

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 11.12.2013

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W.P.(C) 6984/2013 & CM No.15110/2013

**SHAPOORJI PALLONJI ROADS PVT. LTD.
AND ANR.**

.....Petitioners

versus

UNION OF INDIA AND ORS.

.....Respondents

Advocates who appeared in this case:

For the Petitioners : Mr N. K. Kaul, Sr. Advocate with
Mr Akhil Sibal, Mr Aslam Ahmed,
Mr Balbit Singh Jamwal and Mr Anoj Menon.

For the Respondents : Mr Rajeev Mehra, ASG with
Mr Ankur Chhibber for R-1 & 2.
Mr Mukul Rohtagi and Mr Sandeep Sethi,
Sr. Advocates with Ms Diya Kapur,
Mr S. Trehan, Ms Manjira Dasgupta and
Mr Arjun S. Puri, for R-3 and 5.
Mr Rajiv Nayar, Sr. Advocate with
Ms Niti Dixit, Mr Vidur Bhatia and
Ms Samiksha for R-4.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. The petitioners have filed the present writ petition challenging, *inter alia*, the decision of the Border Roads Organisation, respondent no.2 herein (hereinafter referred as the 'BRO') in awarding the Letter of Award dated 12.03.2013 (hereinafter referred as the 'impugned LOA') in favour of

respondent no.3 for the project referred to as Z-Morh tunnel on National Highway No. 1 (Srinagar Sonmarg Gumri Road) in the State of Jammu & Kashmir on Design, Build, Finance, Operate and Transfer Annuity Basis. The petitioners have also impugned the action of the BRO in executing the Concession Agreement with respondent no.5, a company incorporated for the purpose of executing the project (hereinafter referred to as the 'SPV').

2. The BRO, is engaged in the development and maintenance of roads and bridges in the border areas of India. The BRO issued a "Request for Qualification" (hereinafter referred to as the 'RFQ') on 16.04.2012, inviting pre-qualification proposals from interested bidders/parties for the development, operation and maintenance of the Z-Morh tunnel on National Highway No. 1 (Srinagar Sonmarg Gumri Road) in the State of Jammu & Kashmir (hereinafter referred to as the 'project') on Design, Build, Finance, Operate and Transfer Annuity basis through Public-Private Partnership.

3. The petitioners have alleged that respondent no.3 has violated the conditions of the RFQ and thus, was disqualified for being considered for award of the contract for the project. Consequently, it is contended that, the impugned LOA in favour of respondent no.3 and the Concession Agreement between respondent no. 2 and the SPV should be set aside and the petitioner, being the second lowest bidder, should be awarded the contract for the project.

4. As per clause 1.2.1 of RFQ, the BRO adopted a two stage process (collectively referred to as the 'Bidding Process') for selection of the bidder for award of the contract for implementing the project. The first stage (the

‘Qualification Stage’) of the process involved screening the applicants/bidders for determining whether the bidders possessed the qualifications, as specified in the RFQ for undertaking the project. All the interested parties, who qualified the Qualification Stage, would be eligible for participation in the second stage of the bidding process (the ‘Bid Stage’) as contemplated in the Request For Proposal (hereinafter referred to as the ‘RFP’).

5. The Project was approved, subject to receipt of approval from the Cabinet Committee on Infrastructure, by the Public Private Partnership Appraisal Committee of the Department of Economic Affairs, Ministry of Finance, Government of India in its 52nd & 53rd meetings held on 10.07.2012 & 16.07.2012. On 14.09.2012, the Cabinet Committee on Infrastructure approved the Project. In the meanwhile, twenty two applicants applied for being considered as qualified for submitting their bids for the project. On 03.08.2012, the BRO announced the list of pre-qualified bidders based on the qualification criteria set out in the RFQ. Seventeen out of the total twenty two applicants, which included the petitioner as well as respondent no. 3 and respondent no. 4, were declared pre-qualified for submission of price bids and participating in the Bid Stage of the bidding process. In August 2012, the BRO issued the RPF for the participation of the bidders who had cleared the Qualification Stage.

6. The petitioner, respondent nos. 3 and respondent no. 4 were amongst the eight bidders, out of seventeen pre-qualified bidders, who submitted their price bids and the same were opened on 16.10.2012. Respondent no.3, who had quoted ₹234.70 crores as Annuity, was the lowest bidder.

Petitioner 3, with a quote of ₹257 crores, was the second lowest bidder and the respondent no.4 was the third lowest bidder (₹267.2 crores).

7. The Petitioner sent a letter dated 04.02.2013 to the BRO for confirming the extension of validity of its bid until March 31, 2013. Respondent no.4 also issued a letter dated 27.02.2013 to the BRO expressing its willingness to extend the validity of its bid, however, no response was received from the BRO. The validity of the bids submitted by all bidders, except respondent no.3 and the Petitioner, expired on 13.02.2013 on the completion of 120 days from the Bid Due Date in terms of Clause 1.2.3 of the RFQ.

8. By way of the impugned LOA dated 12.03.2013 issued to respondent no.3 by the BRO, respondent no.3 was declared as the "Selected Bidder". Respondent no.3 being a single entity applicant was required to incorporate a Special Purpose Vehicle in terms of the RFP and RFQ for the purpose of domiciling the Project in an independent entity carrying on no other business or activity other than those related to the project. It was stated in the impugned LOA that the Special Purpose Vehicle would be the concessionaire for the Project and a Concession Agreement would be entered into between the BRO and such Special Purpose Vehicle. Respondent no. 5 was incorporated as the Special Purpose Vehicle (SPV) for the purposes of executing the project and exercising the attendant rights in relation to the project. The concession agreement between the BRO and the Special Purpose Vehicle was executed on 30.04.2013.

9. The petitioner sent a letter dated 26.04.2013 and 18.06.2013 to respondent no. 2 and a letter dated 28.06.2013 to respondent no. 1 alleging that there were irregularities and misrepresentation on the part of the petitioner which violated the terms and conditions of the bid documents and requested respondent no. 2 to cancel the impugned LOA.

10. Briefly stated the undisputed facts that according to the petitioner rendered the respondent no.3 as ineligible for being awarded the contract for execution of the project are as under:-

10.1 That on 14.03.2013 a committee of the Board of Directors of respondent no.4 passed a resolution granting the corporate authority for respondent no.4 to subscribe to the extent of 14.5% of the equity capital of the SPV. The resolution of respondent no. 4 also authorised taking steps for incorporation of the SPV.

10.2 A committee of the Board of Directors of respondent no.3 passed a resolution on 15.03.2013 authorizing respondent no.3 to take steps for incorporation of the SPV and also subscribe to the extent of 85.5% of the paid up equity share capital of the SPV.

10.3 Respondent nos.3 and 4 entered into a Memorandum of Understanding dated 15.03.2013 which, *inter-alia*, provided for capitalization of the SPV to the extent of 14.5% by respondent no.4 and 85.5% by respondent no.3. The Memorandum of Understanding also included certain covenants which provided certain additional rights (other than those stemming from subscription to the equity capital) to respondent

no.4 in relation to the affairs of the SPV and the project to be executed by the SPV.

10.4 On 20.03.2013, respondent nos.3 and 4 subscribed to the Memorandum and Articles of Association of the SPV. The learned counsel for the petitioner also pointed out that the SPV was incorporated as a public company and, consequently, required a minimum of seven members to subscribe to the Memorandum and Articles of Association. Accordingly, five individuals, who were employees of respondent no.4, also subscribed to the Memorandum and Articles of Association of the SPV for the purposes of complying with the provisions of the Companies Act, 1956.

10.5 The petitioners contended that the Annual Report of respondent no.4 for the year ended 31.03.2013 indicated that a sum of Rs.100 crores had already been paid to acquire the rights to subscribe to the shares of the SPV and the same was reflected as a capital advance to be amortized over a period of time. Mr Nayar, the learned Senior Counsel appearing on behalf of respondent no. 4 stated that this amount of ₹100 crores was paid by respondent no. 4 on 29.03.2013.

10.6 After the Concession Agreement was executed between the SPV and the BRO on 30.04.2013, the SPV sent a letter dated 03.05.2013 to BRO seeking approval for increasing the equity stake of respondent no.4 from 14.5% to 49%

10.7 Respondent no. 3 had, earlier in February 2012, approached the Corporate Debt Restructuring Cell for restructuring repayments of debts and a scheme in this regard had been approved.

11. According to the petitioner, the facts as briefly stated above indicate that substantial interest in the project was divested by respondent no.3 in favour of respondent no.4. It was further emphasised that this was done prior to the conclusion of the bidding process as, according to the petitioners, the bidding process would conclude on execution of the Concession Agreement and not at the stage of signing of the LOA. It is contended that since, respondent no.4 was an “Applicant” at the stage of signing of the LOA, the formation of the SPV by the respondent nos.3 & 4 collectively at that stage and transfer of funds from respondent no 4 to respondent no. 3 and/or respondent no. 5 were in direct violation of the terms and conditions of the RFQ and the RFP. It is also contended by the petitioners that the respondents were obliged to adhere to the terms and conditions as stipulated by them. It is urged that the association and the arrangement between respondent no. 3 and 4 rendered respondent no. 3 ineligible for being awarded the contract for the project. In support of the above contention, the counsel has placed reliance on the decision of a Division bench of this court in Navinya Buildcon Private Limited v. Union of India & Ors.: 2009 VI AD (Delhi) 839 and also on the decision of the Supreme Court in B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. And Ors.: (2006) 11 SCC 548.

12. The learned counsel for respondent nos. 3 and 5 submitted that since the project was one of considerable national importance, the decisions regarding the same were outside purview of judicial review under Article 226 of the Constitution of India. It was contended that courts would not interfere with the decision of the executive regarding projects of national

importance as the same would not be in the larger public interest. The counsel also referred to the decision of the Supreme Court in *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd. and Ors.*: (1997) 1 SCC 738, in support of their contention.

13. The learned counsel for the respondents also controverted the submission that there had been any violation of the terms of the RFQ or the RFP on the part of respondent no. 3, as contended by the petitioners. The RFQ was issued on 16.04.2012 and after screening all the applicants a list of seventeen bidders who were found to be pre-qualified was announced on 03.08.2012. Eight pre-qualified bidders submitted their bids which were opened on 16.10.2012. In terms of the RFP, the validity of the price bid only extended for a period of 120 days from the date of submission of the price bids. Accordingly, all the bids were valid only till 13.02.2013. In terms of the RFP, the price bid of respondent no.3, who was found to be lowest bidder (L-1), and the price bid of the petitioner, who was the second lowest bidder (L-II), were required to be extended. Although, respondent no.4 made a request for being permitted to extend the validity of its bid, the said request was not responded to by respondent nos.1 and 2. It is, therefore, contended that by 13.02.2013, the bidding process had ended insofar as respondent no.4 was concerned and irrespective of the further outcome of the bidding process, respondent no.4 would not be eligible for being awarded the contract. It was pointed out that all the events, which according to the petitioner violated the terms of the RFQ and RFP, had taken place after the bids of respondent no.4 had lapsed and qua respondent no.4 the bidding process had concluded. It is, thus, contended that any

association between respondent nos.3 and 4 or any funding that respondent no.3 or SPV may have obtained from respondent no.4 would be of no relevance as far as the bidding process is concerned.

14. It is contended by the learned senior counsel for respondent no.3 that the court does not sit in appeal, over decisions relating to contractual matters, under Article 226 of the Constitution of India. The court may interfere, under Article 226 of the Constitution, only if the decision is arbitrary, *mala fide* and shocks the conscience of the court. In support of the above contention, the counsel has placed reliance on the decision of the Supreme Court in **Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors.**: (1999) 1 SCC 492. It is further submitted that the High Court will not examine the bid document clause by clause. The courts would interfere with the decision of the state only if it is found that the actions of the state are arbitrary or capricious.

15. We have heard the learned counsel for the parties at length.

16. At the outset, we must express our inability to accept the contention that in respect of decisions concerning projects of national importance, the Courts would refrain from exercising powers of judicial review under Article 226 of the Constitution of India. It is indisputable that the scope of judicial review under Article 226 of the Constitution is limited to the decision making process and to examine whether a decision is unreasonable, arbitrary, capricious or *mala fide*. In absence of any allegation in this regard or any finding of illegality, the High Courts will not interfere with the decisions of the executive in exercise of the powers

under Article 226 of the Constitution of India. However, the exercise of jurisdiction under Article 226 is not concerned with the importance of the subject matter of the decisions made by the executive. In the event, a decision is found to be arbitrary or that the decision making process is found to be flawed, the Courts would interfere with the decisions irrespective of the subject matter of the decision and notwithstanding that the same concerns a project of national importance. Article 14 of the Constitution of India strikes at the root of arbitrariness and if a decision is found to be arbitrary the same would be liable to be interfered with under Article 226 of the Constitution of India, notwithstanding that the administrative decision concerns a matter of vital national importance. It cannot be accepted that any distinction is required to be drawn, in respect of the scope of judicial review, on the basis of the subject matter of the decision. The decision in *Asia Foundation & Construction Ltd. (supra)* also does not support the contention as canvassed by the respondent nos. 3 and 5. In that decision, the Supreme Court had reiterated the, already well established, principles which circumscribe the scope of judicial review under Article 226 of the Constitution of India. After noticing the decision in **Tata Cellular v. Union of India: (1994) 6 SCC 651**, the Supreme Court held as under:-

“10. Therefore, through the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose.”

The Supreme Court in *Tata Cellular (supra)* had also summarized the grounds for judicial review of an administrative action as under:-

“77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers,
2. committed an error of law,
3. committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taking in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;
- (ii) Irrationality, namely, Wednesbury unreasonableness.
- (iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time.”

There can be no quarrel as to the grounds for judicial review, as are enunciated in the aforementioned decisions. And, the same must be applied while examining the challenge which is the subject matter of the present petition.

17. The allegation that respondent no.3 is disqualified on account of violating the terms of the RFQ and the RFP, is at the core of the controversy in the present case. It is, thus, necessary for us to examine the relevant terms of the RFQ which are reproduced hereunder:

“2.2 Eligibility of Applicants

2.2.1 For determining the eligibility of Applicants for their pre-qualification hereunder, the following shall apply:

- (a) The Applicant for pre-qualification may be a single entity or a group of entities (the "**Consortium**"), coming together to implement the Project. However, no applicant applying individually or as a member of a Consortium, as the case may be, can be member of another Applicant. The term Applicant used herein would apply to both a single entity and a Consortium.
- (b) An Applicant may be a natural person, private entity, or any combination of them with a formal intent to enter into an agreement or under an existing agreement to form a Consortium. A Consortium shall be eligible for consideration subject to the conditions set out in Clause 2.2.6 below.
- (c) An Applicant shall not have a conflict of interest (the "**Conflict of Interest**") that affects the Bidding Process. Any Applicant found to have a Conflict of Interest shall be disqualified. An Applicant shall be deemed to have a Conflict of Interest affecting the Bidding Process, if:
 - (i) the Applicant, its Member or Associate (or any constituent thereof) and any other Applicant, its Member or any Associate thereof (or any constituent thereof) have common controlling shareholders or other ownership interest; provided that this disqualification shall not apply in cases where the direct or indirect shareholding of an

Applicant, its Member or an Associate thereof (or any shareholder thereof having a shareholding of not more than twenty five per cent of the paid up and subscribed share capital of such Applicant, Member or Associate, as the case may be) in the other Applicant, its Member or Associate, as the case may be, is not more than twenty five per cent of the paid up and subscribed share capital thereof; provided further that this disqualification shall not apply to any ownership by a bank, insurance company, pension fund or a public financial institution referred to in section 4A of the Companies Act 1956. For the purposes of this Clause 2.2.1(c), indirect shareholding held through one or more intermediate persons shall be computed as follows: (aa) where any intermediary is controlled by a person through management control or otherwise, the entire shareholding held by such controlled intermediary in any other person (the "**Subject Person**") shall be taken into account for computing the shareholding of such controlling person in the Subject Person; and (bb) subject always to sub-clause (aa) above, where a person does not exercise control over an intermediary, which has shareholding in the Subject Person, the computation of indirect shareholding of such person in the Subject Person shall be undertaken on a proportionate basis; provided, however, that no such shareholding shall be reckoned under this sub-clause (bb) if the shareholding of such person in the intermediary is less than 26% of the subscribed and paid up equity shareholding of such intermediary; or

- (ii) a constituent of such Applicant is also a constituent of another Applicant; or
- (iii) such Applicant, or any Associate thereof receives or has received any direct or indirect subsidy, grant, concessional loan or subordinated debt from

any other Applicant, or any Associate thereof or has provided any such subsidy, grant, concessional loan or subordinated debt to any other Applicant, its Member or any Associate thereof; or

(iv) such Applicant has the same legal representative for purposes of this Application as any other Applicant; or

(v) such Applicant, or any Associate thereof has a relationship with another Applicant, or any Associate thereof, directly or through common third party/ parties, that puts either or both of them in a position to have access to each others' information about, or to influence the Application of either or each other; or

(vi) such Applicant, or any Associate thereof has participated as a consultant to the Authority in the preparation of any documents, design or technical specifications of the Project.

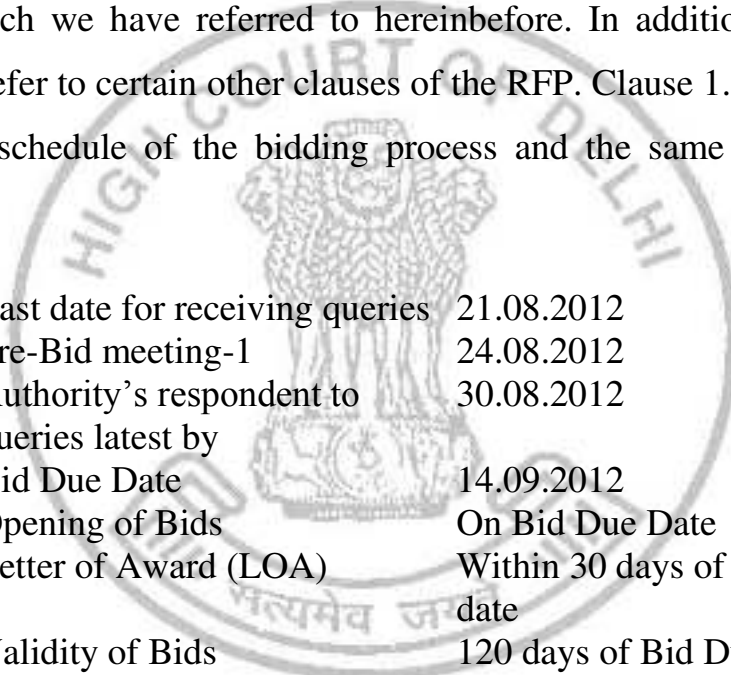
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18. Our attention was also drawn to clause 2.7.3 of RFQ which specifies that an Applicant would be disqualified in the event the applicant has not met any pre-qualification conditions or has made material misrepresentation or has given any materially incorrect or false information. The learned counsel for the petitioner also pointed out that in terms of clause 4.1 of RFQ, the application of any applicant would be liable to be rejected if the applicant had, directly or indirectly or through an agent, engaged in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or a restrictive practice in the Bidding Process. The expression restrictive practice was defined in Clause 4.3 (e) of the RFQ as under:-

“(e) “restrictive practice” means forming a cartel or arriving at any understanding or arrangement among Applicants with the objective of restricting or manipulating a full and fair competition in the Bidding Process.”

19. Clause 2.2.6 of RFQ provided that where the applicant was a single entity, the applicant may be required to form an appropriate SPV to execute the Concession Agreement and implement the Project.

20. The RFP also contained clauses to the same effect as the clauses of the RFQ, which we have referred to hereinbefore. In addition, it is also expedient to refer to certain other clauses of the RFP. Clause 1.3 of the RFP provided the schedule of the bidding process and the same is extracted below:-



“1.	Last date for receiving queries	21.08.2012
2.	Pre-Bid meeting-1	24.08.2012
3.	Authority’s respondent to queries latest by	30.08.2012
4.	Bid Due Date	14.09.2012
5.	Opening of Bids	On Bid Due Date
6.	Letter of Award (LOA)	Within 30 days of Bid due date
7.	Validity of Bids	120 days of Bid Due Date
8.	Signing of Concession Agreement	Within 30 days of award of LOA.”

21. Clause 2.1.1 of RFP proscribed any bidder for submitting more than one bid for the Project. A bidder bidding individually or as a member of a consortium was not entitled to submit another bid either individually or as a member of any consortium, as the case may be. Clause 2.1.16 of the RFP stated that the RFP was not transferable. Clause 2.17 of RFP provided that bids would be valid for a period of not less than 120 (one hundred and

twenty) days from the Bid Due Date. The validity of bids could also be extended by mutual consent of the respective bidders and the BRO.

22. Clause 3.3.1 of the RFP specified that the bidder whose bid was adjudged as responsive in terms of Clause 3.2.1 and who had quoted the lowest Annuity to be paid by the BRO would be declared as the selected bidder.

23. It is contended that subscription of shares of the SPV by respondent no.4 and receipt of funds by respondent no.3 and/or respondent no.5 from respondent no.4 would constitute a conflict of interest as contemplated in Clause 2.2.1 of the RFQ. Clause 2.2.1(c)(iii) of the RFQ provides that an applicant would be deemed to have a conflict of interest affecting the bidding process, if a constituent of such applicant was also a constituent of another applicant. A conflict of interest would also occur where an applicant received funds directly or indirectly from another applicant or an associate thereof. Clause 2.2.1(c)(v) of the RFQ further provided that in cases where an applicant had a relationship with another applicant either directly or through any associate which put either of the applicants in a position to access the other applicant's information or to influence the application of either of the applicants, then in such cases there would be deemed to be a conflict of interest which would adversely affect the bidding process.

24. The terms and conditions as specified in the RFQ and the RFP insofar as they related to conflict of interest (referred to as 'conflict of interest clauses') must be read in the context of the purpose for which the

conflict of interest clauses were inserted in the RFQ and the RFP. It is apparent from a plain reading that the conflict of interest clauses had been placed in the RFP and RFQ to avoid any adverse effect on the competitive aspect of the bidding process. The purpose of including the said clauses in the bid documents was to ensure that the competitive bidding *inter se* the applicants was not subverted or in any manner diluted by associations or relationship being formed between two applicants which could possibly result in affecting their decision during the participation in the competitive bidding process.

25. It follows from the above, that the essential question that needs to be addressed is whether the conflict of interest clauses of the RFQ/RFP have any relevance subsequent to the financial bids having been opened and the selection of the successful bidder(s) having been concluded.

26. As stated hereinbefore, the bids were opened on 16.10.2012 and the evaluation process was completed soon thereafter. All the bids other than that of respondent no.3 and the petitioner herein (L-I and L-II) were not extended beyond the period of 120 days from the submission of the price bid. Indisputably, the bid of respondent no.4 was, therefore, no longer valid after 13.02.2013 and respondent no.4 could no longer be stated to be in the fray for obtaining the concession/contract for the project. The respondent no.3 was conclusively selected as the successful bidder. In the event respondent no.3 did not fulfil the requisite formalities or if for any other reason the agreement with the respondent no.3/5 was not executed, the contract could be awarded to the petitioner as the petitioner was the bidder with the second lowest bid. The RFP contemplated such an eventuality and

for that purpose had provided for the extension of validity of the bid of the second lowest bidder. However, in no circumstances could the bid of respondent no.4 be considered after 13.02.2013 as the same was no longer valid. In this view of the matter respondent no.4 ceased to be in a position of a competitor who was competing with petitioner or respondent no.3 for the purpose of obtaining the contract for implementing the project. The bidding process, as envisaged under the RFQ or the RFP, would no longer afford respondent no.4 any possibility of participating in the bidding process or having any interest therein. Thus, the question of any conflict of interest between respondent no.3 and respondent no.4, in relation to the bidding process, did not exist after 13.02.2013. In our view, the question of any relationship and/or arrangement entered into by respondent nos.3 and respondent no. 4, *inter se*, after 13.02.2013, would have no bearing on the competitive bidding process conducted under the RFP and the RFQ. Admittedly, respondent no.4 had neither invested any funds with respondent no.3 and/or respondent no.5 nor had entered into any arrangement/ relationship, whatsoever, with the said respondent(s) prior to 13.02.2013. Prior to respondent no. 3 being declared a successful bidder, both respondent nos.3 and 4 were rival competitors who were pursuing their independent bids for the project. Respondent no.4 has, apparently, chosen to collaborate with respondent no.3 for the purposes of the project only after respondent no.4 had been conclusively ousted from the bidding process.

27. In view of our conclusion that the conflict of interest clauses of the RFQ/RFP had no application or relevance in so far as respondent no.4 is

concerned after the validity of its bids had expired, we are unable to hold that the relationship between respondent nos.3 and 4 in any manner would fall foul of the conflict of interest clauses of the RFP or the RFQ. In this view of the matter, there is no question of respondent no.3 incurring any disqualification on account of its association with respondent no.4 which was, apparently, formed only after 13.02.2013.

28. Before concluding, we must also examine the contention that respondent no.3 was not financially sound and thus, its bids could not be considered. It was pointed out by the petitioner that the respondent no.3 had approached the CDR Cell of the Reserve Bank of India for re-structuring of its debts payable to banks and institutions. This, according to the petitioner, clearly indicated that respondent no.3 was not financially sound. In this regard, it is not disputed that the CDR package has already been sanctioned and the re-structuring of the debt has already been accepted by the concerned banks/financial institutions and, therefore, in our view the fact that the respondent no.3 had approached the CDR Cell in February 2012 would not be relevant. More importantly, the RFQ itself provides for a criteria in relation to the financial net worth of the company which was required to be satisfied by an applicant at the Qualification Stage. Clause 2.2.2(B) of the RFQ provided that in order to qualify for bidding an applicant must have a minimum net worth of ₹757.50 crores. The relevant clause of the RFQ is quoted below:-

"2.2.2 To be eligible for pre-qualification and short-listing, an Applicant shall fulfil the following conditions of eligibility:

(A) xxxx xxxx xxxx xxxx

(B) **Financial Capacity:** The Applicant shall have a minimum Net Worth (the “**Financial Capacity**”) of Rs. 757.50 crore (Rs. seven hundred fifty seven crore and fifty lakh) at the close of the preceding financial year."

29. It is not disputed that the applicant qualifies this criteria and its net worth exceeds the minimum net-worth as specified. We are, thus, unable to accept the contention that respondent no.3 should be disqualified on account of its alleged financial position.

30. We, accordingly, dismiss the present petition and the pending application. The interim order is vacated. The parties are left to bear their own costs.

VIBHU BAKHRU, J

BADAR DURREZ AHMED, J

DECEMBER 11, 2013
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