

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

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Judgment reserved on: 28th September, 2015

Judgment delivered on: 02nd February, 2016

+ WP(C) 353/2015 & CM No.562/2015 (stay)

**INCKAH INFRASTRUCTURE TECHNOLOGIES PVT. LTD. &
ANR.**

.... Petitioners

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR.

.... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr Gaurav Nair, Advocate.

For the Respondents : Ms Meenakshi Sood and Mr Mukesh Kumar, Advocates for respondent No.1.

Mr Anurag Ahluwalia and Mr Arunava Mukherjee, Advocate for respondent No.2.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGEMENT

SANJEEV SACHDEVA, J

1. The petitioner is aggrieved by the decision of the respondent No.1 in treating the bid of the petitioner as non-responsive and has sought a writ of mandamus directing the respondent No.1 to treat the technical bid of the petitioner as responsive and to consider the financial bid of the petitioner No.1.

2. The respondent No.1 had invited bids for ordinary repairs and routine maintenance of Chitradurga – Davanagere Section of NH-4 from Km.189 to Km.260 (71 Kms) in the State of Karnataka for the year 2014 – 15 through letter dated 28.10.2014. Online tenders were invited from eligible bidders for execution of the work. The tender process consisted of two stages of evaluation i.e., (1) Technical Bid Evaluation and (2) Financial Bid Evaluation. The qualification criteria prescribed was execution of similar nature of work during the preceding five years.

3. To qualify for award of the contract, the bidder in its name had to achieve, in all classes of civil engineering construction works, an average annual financial turnover equal to the amount indicated in Notice Inviting Tender (NIT) during the last five years ending 31st March of the previous financial year. The Bidder also had to satisfactorily complete at least 90% of the contract value as a prime contractor or as a nominated sub-contractor similar works during the last five years ending on the last day of the month previous to the one in which the bids were invited. This was further subject to all other qualification criteria being satisfied. The value of one similar completed work was to be not less than the amount equal to Rs 230 lakhs. The expression “similar work” was to mean “maintenance/construction of bituminous road work”. The bidders were entitled to an escalation factor to bring the value of such completed works to the level of the current financial year i.e. 2014 – 2015.

4. The petitioner submitted its bid in response to the NIT. The bid of the petitioner was treated to be non-responsive and the financial bid was not opened. Impugning the action of the respondent in declaring the bid as non-responsive, the petitioner has filed the present petition.

5. The respondent No.1, in its counter affidavit, has contended that the petitioner has suppressed material facts and made a false representation in the certificates submitted as proof of qualification requirements and, thus, in terms of Clause 4.7(i) of Section 2 of the Invitation to Bid, the petitioner has suffered a disqualification and the bid of the petitioner was liable to be rejected on this ground alone.

6. It is further contended that the petitioner had submitted not only one certificate of experience but had submitted three certificates of experience. One of the certificates of experience dated 06.07.2012 issued by New Delhi Municipal Corporation was one wherein the petitioner had deliberately misrepresented the facts in order to be considered during the bids evaluation process.

7. Further, it is contended that the petitioner had experience only in Micro-surfacing and the same did not qualify as 'similar work' as defined in the cost estimates/bill of quantities of the NIT.

8. It is contended that the Technical Evaluation Committee of the respondent No.1 after examining the certificates submitted by the petitioner and, on obtaining clarification from the certificate issuing authorities, have

come to a conclusion that not only did the petitioner not fulfill the qualifying conditions of having executed a similar work of the nature as tendered but had also misrepresented facts and, as such, the petitioner's bid was liable to be rejected and was, thus, rejected.

9. We have examined the records of the case as produced by the parties. Perusal of the record shows that the petitioner had furnished three certificates in support of its claim of having executed work of similar nature during the preceding five years. The details of the certificates submitted are as under:-

S. No.	Name of Work	Value of Work	Certificate issued by	Work Executed during
1	Microsurfacing of pavement between samakhiyali to gandhidham section on NH-8A	Rs. 5.38 Crores	GM and PD, NHAI, Palanpur dated 05.04.2011	09.09.2010 to 28.02.2011
2	S/R of Roads in NDMC Area SH: Riding Quality of Improvement Programme Phase-II (Cold Mix Technology)	Rs. 1.95 Crores	Suptdg. Engineer (R-I), New Delhi, Municipal Council dated 06.07.2012	12.03.2009 to 11.12.2009
3.	Microsurfacing Overlay on NH-6 (Surat – Hazira)	Rs. 2.40 Crores	Manager Procurement, M/s. Soma Isolux dated 01.03.2011	2010-2011

10. The learned counsel for the petitioner has admitted that the work executed by the petitioner in the past was of the Micro-Surfacing. It is, however, contended that Micro-Surfacing is a Bituminous overlay. It is contended that Bituminous road work includes Micro-Surfacing. Micro-

Surfacing is a polymer modified cold-mix paving system and is routinely used the world over. Reliance is placed on the publication of Ministry of Road Transport and Highways (MORTH) by the petitioner to contend that Micro- surfacing is also a part of the bituminous road work and, as such, the respondent No.1 could not have treated the bid of the petitioner as non-responsive.

11. Perusal of the bill of quantities annexed with the NIT shows that the scope of work involves various items of work. Respondent No. 1 has contended Micro-surfacing work is not covered in the scope of operation and maintenance work as sought for in the NIT. The scope of operation and maintenance work as stated in the NIT does not cover Micro-surfacing and the certificates submitted by the petitioner do not show that the petitioner had experience for ordinary repair and routine maintenance work of highway works. The scope of work does not require Micro-surfacing. The experience certificates submitted by the petitioner are of Micro-surfacing work only and not of bituminous wearing coat/base courses works like bituminous concrete, semi dense bituminous concrete, bituminous macadam and dense bituminous concrete. It is contended by the respondent that even though Micro-surfacing figures in the specifications for road and bridge works (fifth revision) Ministry of Road Transport & Highways, the scope of work in the bid document does not contain Micro-surfacing. It is further contended that Micro-surfacing may be a part of the entire gamut of work but the same does not constitute a component of the bill of quantities as

envisaged in the NIT because Micro-surfacing work was not included in the scope of tender and was not required for the instant work.

12. It is borne out from the counter affidavit that the petitioner does not have any experience of having executed the Hot Mix nature of works like bituminous macadam, dense bituminous macadam, bituminous concrete, semi dense bituminous concrete which are general items for construction/maintenance of bituminous highways in India. Micro-surfacing work, it is contended, would be useful only in cases where existing payment surface is structurally sound but the surface shows signs of premature ageing, aggregate loss, cracking, high degree of polishing etc. and is suitable for low and medium traffic roads and in the present case the highway on which the work is to be executed is a four lane national highway having heavy traffic and the repairs needed involved pothole filling with bituminous concrete on which Micro-surfacing is not useful.

13. Apart from the facts that the certificates submitted by the petitioner showing experience of Micro-surfacing did not satisfy the requirements of similar works, the Technical Evaluation Committee has found, after obtaining clarifications from the certificate issuing authorities, that there are discrepancies in the certificates issued. The Technical Evaluation Committee has thus concluded that the petitioner has made misleading and false representation in the certificates submitted in proof of qualification requirements and has, thus, defaulted under Clause 4.7(i) of Instructions to

Bidders of Section 2 of Bid document and, therefore, has been subjected to disqualification.

14. The relevant noting of the Technical Evaluation Committee is as under:-

1.	xxx	xxx	xxx	xxx
2.	xxx	xxx	xxx	xxx
3.	xxx	xxx	xxx	xxx
4.	Similar Nature of the work	Should have executed single work of value Rs.230.00 Lakhs during last 5 years.	Bidder has submitted three certificates in support of similar nature of work executed by him i.e. (1) Micro surfacing of pavement between Samakhiali to Gandhidham section on NH-8A (Certification issued by PD, NHAI-Palanpur dated 15.04.2011) costing Rs.5.38 Crores completed during 2010-11 (2) Micro surfacing overlay on NH-6 (Certificate issued by M/s. Soma Isolux dated 01.03.2011) costing Rs.2.403 crores completed during 2010-11 (3) S/R of Roads in NDMC Area SH: Riding Quality of Improvement Programme Phase-II (Cold Mix Technology) costing Rs.1.95 Crores completed during 2009-10 (Certificate issued by SE(R-1) dated 06.07.2012 and further clarification given on 17.12.2014 through email). (Page No.114 to 121)	Not satisfied and hence Non-Responsive
	As the Agreement date mentioned in the Certificate dated 06.07.2012 is not matching with date of Completion, RO-Bengaluru has requested clarification from SE(R-I), NDMC, New Delhi through letter no.3009 dated 08.12.2014, SE has given clarification that Agency for the Contract is M/s. Satyaprakash and Brothers Private Limited with Agreement amount to Rs.8,43,88,575/- under whom M/s. Inckah Infrastructure Technologies has executed Microsurfacing work amounting to Rs.1.95 Crores with date of Start of Work as			

	12.03.2009, and date of completion as 08.03.2010. But in the Original Certificate dated 06.07.2012 which was furnished in Bid Document, it was mentioned the name of the Agency as M/s. Inckah Infrastructure Technologies Limited and in no where it was mentioned Original Agency Name of M/s. Satyaprakash and Brothers Private Limited though M/s. Inckah Infrastructure Technologies Limited has executed sub-contract under the main contract. Further, the Agreement date furnished in Original Certificate is 02.02.2010 against which no clarification was given by SE, NDMC. Actual date of completion of work is 11.12.2009 as per Original Certificate furnished in Bid Document whereas as per clarification it is 08.03.2010 which are mismatching. Therefore the Bidder has made misleading or false representation in the Certificates submitted in proof of qualification requirements and hence default under Clause 4.7(i) of ITD of Section 2 of Bid Document and therefore subject to disqualification. Further, the work executed by the Firm is only Microsurfacing as seen from all the three Certificates and it cannot be considered as a similar nature of work to OR and Routine Maintenance work. The scope of present O&M work does not cover Microsurfacing and the Bidder is not having any experience for OR & Routine Maintenance work of Highway works. As such the Bid submitted by M/s. Inckah Infrastructure Technologies Limited can be treated as “Non-Responsive”.			
5.	Xxx	xxx	xxx	xxx
6.	Xxx	xxx	xxx	xxx

15. From the report of the Technical Evaluation Committee, it is apparent that the petitioner did not satisfy the technical requirements of having completed the work of similar nature. Micro-surfacing, as elaborated hereinabove, may be a part of bituminous work, however, the same is not part of the scope of work envisaged in the tender document. Clearly, the petitioner has not executed works of similar nature and, thus, cannot be said to have experience as required by the NIT. The Technical Evaluation Committee has further found that the petitioner had made misrepresentation

and had made misleading statements in the certificates submitted in support of its technical qualifications. Even if it were assumed in favour of the petitioner that there are no misrepresentations, the petitioner would still not be qualified as the experience certificates submitted by the petitioner are for work which is not covered in the scope of work as envisaged in the tender document.

16. We do not find any infirmity in the report of the Technical Committee and the final conclusion arrived at that the petitioner does not have the requisite qualifications and that the bid of the petitioner is non-responsive.

17. In view of the above, we find no merit in the petition. The same is accordingly dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

FEBRUARY 02, 2016
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