

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

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Judgment Reserved on: 12th May, 2016

Judgment Delivered on: 30th May, 2016

+ W.P.(C) 3140/2016

**KALTHIA ENGINEERING AND CONSTRUCTION
LIMITED**

..... Petitioner

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Salman Khurshid, Senior Advocate and Mr J.P.Sengh, Senior Advocate with Mr Atul Sharma, Mr Nitesh Jain and Mr Abhinav Mukhi.

For the Respondent: Ms Gunjan Sinha Jain for NHAI.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J

W.P.(C) No.3140/2016 & CM Nos.14271/2016(for interim direction), 13430/2016(stay)

1. The petitioner has sought quashing of the decision of the respondent and letter dated 30.03.2016 annulling the bidding process in relation to the work of periodic renewal by BC for the stretch of Bamanbore-Garamore (Km. 182.600 to km. 254.000) section of

NH-8A in the State of Gujarat. It is contended that the petitioner was L – 1 and the tender process has been arbitrarily annulled by the respondent.

2. The impugned letter of 30.03.2016 reads as under:-

*“NHAI/Bamanbore-Garmore/2015/
CM-III/8419*

March 30th 2016

To,

- 1. M/s Classic Network Pvt. Ltd.*
- 2. M/s Apex Tarmac Pvt. Ltd.*
- 3. M/s GHV (India) Pvt. Ltd.*
- 4. M/s Kunal Structure (India) Pvt. Ltd.*
- 5. M/s Ketan Construction Ltd.*
- 6. M/s Gawar Construction Ltd.*
- 7. M/s Kalthia Engineering and Construction Ltd.*
- 8. M/s M.S. Khurana Engineering Ltd.*

Sub: Periodic renewal by BC for the stretch of Bamanbore-Garamore (Km.182.600 to Km. 254.000) section of NH-8A in the state of Gujarat.

Sir,

With reference to above subject, your firm had submitted bid on 24.11.2015. In this context, this is to inform you that after approval of the Competent Authority, the said bidding process has been annulled/ cancelled.

Yours faithfully,

*Maneesh Rastogi
GM (CM-III)”*

3. The respondent on 28.10.2015 had invited bids for the above-referred tender. The time for completion of the work, as mentioned in

the Notice Inviting Tender (hereinafter referred to as “the NIT dated 28.10.2015”) was 06 months.

4. In Section 2, Instructions to Bidders, under the clause Qualification of the Bidder, the minimum qualification prescribed by clause 4.6 reads as under:-

“4.6 Bidders who meet the minimum qualification criteria will be qualified only if their available bid capacity is more than the total bid value. The available bid capacity will be calculated as under:

$$\text{Assessed Available Bid capacity} = (A * N * 2 - B)$$

Where

A= Maximum value of civil engineering works executed in anyone year during the last three years (escalation factor as specified in this section shall be used to bring the maximum value of civil engineering works to the level of current financial year i.e., 2013-14) taking into account the completed as well as works in progress.

N = Number of years prescribed for completion of the works for which bid is invited.

B = Value (escalation factor as specified in this section shall be used to bring the value to the level of current financial year i.e., 2013-14) of existing commitments and on-going works to be completed during the next 01 year (period of completion of the works for which bid is invited).”

5. Eight Companies participated in the tender process, out of

which five qualified the technical bid in terms of the said qualifying condition.

6. It is contended by the petitioner that on opening of the financial bids, the petitioner was declared L – 1. One of the disqualified bidders, M/s Classic Network Private Limited filed a Special Leave Application/writ petition (Special Civil Application No. 2596 of 2016) before the High Court of Gujarat at Ahmedabad against the respondent's decision disqualifying it in the technical bid. Subsequently, the writ petition was withdrawn on 09.03.2016. On 30.03.2016, the impugned letter has been issued annulling/cancelling the bidding process. On 31.03.2016, a fresh NIT has been issued which is also impugned in the present petition (hereinafter referred to as “the NIT dated 31.03.2016”).

7. The respondent, in its counter-affidavit, has contended that the cancellation of the tender has been done under clause 31 of the said NIT which empowers the respondent to accept any bid, and to reject any or all bids. Reliance is placed on clause 31.1, which reads as under:

“31. Employer's Right to Accept any Bid and to Reject any or all Bids

31.1 Notwithstanding Clause 30, the Employer reserves the right to accept or reject any Bid, and to cancel the bidding process and reject all bids, at any time prior to the award of Contract, without thereby incurring any

liability to the affected Bidder or bidders or any obligation to inform the affected Bidder or bidders of the grounds for the Employer's action.”

8. It is further contended that, in the writ petition filed by M/s Classic Network Private Limited before the High Court of Gujarat, it was contended, that the clauses of the NIT dated 28.10.2015 were inconsistent, particularly, the formula mentioned in clause 4.6 was faulty. In the said petition, it was submitted by the petitioner therein, that the period of completion of work for the bid invited was six months but in clause 4.6, the period of completion had been mentioned to be one year. It is submitted, that the petitioner therein had contended that on account of the faulty evaluation criterion in the NIT dated 28.10.2015, its technical disqualification was bad in law.

9. The respondent on the contrary has contended that on the basis of the correspondence between the respondent's advocate in Gujarat and the deliberations that took place in the office of the respondent, the respondent proposed to cancel the tender as there was anomaly/discrepancy in the formula for calculation of the available bid capacity and it was not possible for the respondent to carry out fresh evaluations beyond the terms of the tender which would have invited further litigation from other parties. It is submitted that a well-considered decision was taken to cancel the bid, as it was too late

in the day to carry out modifications in the parameters and re-evaluation of the bids and the same was also not feasible/advisable. It was further proposed that bids may be re-invited after correcting the RFP to avoid any ambiguity/confusion as the award of work was still under consideration. The said decision, it is contended, was accorded approval by the competent authority on 30.03.2016.

10. It is contended that the withdrawal of the petition in the Gujarat High Court does not, in any manner, correct the discrepancy in the bidding document and the evaluation in terms of the tender conditions. It is submitted that the award of contract despite the ambiguities in the tender process would have raised serious questions on the legality and propriety of the tender process and continuation of the award of contract of NIT dated 28.10.2015 could have led to further administrative and legal complications. Powers under clause 31.1 of the NIT were thus exercised and the whole bidding process was annulled and fresh NIT dated 31.03.2016 after correction of the discrepancy has been issued.

11. It is contended that there is an anomaly in clause 4.6 which specifies the formula for calculation of the available bid capacity in the NIT dated 28.10.2015 in as much as in the definition of factor “B”, i.e. value of existing commitments and on-going works to be completed has been stated to be 01 year and in the bracket the same has been stated to be the period for completion of work for which bid

is invited, which is actually 06 months. It is further contended that by taking factor “B” as 01 year, and the factor “N”, i.e. the number of years prescribed for completion of work as 0.5, absurd consequences were following, leading to technical disqualification of certain bidders. It is submitted that the respondent was well within its right to strike down the tender, when its term being discrepant were leading to administrative difficulties and serious legal consequences.

12. We may note that the formula specified in clause 4.6 is as under:

$$\text{Assessed Available Bid capacity} = (A * N * 2 - B)$$

A = Maximum value of civil engineering works executed in any one year during the last three years (escalation factor as specified in this section shall be used to bring the maximum value of civil engineering works to the level of current financial year i.e., 2013-14) taking into account the completed as well as works in progress.

N = Number of years prescribed for completion of the works for which bid is invited.

B = Value (escalation factor as specified in this section shall be used to bring the value to the level of current financial year i.e., 2013-14) of existing commitments and on-going works to be completed during the next 01 year (period of completion of the works for which bid is invited).

13. Factor N, in the formula, is the number of years prescribed for

completion of the work, which as specified by the NIT dated 28.10.2015 is 06 months. However, in the definition of factor B value of existing commitments and on-going works to be completed during the next 01 year has been equated to the period of completion of the work.. There is clearly an anomaly in the formula. There would clearly be confusion in the minds of the bidders whether the period is to be taken as 01 year or 06 months. By applying different figures, the results would be completely different. The consequence of which would be that a bidder, who may be qualified by applying one parameter, may become disqualified and a bidder, who may be disqualified by applying one parameter, may be qualified by applying the other parameter. This sort of ambiguity can never be permitted to exist in a formula for calculating the technical qualification of a bidder.

14. The respondent after annulling the tender process has issued a fresh NIT dated 31.03.2016. The formula for calculating the available bid capacity has been modified to read as under:

$$\text{Assessed Available Bid capacity} = (A * N * 2 - B)$$

Where

A= Maximum value of civil engineering works executed in any one year during the last three years (escalation factor as specified in this section shall be used to bring the maximum value of civil engineering works to the level of current financial year i.e., 2016-17) taking into

account the completed as well as works in progress.

N = Number of years prescribed for completion of the works for which bid is invited.

B = Value (escalation factor as specified in this section shall be used to bring the value to the level of current financial year i.e., 2016-17) of existing commitments and on-going works to be completed during the next 06 months.

15. In the NIT, dated 31.03.2016, in factor B, the period for completion of existing commitments and on-going works has been rectified to read as 06 months in place of 01 year. The respondents have justified their action of annulling the bid process on account of the anomaly in the formula for assessing the available bid capacity as stipulated by NIT dated 28.10.2015. The respondents have sought to rectify this error in the NIT dated 28.10.2015.

16. We may refer to the decision of the Supreme Court in **Maa Binda Express Carrier and Another v. North East Frontier Railway & Others** : (2014) 3 SCC 760, wherein the Supreme Court has held as under:-

“8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in

response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.”

(underlining supplied)

17. The Supreme Court has clearly held that submission of a tender in response to NIT is no more than making an offer, which the States or its agencies are under no obligation to accept. The bidder cannot insist that its tender be accepted simply because a given tender is the highest or the lowest (as the case may be). The bidder is only entitled to a fair, equal and non-discriminatory treatment in the matter of evaluation of the tender.

18. In the present case, clearly, since there was an anomaly in the NIT dated 28.10.2015 leading to an ambiguity and discrepancy in the evaluation of the bids of various bidders, the respondents were justified in annulling/cancelling the entire bidding process. We have been informed that pursuant to the NIT dated 31.03.2015, bids have been received not only from some of the earlier bidders but from parties, which had not bid earlier, which fortifies the contention of the respondent that on account of the anomaly in the formula, some eligible bidders may have decided not to bid.

19. We find no infirmity in the decision of the respondent in annulling/quashing the entire bidding process pursuant to NIT dated 28.10.2015 and the issuance of the fresh NIT dated 31.03.2016. The writ petition is accordingly dismissed leaving the parties to bear their own costs.

SANJEEV SACHDEVA, J

BADAR DURREZ AHMED, J

MAY 30, 2016
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