

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 07.05.2018

+ **W.P.(C) 3251/2018, C.M. APPL.12826-12827/2018**

**EFKON INDIA PRIVATE LIMITED AND STRABAG AG
CONSORTIUM, AN UNINCORPORATED JOINT VENTURE**

..... Petitioner

Through: Sh. Dayan Krishnan, Sr. Advocate with Ms.
Amrita Narayan, Sh. Akshay Gupta and Ms. Aakashi
Lodha, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA.... Respondent

Through: Sh. Sandeep Sethi, Sr. Advocate with Ms.
Gunjan Sinha Jain, Advocate and Sh. Rajeev Yadav, GM
(T) and Sh. Abdullah, Dy. Manager (T), for NHAI.

+ **W.P.(C) 3607/2018, C.M. APPL.14272-73/2018, 17517/2018**

**IBI GROUP UK LTD. AND IBI GROUP (CONSORTIUM) AND
ANR.**

..... Petitioners

Through: Sh. Abhinav Vashisht, Sr. Advocate with Sh.
Milanka Chaudhary, Sh. Abhinav Agnihotri, Ms. Priya
and Ms. Abhilasha Singh, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ORS.

.... Respondents

Through: Ms. Gunjan Sinha Jain and Ms. Soumya
Priyadarshini, Advocates, for NHAI/Respondent No.1.
Sh. Devashish Bharuka and Sh. Ravi Bharuka,
Advocates, for Respondent No.2.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A.K. CHAWLA

MR. JUSTICE S. RAVINDRA BHAT

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W.P.(C) 3251/2018 & W.P.(C) 3607/2018

1. This common judgment will dispose of two writ petitioners' challenge to the rejection of their tenders, furnished in response to the invitation to bid, issued by the respondent National Highways Authority of India (hereafter "NHAI"). The tenders were invited for the purpose of installation of an Advanced Traffic Management System (ATMS) and Toll Management System (TMS). To fund the project in part, a loan was given by the Japan International Cooperation Agency (JICA), towards the cost of Eastern Peripheral Expressway ITS Installation Project. NHAI invited sealed tenders from eligible bidders for the Design, Supply, Installation, Testing, Commissioning of ATMS and TMS of the Eastern Peripheral Expressway (hereinafter referred to as "the project"). The unsuccessful bidders, who are petitioners in this case are M/s. Efkon India Private Limited and Strabag AG Consortium [in W.P.(C) 3251/2018 hereafter called "Efkon"] and M/s. IBI Group UK Ltd and IBI Group Consortium [in W.P.(C) 3607/2018- hereafter called "IBI"].

2. The brief facts are that scope of work tendered by NHAI included supply, laying, installation and testing of Fibre Optic Cable along the Eastern Peripheral Expressway on both sides, in addition to Operation & Maintenance of ATMS for a period of Four (4) years from the date of a Taking-Over Certificate of ATMS. Further scope of works is described in the Employer's Requirements of the Bid Document. The bidding documents

consisted among others a standard pre-qualification Document under Japanese ODA Loans by JICA, dated October 2012 and Notice Inviting Tender (NIT) dated 23.06.2017. The tender was to be conducted by way of submission of Technical Bid and a Financial Bid through e-procurement portal. The tender documents also contained a mandatory Bid Security of ₹ 4,52,00,000/- (Rupees Four Crores and Fifty Two Lakhs only) which had to be submitted at the time of submission of technical bid.

3. The schedule of bidding process (Clause 2 NIT) stipulated invitation of RFP on 23.06.2017; bid due date was 22.08.2017; opening of technical bids was on 23.08.2017; declaration of eligible/qualified bidders was 20 days from the opening of Technical Bids; opening of Financial Bid was 7 days after the declaration of qualified bidders. The letter of award of contract was 10 days after the opening of financial bids and signing of Agreement is 10 days after the LOA. The two petitioners, (the petitioner in W.P.(C) 3251/2018 referred to hereafter as “Efkon” and the petitioner in W.P.(C) 3607/2018 hereafter referred to as “IBI Group”) submitted their bids. NHAI sought clarifications from Efkon by its letter dated 26.10.2017, which were responded to with replies. Efkon, by letter dated 04.11.2017 replied to all the queries of NHAI. By letter dated 18.01.2018 NHAI sought extension of validity of the bid upto 21.02.2018 which was acceded to by Efkon’s letter dated 19.01.2018, confirming bid extension upto 21.02.2018. The petitioner Efkon also extended bid validity till 08.03.2018, by its letter-dated 16.02.2018. Since nothing was heard about the bid, Efkon flagged concerns in its letter to NHAI’s Chairman dated 26.10.2017. At this stage, NHAI asked all bidders to extend their bid validity and that of the bank guarantees

furnished till 30.04.2018 and 31.05.2018 respectively. This request too was acceded to. It is stated that in these circumstances, Efkon was shocked to receive the result of technical evaluation addressed by NHAI by its letter dated 02.04.2018 stating that the Petitioner has not qualified technically. It was furthermore surprising to note that no reasons were assigned, based on which such a decision was taken by NHAI. The letter proposed to open the financial bid on 03.04.2018 at 11:30 A.M. It is contended that in terms of the schedule under Notice Clause 2 of the tender conditions, the financial bids were to be opened only after seven days from the date of declaration of qualified bidders, to provide disqualified bidders an opportunity to redress their grievances before NHAI and to follow due and transparent bidding process.

4. Mr. Dayan Krishnan, learned senior counsel for Efkon argues that the breach of the tender conditions, which required NHAI to open the financial bids a week after intimating result of technical bids, was illegal and arbitrary. It, therefore, addressed an e-mail to NHAI, questioning its disqualification in the technical qualification round and further, seeking reasons based on which NHAI had disqualified it. The opening of the financial bid almost immediately after evaluating the technical bids is also characterized as illegal. It is also argued that NHAI is further obliged under Clause 2.9 of the NIT to display the result of technical evaluation on the web portal for 7 days, including reasons for non-responsiveness, if any, and the financial bid shall only be opened thereafter.

5. Efkon argues that the technical evaluation and rejection of its technical bid is arbitrary and in gross abuse of the powers vested in NHAI, which has

acted without any authority of law. It is urged that non-arbitrariness is a facet of equality and the lack of reasons why the petitioner's bid was rejected also results in violation of principles of natural justice. It is urged that NHAI's haste in trying to eliminate the bidders without stating any reasons or opportunity to be heard and proceeding with the Tender process in derogation to the Notice Inviting Tender, smacks of *malafides* and it displays highhandedness by the NHAI. It is contended that the record belies the NHAI's position with respect to Efkons inability to fulfill the eligibility criteria, in terms of prior experience, because it had been awarded and had completed installation of other toll management systems. Efkons also argues that when it sought to place material documents, in the form of certificates, which supported its claim for prior experience, NHAI wrongly refused to take them on record and evaluate them, though the tender conditions permitted such a course. On the other hand, to favour other bidders, NHAI entertained similar requests by rival tenderers.

6. Mr. Dayan Krishnan, learned senior counsel also submitted that besides, there is nothing in the NIT conditions or relevant tender documents to distinguish between one toll management system and another. It is urged that the electronic based multiple lane toll collection systems, which the petitioners are currently using in the contracts and concessions awarded in many parts of the country reflects a distance based calculation and collection of revenue. The variances, which NHAI seeks to highlight, are mere alternatives, which in no way point to radical differences between one toll-based system and another.

7. It was also submitted on behalf of Efkon that no condition in the tender documents, NIT or the Instructions to Bidders (ITB) clarified that experience of subsidiaries, sister concerns or such associate companies could not be claimed. In the circumstances, the position of NHAI that the experience claimed by the petitioner Efkon, could not *per se* be excluded.

8. Mr. Abhinav Vashisht, learned senior counsel, stated that IBI's bid confirmed to all the evaluation and qualification criteria which was specified in the Request For Proposal (Invitation for Bids) *inter alia* relating to issues such as (a) Personnel; (b) Equipment; (c) Experience of Operation and management; and (d) Technical documents such as design concept of Central Processing System, Event Generation Method, Layout of Operation Room etc. In spite of IBI meeting all eligibility criteria, NHAI disqualified it and also arbitrarily did not provide any reasons for its decisions.

9. IDI alleges that besides, the bids of other tenderers, i.e., M/s Sice Vaan JV and M/s Larsen & Toubro Ltd despite being non responsive, were entertained. It is submitted that in terms of Clause 32.2 of the tender documents, determination of the qualification of the bidders is to be based upon an examination of the documentary evidence of the bidders' qualifications submitted by the bidder pursuant to Clause 15 of the ITB, which requires the bidder to submit the necessary information in terms of the Bidding Forms. In terms of Clause 33.1 of the ITB, the determination of responsiveness of the technical bid of any bidder is based on the contents of the bid itself. Thus, in order to evaluate the responsiveness of the bid, all the documents submitted by the bidders are to be scrutinized including the Bidding Forms. It is submitted further that in terms of Clause 22.2 of the

ITB, all pages of the bid where entries are made by the bidder are required to be signed or initialed by the person signing the bid on behalf of the Bidder. It is submitted that the Bidding Forms (which specify the entire eligibility and qualifying criteria of the bidder) submitted by Vaan along with its technical bid has neither been signed nor initialed by any person on its behalf. Mr. Vashisht submitted that in terms of Clause 2.5 of the Invitation for Bids certain minimum qualifying criteria had been specified for sub-contractors/manufacturers for providing/supplying services described therein. Under the said provision, the sub-contractors and manufacturers with respect to the services mentioned therein are required to have at least two similar contract experience within 5 years. In terms of the corrigendum dated 31.08.2017, the said provision was clarified by NHAI that with respect to toll collection system, the sub-contractors and manufacturers are required to have the said contract experience with respect to distance based toll collection system only. It is submitted that in the bid submitted by M/S Vaan and M/s Larsen & Toubro, the sub-contractor/manufacturer mentioned by them with respect to the supply or service of toll-collection system, did not have the requisite qualification mandated under Clause 2.5. In this regard it is urged that the said provision clarifies that failure to comply with the requirement as contained therein, will result in rejection of the sub-contractor.

10. IDI also argues that in terms of Clause 12 of the “Employers Requirements” forming part of the tender documents which specifies the technical specifications to be complied with by the bidders in their technical bids, the technical proposal/bid which is to be submitted by the bidders is to include a statement of compliance along with the specifications indicating

whether the proposed equipment comply with the specified requirements. In the present case, M/s Vaan while submitting its technical proposal did not include the said statement of compliance as required by the said provision.

11. Besides, IDI adopted Efkon's argument with respect to the unreasoned decision, communicated in its case, by NHAI stating that it violated prescribed norms. Likewise, serious exception was taken to the fact that the financial bids were opened less than seven days after opening of the technical bids.

12. NHAI urges that the Eastern Peripheral Expressway (EPE) was conceptualized by the Supreme Court with the laudable objective of reducing vehicular pollution in the National Capital Territory of Delhi. The construction of Eastern Peripheral Expressway (EPE) was entrusted to the Central Government by the order of the Supreme Court, in *M.C. Mehta v. Union of India*, W.P.(C) 13029/1985. The Central Government in turn entrusted the task to NHAI. It is submitted that the Supreme Court of India and the Environment Pollution (Prevention and Control) Authority (EPCA) formed under the *Environment Protection Act, 1986*, closely monitor construction and progress of the project highway. The NHAI refers to a notification dated 30th February, 2006 issued by the Union Ministry of Road Transport and Highways tasking it to construct the Eastern Peripheral Expressway (EPE). It is further argued that alignment of the EPE starts near Kundli (km 36.083 on NH-1), traverses to cross river Yamuna (EPE Ch. Km. 12.600) crosses NH-57 at km 15.360 (near Mawikalan), NH-58 km at 44.500 (near Duhai), NH-24 at km 52.190 (near Dasna), NH-91 at km 72.725 (near Beel Akbarpur), Kasna-Sikandra road (near Sirsa), Taj Expressway (near village Jaganpur Afjalpur) at 91,900, river Yamuna (EPE chainage km

102,600), Atali-Chainsa Road (near village Maujpur) and ends at Palwal (km 64.330 on NH-2). It is further submitted that the Supreme Court has directed the completion of the EPE in the strictly time bound manner and delay in the implementation of the project of which the Intelligent Transportation System is an integral part would cause serious harm of the large public interest involved in its commencement.

13. NHAI explains that the EPE is a toll road of dual 3-lane in standard sections with total length of around 135 Kms. To attain efficient operation and maintenance of the EPE and to secure the traffic safety, the Answering Respondent has introduced Advance Traffic Management System (ATMS) and Toll Management System (TMS). Elaborating on the NIT in this case, it is submitted that the process involves a two stage (technical and financial) evaluation of the bids that are based on the Standard Prequalification Documents under the Japanese ODA Loans by JICA (of July, 2015). JICA appointed a Projected Management Consultant, M/s Nippon KOEI for the preparation of Bidding documents and the evaluation of the bids received for the Project. In addition, NHAI has appointed a high profile evaluation team including an outside expert member from IIT Kanpur for the project.

14. Mr. Sandeep Sethi, learned Additional Solicitor General, for NHAI argued that the Evaluation Committee on 26.09.2017 opened four bids for the subject project. Elaborating, he states that the evaluation committee by its meeting dated 28.11.2017 recommended the disqualification of the Petitioner here based on the Evaluation report and presentation submitted by the JICA appointed Technical Consultant, M/s Nippon KOEI. It is further stated that the petitioner's bid was rejected, after receiving due approval of

the competent Authority to the recommendations of the M/s Nippon KOEI owing to the non-compliance/non-fulfillment of requirements as per the Qualification of Bidders specified in Clause 32, Section 1 “Instructions to Bidders (ITB)” and Section 3 “Evaluation and Qualification Criteria” of Part 1 (Bidding Procedure) of Bidding Document. That condition reads as follows:-

“2.4.2 (a1) Specific Experience in TMS:

Minimum Experience of Distance Based Toll Management System with more than five (5) toll plazas, forty (40) lanes and ten (10) ETC lanes on one (1) stretch that have been satisfactorily and substantially completed as a prime contractor (single entity or JV member), management company of management contractor in last 10 years.”

15. The learned ASG explained that Nippon was of the view that that the documentary evidence given by Efkon did not prove its claim. The bidder, said NHAI’s counsel, provided a toll notification that does not mention that the project relied on had adopted distance based tolling and that the notification only mentioned per KM toll rate and the hike in the toll rate for each category of the vehicle. The bidder was asked to submit the tariff plan, in which the toll fees payable to each toll plaza for each category of vehicle is mentioned. The tariff plan also mentions the distance for which toll is collected at each toll plaza. In terms of details submitted by the bidder, there are three main line toll plazas and two ramps on the Yamuna Expressway Project. The commuter has the option to pay for one toll plaza or whole stretch at the first toll plaza and can pass through rest of the toll plazas without paying again, but he/she will have to stop to show the receipt. Further, there are entry/exits at locations other than toll plaza locations also,

from where the user can enter/exit in the mid-way whereas toll management system does not exist at each entry/exits. Thus, the use is not changed as per the actual distance covered. Therefore, argued counsel, the project does not qualify for the distance-based toll Management System, and hence the bidder does not comply the requirement. Furthermore, NHAI urged that the petitioner submitted a provisional completion certificate dated 20.09.17 (80% work completion) for a new project. This project was not considered during re-evaluation, as this project was not claimed in the original bid.

16. It was submitted on behalf of NHAI that as far as condition 2.4.2 (b), i.e. experience in key activities are concerned, it is urged that JICA's view was that the conditions in the tender required the bidding party to have fulfilled the parameters and that in the petitioner's case, with respect to the enumerated works (ETC System, Camera Monitoring system with at least 25 cameras, ATCC system, VMS Dissemination System with, at least, 5 VMS and Internet Dissemination System). Efkon, however, had claimed experience of its subsidiary to fulfill the Technical Experience. It was submitted that the experience claimed by the petitioner was not in conformity with provisions of the Bid Document, as the subsidiary company was not a consortium member for the EPE ITS Project. Turning next to operation and maintenance (Clause 2.4.2) it is urged that the minimum Experience as prime contractor (single entity or JV member), management company, management contractor or Sub-contractor for a period of three years in Operation and Maintenance of Advanced Traffic Management System of Highway with one (1) Management Centre and more than one hundred (100) km length as a ITS Maintenance Operator in last 10 years was

essential. The Nippon view, accepted by NHAI here too was that Efkon had claimed its subsidiary's experience, a claim not based on provisions of the bid document as the concerned subsidiary company was not the consortium member for EPE ITS Project. Hence this bidder does not qualify the requirement. It is furthermore submitted that after approval of NHAI's competent authority, Efkon's bid was disqualified and not considered for further Evaluation. The Evaluation Committee in its meeting held on 30.01.2018 recommended the submission of the technical evaluation report to JICA for review and concurrence as per the "*Guidelines for procurement under Japanese ODA loans*". Accordingly, by letter dated 05.02.2018 the Final Evaluation Report on Technical Proposal of Bids submitted by JICA appointed Technical Consultant, M/s Nippon KOEI and the Minutes of Meeting of the Evaluation Committee dated 30.01.2018 to JICA for review and concurrence. JICA concurred and permitted with the further bidding process. In these circumstances, the results of bidding were posted on NHAI's e-portal on 02.04.2018 and the financial bids of the two technically qualified bidders were opened on 03.04.2018.

17. NHAI further argues that the record clearly establishes that after following the complete and intensive process of technical evaluation, the result of the technical evaluation was published by order dated 02.04.2018. Vide the said letter it was duly communicated to the Petitioner as well as the other disqualified bidders that the Financial Bids of the Technically Qualified bidders shall be opened on 03.04.2018 at 11.30 hours. The learned ASG submitted that on 03.04.2018, NHAI opened the Financial Bids of the technically qualified bidders. Upon opening of the financial bid, M/s SICE-

Vaan JV has been found to be the lowest bidder (L1) with a quote price of ₹ 234.29 crores. Refuting the submission of the petitioners with respect to violation of Clause 2 as unmerited it is argued that the schedule mentioned in Clause 2 is only tentative in nature and date of declaration of opening of the financial bid could have been advanced in term of Clause 27.7 and 8 of Option A, Section I, Instruction to Bidders relating to bid opening. It is also submitted that the alleged violation of Clause 2.9 of NIT is also an untenable argument because that term is not mandatory but merely directory. Non-compliance of that condition does not vitiate the tender process. This is sought to be supported by Clauses 6.1 and 6.2 of the ITB, which provides that the Invitation for Bids issued by the Employer is not part of the Bidding Documents. As regards the alleged non-compliance of Clause 2.9 the ASG argued that at the highest is merely a procedural aberration, which does not at all strike at root of the tender process. Such technical objections must necessarily be rejected in face of undisputed position that the timely commencement of EPE with the installation of the Integrated Transportation System is in the larger public interest.

18. NHAI argues as wrong the complaint that the impugned letter dated 02.04.2018 was issued by it in a unilateral and arbitrary manner or in utter violation of the principles of natural justice or without affording a show cause to the petitioner or without affording an opportunity of hearing to the petitioner. It is submitted that as per petitioner's own showing the NHAI sought various clarifications from the petitioner before passing the impugned order. Furthermore, the complaint of an unreasoned bid rejection is also denied on the ground that NHAI's letter dated 05.04.2018 duly

communicated the grounds for rejection of technical bid for the subject project.

19. With respect to IDI, it was submitted that the question of notifying the reasons did not arise, and that requirement had to be fulfilled, after the tender results were made known. As regards its complaint that the reasons for its rejection were not forthcoming, it is highlighted that the NHAI's position is that though *per se* IDI's bid was not disqualified, the detailed technical evaluation according to the prescribed criteria, in the ITB Clause 35 its tender was not acceptable as it failed to achieve the minimum qualifying marks. During the hearing, with reference to the evaluation of the technical expert's report, this submission was elaborated with reference to the said document. It was contended that IDI failed to achieve the minimum prescribed benchmark, in that evaluation; the process was fair and objective and received the scrutiny of JICA and the High profile committee (of NHAI) and consequently IDI has no cause to complain.

20. The learned ASG argued that since the project funding agency is JICA, which has employed Nippon KOEI as a technical consultant, the tender evaluation documents prepared by those entities are confidential and proprietary; nevertheless, the reasons for rejection were made known to the concerned parties. During the course of hearings, NHAI produced the relevant evaluation report and made a copy of it available to the court.

Analysis and Conclusions

21. It is apparent that the petitioners (Efkon and IDI) have certain common grounds of attack. Both argue that rejection of their bids was unreasoned and, therefore, illegal; likewise both allege that opening the financial bid without waiting for a week, contrary to tender conditions

rendered the award illegal. The third common ground of attack is that documents of Vaan were accepted beyond the last date of bid submission, whereas their requests in that regard were turned down, or their documents so submitted, ignored. Efkon further alleges that rejection of its bid on the ground that it did not fulfill the experience criteria is plainly erroneous; it also states that the refusal to take into account the experience of its consortium partner, is unjustified. IDI's argument is that though it is deemed to possess eligibility, the *rationale* for rejection of its bid is unknown.

22. The most important challenge, on which both petitions principally rest, are the fairness and objectivity of the tender evaluation process. The evaluation report, which is relied on by NHAI is an exhaustive document, comprising 182 pages. It details the strengths and shortfalls of each tendering party and evaluates each criteria. In the case of Efkon, the observations in the report, pertinently are that its documentary evidence did not establish its claim with respect to specific experience. According to the committee, the documents were silent whether the projects executed by it (or ongoing contracts) had adopted a distance based tolling. The notification (of the statutory authorities relied on in support of experience, by Efkon) mentioned *per KM* toll rate and increase in toll rate for different categories of vehicles. The committee was of the opinion that the details furnished by Efkon, especially relating to the Yamuna Expressway Project showed that there were 3 main line toll plazas and 2 ramp toll plazas on the Project; the commuter can opt to pay for one toll plaza or whole stretch at the first toll plaza and can pass through the rest of the plaza without paying again; in which case, she or he would have to stop to show the receipt. Importantly,

unmetered entry mid way into the expressway, is permitted which would not capture the actual distance traversed.

23. During the hearing Efkon had endeavoured to argue that its existing toll management systems were no different from what is tendered for by NHAI; the latter, naturally argued otherwise. Both parties produced schematic diagrams (prepared to scale) to demonstrate their points of view. NHAI's argument is that the toll management systems, which the bidders have to demonstrate experience of, should present an accurate system where payment for the *actual distance travelled* is collected. Its drawings precisely demonstrate this; if a commuter enters the highway at point A, that point (of entry) should be monitored so as to ensure that a toll ticket is generated; the payment would be collected, upon displaying the ticket, at the exit point. This system, it is emphasized, has the merit of at once *plugging revenue* leaks- which occur when long toll stretches are unmetered or where entry points are unmanned or unregulated and the toll plaza is located at a considerable distance (like in Efkon's case) and one toll fee is collected. The relevant part of the tender conditions (Section 16, Toll Management Systems) reads as follows:

“The Toll Management System to be implemented along the Project shall be a closed system and drivers will be charged with a toll corresponding with the distance travelled. Toll fee shall be collected from all motorized vehicles using the expressway with the exception of VIP vehicles, emergency services, high personages and military convoys and other exemptions as per the NHAI guidelines.

Three type of toll collection method shall be adopted; Electronic Toll Collection (ETC), Touch &Go (T&G), and Manual. ETC shall be installed at dedicated ETC lanes as per IHMCL Fastag ETC design and guidelines, while all other

lanes shall be hybrid lanes equipped with manual, ETC and Touch & Go facilities. IHMCL Fastag ETC shall use prepaid payment system in line with the current guidelines of IHMCL. Fastag ETC system and Tag shall also comply with the relevant NPCI standards (guidelines) adopted by NHAI/IHMCL.

Manual lanes at the entry toll plazas will be boothless and equipped with Ticket dispensing machines for issuing transit tickets to the commuters entering the expressway. Postpaid payment system may be introduced in future to the toll management system under the Contract, only if NHAI guidelines are rolled out for postpaid payment during the execution of this contract.

Though the ETC system shall be in line with the PAN India Fastag ETC program of IHMCL, it shall also be capable of simultaneously processing local ETC tags issued from EPE POS. The local ETC tags shall be processed using the ETC tagTID.”

24. NHAI's stand is that though *per se* it was not disqualified, IDI's detailed technical evaluation according to the prescribed criteria, in the ITB Clause 32 its tender was not acceptable as it failed to achieve the minimum qualifying marks. NHAI elaborates that the in terms of "Qualification of Bidders" specified in Section 1, Clause 32, "instructions to Bidders (ITB)" and Section 3 "Evaluation and Qualification Criteria" of Part 1 (Bidding Procedure) of Bidding Document, IDI did not achieve minimum points as per requirements of clause 1.1.3 (b) of Section 3. The report, relied on by NHAI (and which was given to the court) discloses that this is a four-step evaluation. This culminates in awarding marks to the competing bidders, 31 different parameters, based on a document evaluation. The parameters include various fields, such as the central processing systems concept; event generation method and event list; Event management method, Exchange information method with linked Different highway operator; Layout of

operation room in traffic management centre; contents made of large display parameters; process of distance based RFID ETC and HHT system; and Operation and Maintenance service Plan for ATMs. According to the evaluation parameters, any eligible bidder has to secure 80% marks to be considered for the financial rounds. The total marks are 31. The document reveals that IDI was awarded 15 marks (just below 50%) and thus was rendered ineligible.

25. As far as non consideration of the consortium partner, in Efkon's case is concerned, the expert noted and remarked that *"the bidder has claimed experience of M5 Motorway, Hungary. This project cannot be considered as the contractor/Concessionaire is SPV 100% subsidiary of Strabag AG and is not the consortium member in EPE ITS Installation project Bid."* Taking into account Efkon's reply, the expert report stated that the bidder *"claimed experience of their subsidiary to fulfill the Technical Experience. The experience claimed by the bidder is not in conformity to the provisions of the Bid Document, as the subsidiary company is not the consortium member for EPE ITS Project. Hence this bidder does not qualify the requirement"*

27. In regard to judicial review in matters concerning tender invitations by public authorities, considerable previous jurisprudence was revisited in *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216. After noticing several previous decisions, the Court stated as follows:

"Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or

whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.”

26. In a later judgment, *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.* & Anr 2016 (16) SCC 818 the Supreme Court held as follows:-

“14.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

.....

.....

24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The

tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

27. In judicial review a court, under Article 226 of the Constitution reviews the decision making process, its legality and procedural regularity and not the merits of the decision of the executive agency. The principal decision maker is the administrative or public agency. That courts might view tender conditions - or a particular stipulation differently (from the public agency) is insufficient reason for interference. *Afcons Infrastructure (supra)* is clear on this aspect; it instructs that courts are to defer to executive decisions, largely unless manifest *mala fides* or procedural irregularity or illegality is established. Similarly, the Supreme Court, in *Montecarlo Ltd v National Thermal Power Corporation Ltd* 2016 (15) SCC 272 stated that:

“Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

Again, in *JSW Infrastructure Ltd v Kakinada Seaports Ltd* 2017 (4) SCC 170 and *Central Coalfields Ltd v SLL-SML (JV Consortium)* 2016 (8) SCC 622, it was held that tender documents and stipulations are to be construed in the context of their background and that no condition is to be treated as redundant or superfluous. Again, most recently in *Municipal Corporation Ujjain v BVG Ltd & Ors* 2018 SCC Online 278, the court emphasized the general “off limits” nature of writ jurisdiction, and stressed the need to defer to executive decision makers, in the following words:

“In arriving at a commercial decision, the considerations which are of paramount importance are commercial considerations. These would include, inter alia, the price at which the party is willing to work; whether the goods or services offered are of the requisite specifications; and whether the person tendering the bid has the ability to deliver the goods or services as per the specifications. It is also by now well settled that the authorities/State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a

relaxation. The State, its corporations, instrumentalities and agencies have a public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise them only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere.”

28. If these principles are kept in mind, the considerations which weighed with NHAI in rejecting as ineligible Efkon's bid, and rejecting IDI's bid as not achieving the required threshold of evaluation cannot be faulted. The court cannot decide whether the differences in the tendered works and the systems operationalized by Efkon are major or minor for the simple reason that the court is ill equipped to do so. Furthermore, that exercise does not fall within the remit of writ jurisdiction. The differences highlighted by NHAI, i.e that the tender specifications demand a greater accuracy and precise metering of the distance, which the bidder (Efkon) lacks, cannot be faulted as manifestly arbitrary or unreasonable- which is the only acceptable standard of judicial review of the merits of the decision. As far as not accepting the experience of the subsidiary goes, NHAI acted within its rights in rejecting the claim for including that experience.

29. The issues of procedural irregularity which are highlighted by both bidders, i.e unreasoned orders and that the financial bids were opened the day after technical bid evaluation was announced (as against the condition that it should be opened 7 days after such evaluation), in the opinion of this court, are not so substantial as to result in tender rejection. At best they

reveal non conformity with some inessential normative conditions and cannot strike at the core of the decision making process itself; they relate to post evaluation periods.

30. The other procedural irregularity, which is highlighted, is the acceptance of documents of one tender, post tender submission (Vaan) and denial of similar treatment to the petitioners. NHAI explains in its counter affidavit, that under the tender, it could call for clarifications from all the bidders arising out of the documents submitted with the bid. It is further part of transparency that the Employer in terms of the ITB duly considers the clarifications. During technical evaluation, multiple clarifications on Technical Bids were sought from all the bidders during the course of evaluation. Evidently, three times the clarifications were sought from the Petitioner. Similarly, Vaan submitted technical documents; however, since Form T-7- Format for submission of Non-compliance Matrix for Part-2 Employers Requirement was not submitted, a clarification was sought from that bidder by letter-dated 28.11.2017. Thereafter, Vaan by letter dated 01.12.2017 furnished the requisite clarification, along with Matrix of Non-compliance, which was been found to be satisfactory by JICA appointed Technical consultant M/s Nippon KOEI. NHAI submits that the documents on the basis of which non-compliance matrix was to be drawn out are part of the bid, and hence the Vaan's bid was considered. NHAI submits that it is not as if absence of the non-compliance matrix even according to the petitioners would have resulted in altering Vaan's technical documents; it characterizes the objection as hyper technical and not germane to the evaluation made.

31. In the considered opinion of the court, since clarifications were sought

by NHAI on several occasions from all bidders, including the petitioners, the objection as to submission of documents later by Vaan is insubstantial. The documents on record and NHAI's explanations reveal that based on Vaan's essential documents, a certain "non-compliance" matrix- was sought, which was furnished. These fell within the jurisdiction of NHAI, to seek clarification. There is no proven irregularity in this procedure adopted by the NHAI.

32. For the above reasons, it is held that the rejection of the petitioners' bids were neither arbitrary, nor procedurally unfair, illegal or lacking in *bona fides*. It cannot also be held to be manifestly unreasonable or so arbitrary that no reasonable man or agency, placed in a like situation would have arrived at such decision. The writ petitions are consequently dismissed without order on costs.



S. RAVINDRA BHAT
(JUDGE)

A.K. CHAWLA
(JUDGE)

MAY 07, 2018