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

% Judgment Reserved on: 12th February, 2015
Judgment Delivered on: 02nd March, 2015

+ WP(C) 8517/2014 & CM Nos.19676/2014, 21025/2014

SUPREME INFRASTRUCTURE INDIA LIMITED AND ANR. ....Appellants

versus

UNION OF INDIA & ANR. ....Respondents

<u>Advocates who appeared in this case:</u>

For the Appellants:	Mr Aman Lekhi, Sr Advocate with Mr Puneet Tanjea & Ms Kopal Shrivastava
For the Respondent:	Mr Jaswinder Singh

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE SANJEEV SACHDEVA

<u>JUDGMENT</u>

<u>SANJEEV SACHDEVA, J.</u>

1. The petitioner (Supreme Infrastructure India Limited) has impugned the letter dated 07.11.2014 issued by the respondent No. 2 rejecting the eligibility bid of the petitioner and for a direction to consider the bid of the petitioner for the project "Construction of Additional office Complex for the Supreme Court of India adjoining

Pragati Maidan, New Delhi : Package-III plus balance work of package-I: Building work including balance work of RCC structure & basement, finishing work, internal & external Services (civil) & External development work (civil)".

2. As per the petitioner, the respondent No. 2 in 2012 had floated a tender for construction of additional office complex for Supreme Court of India. The Petitioner was awarded the contract in October 2012. In July, 2014 on account of various issues the contract was terminated.

3. The respondent No. 2 floated the above tender and the petitioner submitted a bid on 21.10.2014. By the impugned letter dated 07.11.2014, the respondent No.2 has rejected the bid of the petitioner due to the following reasons:-

(i) Scanned copy of EMD not uploaded with the bid documents.

(ii) Requirement of one completed work of Rs.173.50 Crore with Govt. bodies is not satisfied.

(iii) Solvency certificate submitted by you is not current.

(iv) Your previous track record for this project.

4. With regard to the first reason for rejection i.e. "(i) scanned coy of EMD not uploaded with the bid documents", the contention of the

petitioners is that the EMD was duly uploaded. All details such as demand draft number, date and details of the issuing Branch were mentioned on the online portal. The petitioner has further contended that the hard copy of the EMD was available and could be submitted. It is contended by the learned senior counsel for the petitioner that no prejudice is caused to the respondent No. 2 because as per the tender document the hard copy of the EMD was required to be submitted within a week of the opening of the tender. It is contended that the petitioner, on 24.07.2014, had written a letter to the respondent No. 2 that they felt that the scanned copy of the EMD might not have got attached at the time of uploading and, as such, a hard copy of the EMD, the details of which had been uploaded, was sent to the respondent No. 2.

5. With regard to the second ground of rejection i.e. "(ii) requirement of one completed work of Rs.173.50 crores with Govt. bodies is not satisfied", the stand of the petitioner is that the petitioner duly met the tender condition. The petitioner had submitted the following certificates issued by the concerned government authority and has contended as under:-

> "(a) Kasheli Bridge work, completed cost of work is Rs.273.53 cr, executed under PWD, Govt. of Maharashtra (State Govt.), wherein certificate was issued by the department to the petitioner as prime contractor which was attached with the bid.

> (b) Wada- Bhiwandi road work, completed cost of Rs.306.72 cr, executed under PWD, Govt. of Maharashtra (State Govt.), wherein certificate was issued by the department to the petitioner as prime contractor which was attached with the Bid. We would like to clear that this work is under BOT and as per tender condition, company have to form separate SPV Company for execution of the work. The Concessionaire 'M/s. Supreme Manor Wada Bhiwandi Infrastructure Pvt. Ltd.' is a subsidiary of 'Supreme Infrastructure Bot Private Ltd.' which in turn is a subsidiary of the Petitioner. "

Both the above works are stated to have been executed under Govt. bodies and the completed cost of the said works is more than the required amount of Rs.173.50 cr.

6. The learned senior counsel for the petitioners further contended that though the said works were awarded to the special purpose vehicle companies created by the petitioner itself for the purposes of award of the contract and the contract was actually executed by the petitioner as the prime contractor. It is submitted that at the time when the first tender had been floated by the respondent No. 2 in 2012, the petitioner had submitted these very certificates to establish its eligibility and the respondent No. 2 had accepted the same and had found the petitioner eligible.

7. With regard to the third condition i.e. "(iii) should have a Solvency of Rs.173.50 crores, (scanned copy of the original solvency

to be uploaded)", the stand of the petitioner as per its letter dated 10.11.2014 is as under:-

> "As per the above requirement, we have already uploaded our two solvency certificates issued by our State Bank of India, Worli, Mumbai. One Solvency is for Rs.285.00 cr, dated 09.10.2013, and second Solvency is for Rs.335.00 cr, dated 23.01.2013. (Copy of the solvency certificates are again attached herewith for your ready reference) Both the Solvency has been issued by our Banker and same has been uploaded with our Bid.
>
> Regarding the current solvency, we are unable to understand that why this clarification has been asked for when the documents do not mentioned the requirement of any validity for particular date."

8. It is submitted by the learned senior counsel for the petitioner that though the solvency certificate submitted was over 12 months old, it would not make any difference, as there was no condition that the solvency certificate should be a current certificate. It is further submitted that the petitioner had duly furnished and submitted the financial documents and the respondent No. 2 could have satisfied itself about the solvency of the petitioner.

9. With regard to the fourth ground of rejection i.e. "(iv) your previous track record for this project", it is submitted that the petitioner's past performance on the same project was not commensurate on account of reasons which were beyond their control in terms of so many factors, some of which were technical. Without

prejudice, it is submitted that the previous track record of the petitioner was irrelevant for the purposes of considering the eligibility for the present tender inasmuch as the respondent had neither prohibited the petitioner from participating nor blacklisted the petitioner.

10. The learned senior counsel for the petitioners further contended that the petitioner had been disqualified not for any of the reasons that have been specified but had been disqualified for extraneous circumstances. It is contended that the respondent No. 2 never wanted to award the contract to the petitioner and, as such, had found excuses to technically disqualify the petitioner.

11. Per contra, with regard to the first reason i.e. "(i) scanned coy of EMD not uploaded with the bid documents", the learned counsel for the respondents submitted that it is admitted by the petitioner itself, that the scanned copy of the EMD was not uploaded and that is why the petitioner had itself written a letter on 27.10.2014 stating that it felt that the scanned copy of the EMD might not have got attached. He further submitted that audit trail details filed by the petitioner itself show that the EMD was not uploaded. Learned counsel for the respondent further pointed out that for every document that was uploaded by the petitioner, the audit trail details show the name of the file and the size of the file that had been uploaded and attached with the tender document, whereas for the trail detail of the EMD, there is

no name of the file or size mentioned which establishes that the EMD was not uploaded. He contended that furnishing of the scanned copy of the earnest money deposit was a precondition for the consideration of the bid.

12. With regard to the second reason "(ii) requirement of one completed work of Rs.173.50 crores with Govt. bodies is not satisfied", learned counsel for the respondent submitted that the petitioner did not meet the eligibility criteria, as he had not completed the requisite works of the stipulated value during the specified period. He submitted that the petitioner for the 2012 tender had submitted certificates for three works, two of the works being the ones which are relied upon by the petitioner for this tender and the third work of Rs.113.23 crores. It is submitted that since the petitioner had qualified solely on the basis of the third work, the respondent No. 2 had ignored the certificates submitted by the petitioner for two other works, the certificates of which have been relied upon by the petitioner for this work. He submitted that though the value of the third work mentioned was slightly lower but as per the tender condition, when brought to the current costing level by enhancing the actual value of work at simple rate of 7% per annum, it met the eligibility criteria prescribed under the 2012 tender and, as such, the petitioner qualified for the same. With regard to the two certificates submitted by the petitioner with the present tender, learned counsel contended that the said certificates do

not show that the work was awarded to the petitioner rather they clearly show that the works were awarded to some third party and the petitioner has been shown only as a prime contractor. It is contended that the certificates do not clearly specify role of the petitioner or the value of the work executed by the petitioner.

13. With regard to the third reason mentioned i.e. "(iii) should have a Solvency of Rs.173.50 crores, (scanned copy of the original solvency to be uploaded)", learned counsel contended that it was a precondition of the tender that the bidder must submit the solvency certificate. It is contended that the petitioner had not submitted any current solvency certificate and the certificates submitted were over 12 months old. It is further submitted that the petitioner had, at the time of the execution of the work awarded by the 2012 tender, by letters dated 20.07.2014 and 12.08.2014 stated that on account of acute economic crises and stringent banking regulations it was experiencing serious cash flow constraints and had suffered a huge impact of low cash flows even from banks regarding their working capital on account of which there were some delays.

14. Learned counsel for the respondent contended that the very purpose of obtaining a solvency certificate was that the Respondent should be able to assess the capacity of the Bidder to execute the work and ensure that the work does not suffer on account of any economic crisis or cash flow crunch on the part of the Bidder. It is contended

that, as the petitioner had itself mentioned that it was facing cash flow constraints and did not submit any solvency certificate for the period post the letter written by it to the respondent No. 2, the petitioner had been disqualified.

15. With regard to the fourth reason i.e. "(iv) your previous track record for this project", learned counsel for the respondent submitted that the past conduct and failure on the part of the petitioner to execute the work awarded under the 2012 contract was a relevant consideration as the petitioner has failed to execute the work. He submitted that there was no bias on the part of the respondent No. 2 as otherwise the respondent No. 2 would not have permitted the petitioner to participate.

16. After hearing learned counsel for the parties and examining their respective contentions, we are of the considered opinion that at least two out of the four reasons provided by the respondent No. 2 for disqualifying the Petitioner are clearly made out. All the four reasons need not be satisfied for the disqualification of the petitioner, even if any one of the reasons given for disqualification is made out, it would be sufficient to disqualify the petitioner.

17. With regard to the reason "(ii) requirement of one completed work of Rs.173.50 crores with Govt. bodies is not satisfied", we find that the two certificates submitted by the petitioner to show that the

petitioner satisfies the eligibility criteria do not satisfy the requirement. The first certificate submitted by the petitioner is with regard to the "Four Lanning of Wada Bhiwandi Road". The said certificate has been issued by the Executive Engineer, Thane (PW), Division Thane and it shows that the said work was awarded to M/s. Supreme Manor Wada Bhiwandi Infrastructure Pvt. Ltd. The petitioner (M/s Supreme Infrastructure India Ltd.) has been shown as a prime contractor in the certificate. The certificate neither shows the role of the petitioner in the said project except for showing it as a Prime Contractor, nor does it show the value of the work executed by the petitioner. The second certificate is a certificate dated 10.04.2012 issued by the Office Executive Engineer, Spl. Project (PW) Division Thane. The said certificate is in respect of "Construction of South and North, Kasheli Bridge". The said certificate shows that the work had been awarded to M/s. Keti Construction JV Sangam (India) Ltd. The petitioner has been shown again as a prime contractor. This certificate also does not clearly spell out the role of the petitioner in the project or the value of work executed by the petitioner.

18. The requirement of submitting certificates along with bid document is to enable the Respondent to ascertain whether the bidder qualifies for the bid or not. The certificates submitted should be clear and unambiguous and should clearly establish that the Bidder satisfies the eligibility criteria. No deeper scrutiny, enquiry or clarification

should be required on the part of the Respondent to ascertain whether the eligibility criteria are met or not. In case a certificate is ambiguous or unclear, the authority would be within its right to refuse to consider the said certificate. In the present case, the certificates do not clearly establish that the petitioner fulfills the eligibility criteria and for ascertaining the eligibility of the petitioner, a deeper examination, scrutiny and clarification would be required. The Respondent is not required to conduct such an examination. The Bidder submitting the certificate must ensure that the certificate is clear and unambiguous and establishes its eligibility. The said certificates, as we have mentioned hereinabove, do not clearly spell out the role of the petitioner in the execution of the said two works or the value of the work executed by the Petitioner. The contention of the petitioner that the respective concessionaires in the said two works were Special Purpose Vehicles floated for the purposes of acquiring the works and the petitioner himself was a part thereof is not apparent from the certificates or the documents submitted. Even before us no document has been pointed out that was filed along with the bid which would establish that the entire work as mentioned in the two certificates or at least of the required value was executed by the petitioner. The relationship of the concessionaire with the petitioner and the value of work executed by the petitioner for the said projects is not borne out from the documents submitted. The contention of the respondent that at the time of the 2012 tender, the certificate submitted by the petitioner for the third work had met the eligibility criteria and as such, the petitioner was found to be eligible is a plausible explanation. We are of the view that the two certificates do not clearly establish the eligibility of the petitioner and the respondent No. 2 cannot be faulted with for disqualifying the petitioner on this ground.

19. With regard to the third ground i.e. "(iii) should have a Solvency of Rs.173.50 crores, (scanned copy of the original solvency to be uploaded)", it is seen that the petitioner has submitted two solvency certificates, one dated 09.10.2013 and the other dated 23.01.2013. The last date for submission of the eligibility and financial bid was stipulated as 14.10.2014. The Notice Inviting Tender (NIT) required that the bidder should have a solvency of Rs.173.50 crores. It is clear that on the date when the tender is submitted or thereabouts, the bidder should have a solvency of the stipulated amount. The certificates submitted by the petitioner were over a year old and were not in proximity to the last date for submission of the bid. The tender condition required the petitioner to satisfy that when the bid was submitted, the petitioner was financially solvent. The petitioner has failed to satisfy the same. The certificates that were over 12 months old could not be utilized by the petitioner for establishing the financial solvency as on the date of the 2014 tender. The contention of the petitioner that the financial documents

in the form of balance sheet have been uploaded would still not satisfy the eligibility criteria inasmuch as the Respondent is not obliged to conduct an audit of the accounts of the bidder to ascertain whether the solvency of the bidder is embedded in the document of not. The certificate should be unequivocal. The bidder has to ensure that the documents submitted by the bidder clearly establish the eligibility conditions and establish that the petitioner is technically qualified. No detailed inquiry or scrutiny is expected to be conducted on the part of the Respondent. Since the Petitioner had itself by letters dated 20.07.2014 and 12.08.2014 stated that on account of acute economic crises and stringent banking regulations it was in a lot of cash flow constraints and had suffered a huge impact of low cash flows even from banks regarding their working capital, it was obligatory on the part of the Petitioner to furnish a solvency certificate for a period post the said letters to establish its solvency. We are of the view that the petitioner has failed to furnish documents to establish its solvency. The action of the respondent No. 2 in disqualifying the petitioner cannot be faulted with.

20. Since on the above two grounds, we have found that the petitioner had failed to satisfy the eligibility criteria and the action of the respondent No. 2 in disqualifying the petitioner cannot be faulted, we do not deem it necessary to examine the other two reasons for the rejection of the bid of the petitioner.

21. In view of the above, we find no merit in the petition. The petition is accordingly dismissed with no order as to costs.

SANJEEV SACHDEVA, J.

MARCH 02, 2015 **BADAR DURREZ AHMED, J.**

st

==