report prepared by the Health Department (**Annexure 'A' See page 335**) was discussed and the sub committee recommended the following course of action -

1. The inspection report points out that there is no difficulty on 03 locations and to that extent the claim of the concessionaire does not merit any consideration. In addition there are 05 sites where toilets of smaller size can be adjusted. At 02 locations minor shift in location is feasible. Therefore in all construction is possible at 10 locations. In case there is a difference in the advertisement panel area, the concessionaire would be entitled to a rebate in concession fee as per the provisions of the agreement.
2. The inspection report points out that it is not possible to construct toilets due to various reasons at 23 places. The report further points out that at 06 places clearance from other authorities is required such as PWD, Horticulture etc. & this may take some time. The committee was of the view that the issue should be resolved quickly & view taken by competent authority for reduction in scope of work as per provisions of concession agreement.

The case was placed before the Empowered Committee in its meeting held on 23.03.09 and the Empowered Committee decided as under –

On the recommendations of the sub committee, the empowered committee decided to reduce the scope of work as per provisions of concession agreement. It was further decided that in case there is difference in the advertisement panel area, the concessionaire would be entitled to a rebate in concession fee as per the provisions of the agreement. Accordingly, a letter is to be issued to the concessionaire and the sub committee should discuss, examine the item on priority basis and give its views / recommendations in the next meeting of the Empowered Committee.

The case was further placed before the sub committee meeting held on 02.04.2009 wherein MOH informed that the concessionaire has been informed vide letter no. D-108/PA/MOH/09/CMO (Proj.) dated 23.03.09 to take up the work on all locations except the 29 locations where it was not found feasible to construct toilets as per report prepared by the department with a privilege for the entitlement to a rebate in terms of Clause 7.1 of the concession agreement. The concessionaire has declined to the proposal of the department and intimate the department vide their letter dated 27.03.09. The contents of the letter are reproduced as under,

“We reiterate that the sites mentioned in the latter and have become unavailable are core of the viability of our project having being on lucrative locations. Having these become non-available has completely jeopardized the project on account of loss of advertisement potential.

We would like to bring to your notice that our proposal to the council was based on revenue accrual from all the sites. The reduction in the licence fee proposed due to non-availability of these 29 sites does not compensate for the revenue loss that would accrue to us for the project as a whole. The project being for a concession period of ten years, the overall losses would be tremendous and unbearable. In such circumstances, it would not be possible for us to continue on this project and perform compelled to discontinue with the work on this project.”

The letter was considered in the sub committee meeting which was of the view that, it is clear that the concessionaire does not want to continue the project for the reasons given in his letter.

Although the reduction in scope of work has been provided in the agreement and the concessionaire is bound to the same. However, because of the present circumstances being beyond control, the change of scope has become extremely large. Moreover, the unavailability of toilets is concentrated in one area i.e. Connaught Place and around. Under these circumstances, the concessionaire has shown his inability to continue with this project. It is further mentioned that the bidders were asked to quote their rates for Group 'A' (construction of 69 sites) and Group 'B' (Renovation of 44 sites) separately at the stage of inviting tenders but the final project was conceived as a single project. Therefore, it was to be clarified whether the project can be legally bifurcated in Group 'A' & Group 'B'.

In the above scenario, the committee feels that legal opinion be taken in the matter whether the project can be bifurcated between Group 'A' and Group 'B' at this stage as per the terms of the agreement so that if possible to do so, the same can be offered to the concessionaire in order to salvage the project to that extent in the best interest of both the parties, failing which the contract be terminated by the prescribed procedure. If the contract cannot be bifurcated then the same shall be processed for termination of the same by mutual understanding.

The file was sent to the Law Department for seeking their advise in the said case as opined by the sub committee in its meeting on 02.04.09 and the Law Department comments on the issue as under –

“Discussed. What was our tender? Was it a single tender or two tenders? What was our proposal to the council and council decision? If it was one tender our proposal for approval from Council, there cannot be two tender or bifurcation of the tender. It will depend on terms of tender and approval of council.”

The case was then placed before the Empowered Committee in its meeting held on 08.05.2009 and after reviewing the facts of the instant case, that the concessionaire has declined for reduction in scope of work from 69 toilets to 40 toilets of Group “A”, the empowered committee recommended that the sub committee framed for this purpose may finalize mutually agreeable terms and conditions for termination of the contract and thereafter put up these terms and conditions for consideration and approval of the council.

The sub committee then review the case in its meeting held on 14.05.09 and opined as under,

“The empowered committee vide meeting held on 08.05.09 deputed the sub committee to work out the modalities for termination, accordingly the sub committee meet on 14.05.09 at 12.00 noon and examined various aspects, in view of the departments inability as reported earlier & in view of the concessionaire’s letter dated 27-03-2009, it become necessary to operate the termination clause of the agreement. However legal interpretation is required as to specify clause of the agreement to be operated in the present situation.

In the meanwhile, the concessionaire vide their letter dated 15.05.2009 addressed to MOH has reiterated their position as under,

“This is further to our letter dated 27th May 2009. We reiterate that we were perforce made to stop work under the captioned contract as the allocated sites at lucrative locations could not be made available to us thereby jeopardizing our entire working on the contract. Under these circumstances it would not be possible for us to continue with the contract. It is hence requested that the above contract be terminated.

We assure you that in the event of the Council agreeing to the termination, we will not file any claim for the work already executed by us under the contract and shall not take recourse to seek legal remedy or through arbitration for making claims for expenses, costs or damages under the contract whatsoever.

We are indemnifying the Council against all such claims, expenses and damages and from legal recourse.

It is requested that the Performance Guarantee deposited by us with the Council be released at the earliest.

We request that the Council decide on the above matter at the earliest and to release the Bank Guarantee after termination of the Contract.”

In view of the opinion of the sub committee and the letter dated 15.05.09 from the concessionaire, the case was sent to the Law Department for their opinion / consent in terms of the termination of the contract under the purview of the present status before placing the same on table for the consideration of the Council.

The opinion of the Law Department was sought and the Law Department in its opinion states as under,

1. The NDMC vide a tender floated sometime in the first half of the year 2008 invited interested parties for renovation, construction, operation and maintenance of public utilities at specified locations, called PTU's, Public Toilet Utilities. The said tender was for group A (69 sites), primarily old toilet blocks constructed by the NDMC and Group B sites (44 in Nos.) were the sites earlier developed by the NDMC on a BOT basis and now in the possession of the NDMC. The total tender was thus for 113 toilet sites. Group B sites required lesser repair than Group A sites. However, Group A sites are more lucrative in terms of location, exposure to public and their potential for generating revenue from advertisers.

Group A sites offer better and quicker returns than Group B sites.

2. Since the bids furnished by M/s City Lifeline Travels Pvt. Ltd. were the highest, vide Council decision dated 18.06.2008, the said bid was accepted subject to various conditions including the condition that no advertisement would be allowed in B categories toilet until all toilets of Group A are completed. Advertisements would be allowed only after completion/renovation of toilets in all respects. The operative part of the Council's decision dated 18.6.2008 is reproduced as under:-

"Resolved by the Council to accept the Highest Bid, quoted by M/s City Life Line Travels Pvt. Ltd., @ Rs. 1.55 Crore + applicable taxes per month, with an escalation of 5% every year, after first year, for a period of 10 years subject to the following conditions:

- i) *That the advertisements will be allowed only after completion/renovation of the toilets in all respects.*
- ii) *That the department will ensure that the advertisements are displayed within the earmarked space.*
- iii) *That no advertisement will be allowed in 'B' category toilets until and unless all the toilets in category 'A' are completed.*
- iv) *The department should ensure that the work is completed as per schedule.*
- v) *That the department to ensure that the space provided for advertisement is not violated or misused in any manner.*

It was also decided that the department may initiate action in anticipation of confirmation of the minutes of the Council."

3. A concession agreement dated 17.10.2008 was entered into between the NDMC and M/s City Lifeline Travels Ltd. The construction/renovation of the toilets was to be completed within a period of nine months from the commencement date, which date was the date on which the physical possession of the toilet sites is delivered by the NDMC. I am informed that all sites were handed over to the concessionaire by middle of January, 2009.
4. Vide letter dated 24.12.2008, work on toilets at S.No. 3 and 13-19 of Group A was stopped by the Chief Engg. (Civil) due to the redevelopment of Connaught Place. Subsequently, work on toilets at Shankar Market (Group A) was also stopped. Thereafter, work at other sites was also stopped due to objections raised by RWAs, VIP residents of the areas and other reasons. In all of the 69 sites in Group A, 29 sites were taken out of the scope of the agreement. The scope of work was thus reduced by the NDMC. This has

been provided by clause 8 of the Agreement which provides for the proportionate reduction in the no. of PTUs and a corresponding decrease of concession fee. Strictly speaking, the NDMC has not acted beyond the scope of the contract.

5. In deference to the agreement dated 17.10.2008, the Concessionaire has deposited earnest money of Rs. 6,00,000/- (Rupees Six Lakh only) in terms of the condition of tender. I am informed that the said amount is adjustable towards the security deposit. I do not have the benefit of the tender papers.
6. As per clause 4 of the agreement dated 17.10.2008, the concessionaire was to deliver to NDMC, on or before signing the agreement, a performance bank guarantee for a sum equivalent to six months' concession fee i.e. Rs. 1.55 crore x 6 i.e. Rs. 9.3 crore. This has been complied with and the said guarantee is still alive.
7. Vide letter dated 27.3.2009, the concessionaire has informed the NDMC that in view of NDMC's inability to make available 29 Group A sites, its demand to reduce the size of PTUs and also advertisement panel sizes in lucrative Group A sites, the agreement is no longer commercially viable from the point of view of the concessionaire due to loss of advertisement potential.
8. The concessionaire has informed the NDMC vide letter dated 27.3.2009 that it is not possible for him to continue work on the project, he being per force compelled to discontinue.
9. It is in this backdrop that vide note dated 18.5.2009, my opinion is sought on the following aspects:-

"In the above scenario, the committee feels that legal opinion be taken in the matter whether the project can be bifurcated between Group 'A' and Group 'B' at this stage as per the terms of the agreement so that if possible to do so, the same can be offered to the concessionaire in order to salvage the project to that extent in the best interest of both the parties, failing which the contract be terminated by the prescribed procedure. If the contract cannot be bifurcated then the same shall be processed for termination of the same by mutual understanding."
10. I am informed that the concessionaire is willing to withdraw completely from the agreement on various terms and conditions, including not filing any claims for the works executed under the contract, not taking recourse to any legal remedy open to it and undertaking to do so, not insisting on refund of its earnest money under the tender. The concessionaire however requests that the performance guarantee of Rs. 9.30 crore be released to it in consideration of the above. I am also informed that the work on the toilets is seriously delayed and that the said toilets have to be completed before the Commonwealth Games i.e. by October 2010.

11. As far as bifurcation of project in Group A and Group B is concerned; and offering the concessionaire group B projects is concerned, it is doubtful whether the concessionaire would accept only Group B projects when he has in fact refused the complete project in view of reduction of specific Group A toilets. As per the Council's decision dated 18.6.2008, no advertisements are to be allowed in B category toilets until and unless all category A toilets are completed. Bifurcating the project into Group A and Group B would go against the said decision of the Council. The seven bids received for Group A and B were processed on the basis of a total requirement for Group A and B and to now bifurcate the highest successful tenderer in that context into only Group B would in my opinion not be feasible.

The objective for doing so seems to be in order to salvage the project. The said bifurcation may however not prove to be beneficial in view of the clear and unequivocal stand taken by the concessionaire that removal of Group A sites makes the contract unworkable and economically viable for it. The contract dated 17.10.2008 has a provision for reduction of sites (Clause 8) but no provision for bifurcation.

My opinion is also sought as to, in the absence of bifurcation, whether the contract can be terminated by mutual understanding. Clauses 9 and 10 of the contract deal with events of default and termination. Clause 12 deals with the modes of dispute resolution including mediation and arbitration. The parties however wish to terminate the contract mutually. In my opinion, there is no impediment to the parties doing so as it is open to them to mutually rescind the original contract in terms of the provisions of the Contract Act, 1872. The effect of rescinding the said contract is that the original contract does not need to be performed. In this context, the provisions of Section 62 of the Contract Act are reproduced below:-

"62. Effect of novation, rescission, and alteration of contract – If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

12. ***In the light of the above, while the NDMC can terminate the contract on mutually acceptable terms, all relevant factors including loss of revenues, possibility of the contract being completed in the existing scenario versus fresh work on sites excluding the prime Group A sites and the compelling urgency of the approaching Commonwealth Games would have to be taken into account. It is in the light of such factors that the NDMC would weigh the offer of the concessionaire as contained in his letter dated 15.5.2009. A clear undertaking which incorporates all conditions of termination including not filing any litigation against the NDMC would need to be taken from the concessionaire. In view of this, once the terms of termination are found to be acceptable, it would not be open to the NDMC to retain the performance bank guarantee as the applicable contract has been rescinded. However, it may be clarified that there exists no blanket obligation on the part of NDMC to return the performance bank guarantee. The same is a decision based on an appraisal or relevant factors including possible losses to the NDMC being compensated. It is open to the NDMC to return the performance Bank Guarantee, whether it does so or not, as part of the conditions of termination is a decision to be taken by the NDMC itself.***

13. This opinion has been prepared on the basis of the records shown to me and instructions received from the NDMC.

5. Financial implications of the proposed project / subject:

The NDMC was likely to earn minimum revenue of Rs. 1.55 Crore per month with an annual increase of 5% for the next 10 (Ten) years. Also, the 113 toilets were to be renovated and handed back to NDMC at the end of concession period. Concessionaire had deposited the Performance security in the form of Bank Guarantee equivalent to Six (6) months concession fee.

Due to the reasons detailed above, the concessionaire is now decline to continue with the project and has requested for releasing the Bank Guarantee furnished by him on account of Performance Security to a tune of Rs. 9.30 crores. In addition to this, the concessionaire has deposited an amount of Rs. 6 lacs as Earnest Money which is still with the department.

Apart from the above, the concessionaire has carried out the civil structure work at a number of locations which also involves a considerable amount in terms of the finance.

6. Implementation schedule with timeliness for each stage including internal proceeding:

The concessionaire had started the work at various locations but the same was stopped due to one or the other reasons and as such none of the parties could adhere to the stipulated renovation period of 9 (Nine) months.

7. Comments of the Finance Deptt. on the subject

No comments

8. Comments of the deptt. on comments of Finance Deptt.

N.A.

9. Legal implications of the subject/project

All the advertisement panels were to be kept as per the guidelines issued by Hon'ble Supreme Court.

10. Details of previous Council Resolutions, existing law of Parliament and Assembly on the subject

The project was approved by the Council vide its Resolution No. 4 (E-4) dated 18.06.08.

11. Comments of the Law Deptt. on the subject/ project

As per the opinion of the Law, in the light of such factors detailed in the agenda the NDMC would weigh the offer of the concessionaire as contained in the letter dated 15.05.2009.

12. Comments of the deptt. on the comments of Law Deptt.

No comments

13. **Recommendations**

The agenda is placed before the Council for its consideration for terminating of the contract in the light of the opinion of the Law Department by withholding the Earnest Money amounting to Rs. 6 lacs and not making any payment to the concessionaire for the construction work executed by him at site. Since the concessionaire is requesting for the refund of his bank guarantee furnished by him in the form of Performance Guarantee, be released to him as the implementation of the project is being terminated subject to the following conditions –

The concessionaire shall furnish an undertaking for

- i) Not filing any claims for the works executed under the contract
- ii) Not taking recourse to any legal remedy open to it and undertaking to do so
- iii) Not insisting on refund of its earnest money under the tender

COUNCIL'S DECISION

After going through the facts brought on record as well as after hearing the views of NDMC's Standing Counsel, the Council directed the department to refer the matter to the Solicitor General of India / Addl. Solicitor General of India, through Law Department, for seeking their expert opinion in the instant case.

It was further directed that the proposal be put up before the Council for further orders, based on the advice of Additional Solicitor General / Solicitor General of India.

SUMMARY OF THE SURVEY REPORT

1. It is feasible to construct toilets of approved design on following **03** locations viz. 4/6, 5/7 & 39/66.
2. Feasible to construct toilets of smaller size at **05** locations viz. 2/4, 8/17, 9/19, 10/21, 14/28.
3. Feasible to construct toilets at **06** locations viz. 1/3, 31/58, 33/60, 25/51, 35/62, 7/16 subject to clearance from other agencies like Horticulture Department, Enforcement Department, Navyug School, PWD etc.
4. Feasible to construct toilets at **02** locations viz. 27/54, 16/38 by change of the site/location.
5. Not feasible to construct toilets at the **13** locations viz. 3/5, 6/9, 17/43, 18/44, 19/45, 20/46, 21/47, 22/48, 23/49, 24/50, 30/57, 32/59, 36/63.
6. Not feasible to construct the toilet at **01** location viz. 15/31 as already renovated under MLA Fund by Civil Engg. Deptt
7. Presently not feasible to construct the toilet at **04** location viz. 11/22, 12/23, 13/25, 29/56 due to Talkatora Stadium Development work/DMRC work.
8. Not feasible to construct the toilets at **05** location viz. 26/52 due to objection by Imperial Hotel, 28/55 objection by Punjab Govt. Kapurthala House, 34/61 objection by the RWA Chanakyapuri, 37/64 due to objection by VIP lobby, 38/65 objection by 1 South End Road owner / Spain Embassy.

Presently feasible /change of drawing to smaller size	3+5	08
Presently feasible subject to clearance /site reallocation	6+2	08
Presently not feasible / developed by MLA Fund / Development of Talkatora Stadium, DMRC / Objections by various agencies	13+1 +4+5	23
	Total	39