

## **INTRODUCTION**

The current issue of Legal Eye deals with revisions to **Request For Proposals in Infrastructure Projects** and issues involved thereto.

## **TOPICS**

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## **» REVISIONS TO REQUESTS FOR PROPOSAL**

Typically, an infrastructure project would run through various phases before the project completion. Each such phase has its own challenges, unique features and requirements. Amongst these, the Request For Proposals (referred to as RFP) assumes significance as, apart from setting the momentum, the RFP also is the first look document that specifies the project intricacies and entice the desired enthusiasm for the project on offer.

From contracting party' s (i.e. service recipient) perspective, lot of behind the scene effort is involved by the organization in converting the proposal into RFP. A typical RFP would *inter alia*, set out the organizational background, project specifications and schedules, bidding process, eligibility and above all, the economics involved.

Once the bidding and selection process is through, the RFP would typically gets converted in more robust project documentation, although the RFP, unless otherwise stated in these documents, continues to assume significance, at the least, till project completion. Legally speaking, a RFP would be a ' proposal' to contract till the time the parties contractually agree to make it binding.

Considering this, it becomes rather critical to analyze the implications of revisions to RFP and whether such change requires for the RFP to be re-introduced or should the change be covered in the project documentation. The contracting party would technically not face problem with revisions to RFP, as the RFPs/project documentation are usually widely worded to authorize the contracting party to introduce change, sometimes with obligations to intimate the contractor (i.e. service provider). However litigation cannot be ruled out from disgruntled corners especially when the change lacks rationality or impacts ability to discharge.

For instance, the High Court of Delhi in its judgment *Reliance Airports Developers P. Ltd v. Airports Authority of India and Ors. 2006 (V) AD (Delhi) 524* whilst relying on numerous judgments of

the Apex Court in similar cases, held that if the RFP provides ample authority to the Government of India and the Airport Authority of India (GOI/AAI) to amend and revise the RFP, there is no illegality arising from lack of power or jurisdiction on the part of the AAI/GOI in making a suitable amendments in the RFP wherein the amendments are considered necessary in public interest. The court also did not find merit in the argument that the modifications should have preceded with notice the bidders where the power to make modifications is absolute. This judgment has been relied upon by the High Court of Delhi once again in its recent judgment in the matter of *Era Infra Engineering Ltd vs. DDA and others* decided on January 8, 2010 while discussing its views on the level of judicial intervention to be adhered when the administrative processes is in question.

Changes in RFP may not always be introduced by the contracting party and the contractor may also, at times, be suggest revisions to RFP which could either be by volition or compulsion. However, the difference being that, the contractor would usually not be authorized to act *suo moto* (as in case where the change is suggested by contracting party) and at times, the changes to be agreed, could be coupled with monetary penalty to the contractor. Notwithstanding this, undue impediments on ability to change RFP, could at times prove detrimental to the project at hand.

In nutshell, there is no statute on revisions to RFP. However, the thumb rule followed as per industry practice, is that change in projects specifications having a bearing on the selection criteria, could result in the RFP being re-introduced. Such scenario may, at times, results in the contractor being disqualified for the upgraded project unless he scales up his caliber to the renewed eligibility criteria. This could also result in inordinate delays in project implementation or commissioning. The manner of keeping such issues out, is careful and tactful discussions on the change with the parties and ensuring, to the extent possible, that the basic framework of the RFP is maintained vis-à-vis the project.

In case of any clarifications please contact our Infrastructure Team.

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