Thiruvananthapuram International Airport privatisation: Getting RoFR right

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If only the Government of Kerala (GoK) or Kerala State Industrial Development Corporation (KSIDC) had paid attention to the auction process in Indian Premier League (IPL), the controversy over the state government not winning the contract for managing Thiruvananthapuram International Airport could have been avoided. The GoK could have agreed to participate in an auction, but should not have agreed to the proviso that it will be eligible for the right of first refusal (RoFR) only if its bid is within 10% of the winning bid.

Civil aviation minister Hardeep Puri tweeted, “If Kerala Govt is against privatisation, then why did it participate in the bidding process? State Govt was given a fair chance & Right of First Refusal (RoFR) if their bid was within 10% below the range of highest bid. However, they bid 19.64 % below.” The point is not whether the Kerala government is pro- or anti-privatisation. The point is that Kerala should have bargained to have the option of matching the winning bid. The price of a commodity is discovered via the bids submitted by other participants, and the entity with RoFR can essentially sit out of the bidding process. What Kerala agreed to was not a standard RoFR since it not only had to participate but also had to be within 10% of the winning bid to be eligible for matching the winning bid.

A good example of RoFR is the Right-to-Match (RTM) card which was introduced in the Indian Premier League (IPL) 2018 auction. The RTM was introduced to help a team reacquire a player who had played for the said team in the last season. Consider the case of Shikar Dhawan. He had played for Hyderabad Sunrisers the earlier year. Kings XI Punjab placed the winning bid of Rs 5.2 crore for Dhawan. At that point, Hyderabad Sunrisers used their RTM and ensured that Dhawan continued to play for them. In the 2018 IPL auction, Mumbai Indians, Chennai Super Kings, Rajasthan Royals all used RTM to retain Kerion Pollard, Faf Du Plessis and Ajinkya Rahane, respectively. A total of 19 players were bought by different franchises using RTM. None of them had to bid for these players in order to be eligible to use their RTM card.

But then, the Supreme Court of India had ruled participation in the tender as a necessary condition for exercising RoFR. The case was in the context of an unfinished road project unlike the contract for airport in Kerala. Even if the state government is required to participate in the auction, the stipulation that the state's bid had to be 'within 10% below the range of highest bid' is against the spirit of RoFR. The objective of the auction is to facilitate price discovery.

Adani Enterprises offered per passenger fee of Rs 168 while KSIDC and GMR Airport offered Rs 135 and Rs 63 per passenger, respectively. At this point, the logic behind IPL auction process should take over: KSIDC will have the RTM the offer made by Adani Enterprises. If the state government believes that the winning bid of Rs 168 is a viable one, then it should match the offer rather than litigate. Otherwise, it should simply walk away.

Courtesy the IPL, cricket aficionados today are conversant with intricacies of an auction process. If only Kerala had understood certain aspects of IPL auction, they might have had a better chance of being selected as the concessionaire for operations, management and development of Thiruvananthapuram airport.

Another lesson from IPL is that teams fight tooth and nail to retain the players they see value and have invested in. Since the Kerala government has given land for the airport, it should have gone to the court to ensure that its interests are not compromised. One might argue that the compensation for this is separate from that of the passenger fee, and the two issues should not be mixed up. But then, is the fact that the winning bid is higher by nearly 20% attributable to the land provided by the state government?

Recent developments suggest that the issue of RoFR has not been thought through despite instances of it being used as a policy tool to promote Make-in-India. A case in point is the 2019 guidelines of the shipping ministry that gave priority in chartering to Made-in-India ships. But, the notification was contested and later withdrawn. Readers might recall another case from recent times that hogged the headlines, Indian Hotels Company Ltd vs New Delhi Municipal Council. The case pertained to the renewal of the lease for Taj Mahal hotel located in south Delhi.

There appears to be a temptation to tinker with RoFR depending on the specifics of the case. Instead, we need to allow auction theory to provide us guidance rather than go by intuition or gut instinct. First, economic theory would allay fears that, with an RoFR, other parties might not bid. This is why we gave the example of RTM card used in IPL auction. Second, if a tender stipulates requiring a minimum number of bidders, the entity with RoFR should ideally not be considered as a part of the process of price discovery.

Third, RoFR is not a negotiated settlement as the auction process helps set the price. But there are still some questions where there are no clear-cut answers. In the auction, Adani Enterprises or any other entity only had to outbid KSIDC by 10%, the pre-specified bid-difference clause. Would entities bid differently depending on whether there is a bid-difference clause or not? Does the size of the bid-difference clause matter? In instances like the Indian Hotels case where the incumbent had a perceived advantage over any new entrant, how should RoFR be structured? If the government is planning to use RoFR as a policy instrument, we need a larger and informed discussion on the issue.

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