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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 01.02.2016

+ **W.P.(C) 8609/2011**

LANCO INFRATECH LTD

..... Petitioner

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR

.....Respondents

Advocates who appeared in this case:

For the Petitioner : Mr Akhil Sibal with Ms Aditi Sharma, Adv.
For the Respondent : Mr K.K. Sharma, Sr Advocate with Mr Mukesh Kumar and Ms Gunjan Sinha, Adv.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition pertains to RFPs (Request for Proposal) for the Etawah – Chakeri (Kanpur) and the Agra – Etawah 6 laning project of the National Highways Authority of India (NHAI) (respondent No.1). Initially, a request for qualification (RFQ) was issued in October 2010 for the six lane section of NH-2 for the segment Etawah – Chakeri (Kanpur) from km 323.475 to km 483.687. Simultaneously, another RFQ was issued by NHAI for the Agra – Etawah section of NH-2 from km 199.660 to km 323.525. Both these projects were in the State of Uttar Pradesh.

2. Amongst others, the petitioner also submitted applications in response to the said RFQs. The petitioner, amongst others, was found

eligible under both the RFQs. In August, 2011, NHAI issued the subject Request for Proposals (RFP) containing the instructions to bidders alongwith the modification to the same so as to include on-line submission of bids in respect of both the projects. Clause 3.2 of the instructions to bidders, as it originally stood, dealt with tests of responsiveness and the same reads as under:-

“3.2 Test of responsiveness

3.2.1 Prior to evaluation of Bids, the Authority shall determine whether each Bid is responsive to the requirements of this RFP. A Bid shall be considered responsive only if:

- (a) it is received as per the format at Appendix-I;*
- (b) it is received by the Bid Due Date including any extension thereof pursuant to Clause 2.12.2;*
- (c) it is signed, sealed, bound together in hard cover and marked as stipulated in Clauses 2.10 and 2.11;*
- (d) it is accompanied by the Bid Security as specified in Clause 2.1.7*
- (e) it is accompanied by the Power(s) of Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be;*
- (f) it contains all the information (complete in all respects) as requested in this RFP and/or Bidding Documents (in formats same as those specified);*
- (g) it does not contain any condition or qualification ; and*
- (h) it is not non-responsive in terms thereof.*

3.2.2 *The Authority reserves the right to reject any Bid which is non-responsive and no request for alternation, modification, substitution or withdrawal shall be entertained by the Authority in respect of such Bid.*

(Italics supplied)

3. It was indicated in the above clause and, particularly, in Clause 3.2.1(a) that a bid would be considered responsive only if it is received as per the format at Appendix – I. Furthermore, Clause (e) provided that a bid must be accompanied by the Powers of Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be. Clause 2.1.10 is not relevant in the present case. Clause 2.1.9 reads as under:-

“2.1.9 The Bidder should submit a Power of Attorney as per the format at Appendix- III, authorizing the signatory of the Bid to commit the Bidder.”

4. It is evident that the bidder was required to submit a Power of Attorney as per the format given in Appendix – III authorizing the signatory of the bid to commit the bidder. The said Appendix – III reads as under:-

“APPENDIX - III

Power of Attorney for signing of Bid

(Refer Clause 2.1.9)

Know all men by these presents, We, (name of the firm and address of the registered office) do hereby irrevocably constitute, nominate, appoint and authorise Mr. / Ms (Name), son/daughter/wife of..... and presently residing at....., who is presently employed with us/the Lead Member of our Consortium and holding the position of..... as our true and lawful attorney (hereinafter referred to as the "Attorney") to do in our name and on our behalf, all such acts, deeds and things as are necessary or required in connection with or incidental to submission of our bid for the Six-Laning of Etawah — Chakeri (Kanpur) section of NH-2 from km 323.475 to km 483.687 in

the State of Uttar Pradesh under NHDP Phase-V on Design, Build, Finance, Operate and Transfer (DBFOT) Toll basis Project proposed or being developed by the National Highways Authority of India (the "Authority") including but not limited to signing and submission of all applications, bids and other documents and writings, participate in bidders' and other conferences and providing information / responses to the Authority, representing us in all matters before the Authority, signing and execution of all contracts including the Concession Agreement and undertakings consequent to acceptance of our bid, and generally dealing with the Authority in all matters in connection with or relating to or arising out of our bid for the said Project and/or upon award thereof to us and/or till the entering into of the Concession Agreement with the Authority.

AND we hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this Power of Attorney and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us.

*IN WITNESS WHEREOF WE,, THE ABOVE NAMED
PRINCIPAL HAVE EXECUTED THIS POWER OF
ATTORNEY ON THIS DAY
OF, 20....*

For

*(Signature, name, designation and address)
of person authorised by Board Resolution
(in case of Firm/Company)/ Partner in
case of Partnership Firm*

Witnesses:

- 1.*
- 2. "*

Accepted

(Signature, name, designation and address of the Attorney)

Notarised

*Person identified by
me/personally appeared before me/
Signed before me/Attested/Authenticated *
(*Notary to specify as applicable)*

(Signature, Name and Address of the Notary)

Seal of the Notary
Registration Number of the Notary
Date:

Notes:

The mode of execution of the Power of Attorney should be in accordance with the procedure, if any, laid down by the applicable law and the charter documents of the executants(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.

Whenever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board of shareholder resolution/power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.

For a Power of Attorney executed and issued overseas, the document will also have to be legalized by the Indian Embassy and notarized in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention, 1961 are not required to be legalized by the Indian Embassy if it carries a conforming Appostille Certificate.”

5. It is also pertinent to note Clauses 2.20.6 and 2.20.7 which read as under:-

“2.20.6 The Authority shall be entitled to forfeit and appropriate the Bid Security as Damages inter alia in any of the events specified in Clause 2.20.7 herein below. The Bidder, by submitting its Bid pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Authority will suffer loss and damage on account of withdrawal of its Bid or for any other default by the Bidder during the period of Bid validity as specified in this RFP. No relaxation of any kind on Bid Security shall be given to any Bidder.

2.20.7 The Bid Security shall be forfeited as Damages without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and/or under the Concession Agreement, or otherwise, under the following conditions:

- (a) If a Bidder submits a non-responsive Bid: subject however that in the event of encashment of bid security occurring due to operation of para 2.20.7(a), the damage so claimed by the authority shall be restricted to 5% of the value of the bid security.*
- (b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Section 4 of this RFP;*
- (c) If a Bidder withdraws its Bid during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Authority;*
- (d) In the case of Selected Bidder, if it fails within the specified time limit-*
 - (i) to sign and return the duplicate copy of LOA;*
 - (ii) to sign the Concession Agreement; or*
 - (iii) to furnish the Performance Security within the period prescribed therefore in the Concession Agreement; or*
- (e) In case the Selected Bidder, having signed the Concession Agreement, commits any breach thereof prior to furnishing the Performance Security.”*

6. On going through the said Clauses 2.20.6 and 2.20.7, it is evident

that NHAI was “entitled to” forfeit and appropriate the bid security as damages, *inter alia*, in case any of the events specified in Clauses 2.20.7 occurred. Clause 2.20.7(a) stipulated that the bid security shall be forfeited as “damages” without prejudice to any other right or remedy that may be available to NHAI under the bidding documents and/or under the Concession Agreement, or otherwise under, *inter alia*, the condition that a bidder submits a non-responsive bid. According to the learned counsel for the petitioner, the power to forfeit, as indicated upon a conjoint reading of Clauses 2.20.6 and 2.20.7, should not be equated with a compulsion to forfeit. It is only in certain circumstances, upon a reasonable exercise of that power that forfeiture of the bid security amount as damages ought to be permitted.

7. We may also point out that initially the tender process was under the traditional paper-based system. This was subsequently modified to an e-tender and the RFP was modified accordingly and a procedure for e-tendering was stipulated. The said procedure for e-tendering and the instructions to bidders under such process was as under:

PROCEDURE UNDER E-TENDERING

INSTRUCTION TO BIDDERS

(Note: RFP stands modified to the extent required as per these instructions)

1. Accessing/ Purchasing of bid documents

- i) *It is mandatory for all the bidders to have class-III Digital Signature Certificate (in the name of person who will sign the Bid) from any of the licensed Certifying Agency (Bidders can see the list of licensed CA's from the link www.cea.gov.in) to participate in e-tendering of NHAI.*

- ii) To participate in the E-Bid submission, it is mandatory for the bidders to get registered their firm/Consortium (As qualified in RFQ stage for the Project) with e-tendering portal <http://www.nhai.org/> to have user ID & password which has to be obtained by submitting an annual registration charges of INR 2206/-(Inclusive of all taxes to M/s ITI Ltd. in the form of Demand Draft issued from a scheduled Bank in India in favour of "M/s ITI Ltd" payable at New Delhi. Validity of online registration is 1 year.
- iii) The complete Bid Document can be Viewed / downloaded from the NHAI e-tendering portal free of cost (www.nhai.org).
- iv) Detailed tender document can be viewed from e-tender portal of NHAI www.nhai.org from 19.08.2011 to 21.09.2011.
- To participate for bidding, bidders have to pay Rs. 3,20,000 (Rs. Three Lakh Twenty Thousand Only) towards fee for RFP document (non-refundable) in the form of Demand Draft issued from a scheduled Bank in India in favour of "National Highways Authority of India" payable at New Delhi and Rs 13,236/-(Thirteen Thousand Two Hundred Thirty Six Only) inclusive of all Taxes towards Tender Processing fee (Non-Refundable) in favour of "M/s ITI Limited", payable at New Delhi.
- vi) Detailed tender document can be downloaded from e-tender portal of NHAI www.nhai.org from 19.08.2011 to 21.09.2011

Following may be noted

- (a) Registration should be valid at least up to the date of submission of bid.
- (b) Bids can be submitted only during the validity of their registration.
- (c) The amendments / clarifications to the bid document, if any, will be hosted on the NHAI website.
- (d) If the firm / Consortium (As qualified in RFQ stage for the Project) is already registered with e-tendering portal of NHAI and validity of

registration is not expired the firm / consortium is not required for fresh registration.

2. *Preparation & Submission of bids:*

- (i) *Detailed tender documents may be downloaded from e-tender portal of NHAI www.nhai.org from 19.08.2011 to 21.09.2011 and tender may be submitted online following the instruction appearing on the screen. A buyer manual containing the detailed guidelines for e-tendering system is also available on e-tender portal of NHAI.*
- (ii) *The following documents shall be prepared and scanned in different files (in PDF or JPEG format such that file size is not more than 5 MB) and uploaded during the on-line submission of Bid. These documents shall also be submitted in 'ORIGINAL' to NHAI before the prescribed date & time for submission of Bids.*
 - (a) *Bid Security [Rs. 15.73 crore (Rupees Fifteen Crore and Seventy three Lakhs only)] in the format at Appendix-II;*
 - (b) *Cost of tender document of Rs 3,20,000 (Rs. Three Lakh Twenty Thousand Only) in the form of DD in favour of NHAI, payable at New Delhi*
 - (c) *Tender processing fee of Rs. 13,236/- (Thirteen Thousand Two Hundred Thirty Six Only) inclusive of all Taxes in the form of DD in favour of M/s. ITI Limited. payable at New Delhi*
 - (d) *Power of Attorney for signing of Bid in the format at Appendix-III;*
 - (e) *If applicable, the Power of Attorney for Lead Member of Consortium in the format at appendix-IV; and*
 - (f) *An Undertaking from the person having PoA referred to in Sub. Cl. (d) above that they agree and abide by the Bid documents uploaded by NHAI and amendments uploaded if any*

- (iii) *The bid (Price bid) should be submitted online only in the prescribed format given in the website. No other mode of submission is accepted.*
- (iv) *Appendix-1 of the Bid shall be digitally signed by the Authorized Signatory of the bidder & submitted "on-line" only. No hard copy of Appendix-1 is required to be submitted...*
- (v) *It may be noted that scan copies can be prepared in different file format (PDF, JPEG).*
- (vi) *It may also be noted that bidders can upload a single file of size of 5 MB only but you can upload multiple files.*

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3. Modification / Substitution/ Withdrawal of bids:

- (i) *The Bidder may modify, substitute or withdraw its e-bid after submission prior to the Bid Due Date 30.09.2011 (upto 1100 hrs). No Bid shall be modified, substituted or withdrawn by the Bidder on or after the Bid Due Date.*
- (ii) *Any alteration/ modification in the Bid or additional information supplied subsequent to the Bid Due Date, unless the same has been expressly sought for by the Authority, shall be disregarded.*
- (iii) *For modification of e-bid, bidder has to detach its old bid from e-tendering portal and upload / resubmit digitally signed modified bid.*
- (iv) *For withdrawal of bid, bidder has to click on withdrawal icon at e-tendering portal and can withdraw its e-bid.*
- (v) *Before withdrawal of a bid, it may specifically be noted that after withdrawal of a bid for any reason, bidder cannot re-submit e-bid again.*

4. Opening & Evaluation of bids.

- (i) *Opening and evaluation of bids will be done through online process.*

- (ii) The Authority shall open on-line received Bids at 11: 30 hours on the Bid Due Date, in the presence of the Bidders who choose to attend. The Authority will subsequently examine and evaluate the Bids in accordance with the provisions set out.*
- (iii) Prior to evaluation of Bids, the Authority shall determine whether each Bid is responsive to the requirements of this RFP.*
- (iv) 'Financial Bid' of non-responsive bidders shall not be opened.*
- (v) The bid shall be opened of those bidders only who submit originals as mentioned in Para 2 (ii) of e-tendering procedure. The bid submitted on-line shall not be opened and shall be declared non responsive, if originals are not submitted as mentioned in Para 2 (ii) of e-tendering procedure. Further action will be initiated against such non responsive bids as per CI 2.20.7 of RFP.*

Identical instructions for e-tendering were issued for both the RFPs.

8. From Clause 1(v), it is evident that for participation, a bidder was required to pay Rs.3.20 lakhs towards fee for RFP documents, which was non-refundable and another sum of Rs.13,236/- towards tender processing fee which was also non-refundable in respect of the Etawah – Chakeri (Kanpur) project. The sums for the Agra – Etawah segment were Rs.2.6 lakhs and Rs.13,236/- respectively.

9. At this juncture, we may point out that it was one of the contentions of the learned counsel for the petitioner that the documentation fee of Rs.3.20 lakhs and the tender processing fee of Rs.13,236/- were the only damages which the respondent could have suffered in the process of evaluating the petitioner's bid for the Etawah – Chakeri Project and, similarly, with regard to the quantified sums for the

Agra – Etawah Project.

10. It is important to note that as per Clause 2(ii) of the e-tender process, the documents were to be prepared and scanned in different files (PDF or JPEG format such that file size is not more than 5 MB) and were to be uploaded during the on-line submission of bids. The documents were also to be submitted in original to the NHAI before the prescribed date and time for submission of bids. One of the documents which was specified is the Power of Attorney for signing of the bid in the format given at Appendix – III to which we have already adverted above. Clause 2(iv) of the said instructions to bidders under the e-tender process specifically provided that Appendix – I of the bid was to be digitally signed by the authorized signatory of the bidder and submitted on-line only. No hard copy of Appendix – I was required to be submitted at all. Clause 4(v) stipulated that the bids of those bidders would only be opened who had submitted originals, as mentioned in paragraph 2(ii) of the e-tendering procedure, which included the submission of the Power of Attorney for signing of bids in the format given in Appendix – III. It was also indicated in Clause 4(v) that the bids submitted on-line shall not be opened and shall be declared non-responsive if the originals are not submitted, as mentioned in paragraph 2(ii) of the e-tendering procedure and that further action would be initiated against such non-responsive bids as per Clause 2.20.7 of the RFP which is already set out in the earlier part of this judgment.

11. Given these bidding conditions, it is admitted that the petitioner submitted the bids on-line for both the projects. The bids were submitted

on 29.09.2011 for the Etawah – Chakeri (Kanpur) project and on 30.09.2011 for the Agra – Etawah project. According to the learned counsel for the petitioner, the on-line bidding included all the relevant documents as stipulated. The only problem that occurred with the bid submitted by the petitioner was that the hard copies of the Powers of Attorney for the two projects, which were furnished to NHAI, had been inadvertently and by mistake switched. Meaning thereby, that the hard copy of the Power of attorney for the Etawah – Chakeri (Kanpur) project was submitted alongwith the other documents for the Agra – Etawah project and vice-versa. It is an admitted fact that both the Powers of Attorney had been submitted by the petitioner in respect of the said projects and had been received by NHAI. It is also an admitted fact that both the Powers of Attorney authorized the same person to submit the bid and to commit the bid on behalf of the petitioner. It is only that by mistake in the envelope for the Etawah – Chakeri (Kanpur) project, the hard copy of the Power of Attorney of the Agra – Etawah project was submitted and in the envelope for the Agra – Etawah project, hard copy of the Power of Attorney in respect of Etawah – Chakeri (Kanpur) was submitted. We may also point out that the hard copies of the Etawah – Chakeri (Kanpur) project was opened on 23.11.2011 in which the respondent NHAI had, apart from all the other documents, received the hard copy for the Power of Attorney of the Agra – Etawah project.

12. On the very next day i.e., on 24.11.2011, the very same Bid Evaluation Committee opened the documents for the Agra – Etawah Project and found that the hard copy of the Power of Attorney was in

respect of the Etawah – Chakeri (Kanpur) Project. We may recall that on the previous date, the Bid Evaluation Committee had already noted that the hard copy of the Agra – Etawah Project had been furnished in the papers for the Etawah – Chakeri (Kanpur) Project. It is, therefore, clear that NHAI had received both the hard copies of the Powers of Attorney for both the projects. It is not the case that the petitioner had not submitted the hard copies of the Powers of Attorney for either of the projects.

13. On 28.11.2011, when the petitioner came to know of this mistake, it sent a letter to the Chairman, NHAI (Annexure – L to this writ petition), wherein it was stated that due to an inadvertent error, the documents containing the Powers of Attorney for the subject projects had been exchanged. It was also stated that this was evident after opening the documents in respect of both the projects and that the error could be rectified by exchanging the respective documents for the said two projects. It was also submitted that a representative of the petitioner, at the time of opening of the said documents, had informed the Bid Evaluation Committee and requested for consideration of the petitioner's bid by exchanging the respective documents. In the said letter, it was also requested to NHAI, not to claim any damages on account of the human error in hard copy submission which was easily rectifiable.

14. The respondent NHAI, of course, paid no heed to this letter and declared the bids of the petitioner to be non-responsive and also sought forfeit. By a letter dated 09.12.2011, however, NHAI informed the petitioner that its bid was declared as non-responsive and that as per

Clause 2.20.6 read with 2.20.7 of the RFP, NHAI was “entitled to” forfeit and appropriate 5% of the value of the bid security as damages. Consequently, it requested the petitioner to deposit an amount of Rs.78.65 lakhs (being 5% of the Bid Security of Rs.15.73 crores) in the form of a demand draft drawn in favour of NHAI within seven days failing which NHAI would “revoke” (sic. should be “invoke”) the proportionate bank guarantee submitted by the petitioner to recover the above amount. A similar letter was written in respect of the Agra – Etawah Project on the same day.

15. The arguments advanced by the learned counsel for the petitioner were, in point of fact, three. The first argument was that the exchanging/switching of the hard copies of the powers of attorney was a minor technical irregularity and was in respect of a non-essential or ancillary, subsidiary requirement of a tender, particularly, in view of the fact that the on-line bidding included the scanned copies of the Powers of Attorney and that the hard copies of the Powers of Attorney had, in fact, been received by NHAI. The second point raised by the learned counsel for the petitioner was that, in any event, the NHAI could not forfeit Rs.78.65 lakhs and Rs.60.35 lakhs, being 5% of the bid security amount towards damages allegedly suffered by NHAI for processing the bid of the petitioner. Such forfeiture would be hit by provisions of Section 74 of the Indian Contract Act, 1874, being in the nature of penalty and being totally unreasonable. Thirdly, it was pointed out that the petitioner has had to keep the bank guarantees alive during the pendency of the present petition because of the insistence of NHAI, as a result of which, the

petitioner had to pay bank charges to the extent of Rs.20,38,756/- and, therefore, the petitioner ought to be compensated for the same by NHAI.

16. In response, the learned counsel for the NHAI submitted that a reading of the instructions to bidders makes it clear that the bids submitted by the petitioner for the two projects were non-responsive as they did not contain the correct documents inasmuch as the hard copy of the Power of Attorney for the Etawah – Chakeri (Kanpur) Project was not found alongwith other documents for that project and similar was the case with the documents of the Agra – Etawah Project. Though, admittedly, both the Powers of Attorney were available with the Bid Evaluation Committee but alongwith the documents of the other project in each case. He further submitted that NHAI was well within its right to declare the bids as non-responsive. He further submitted that once the bids were declared non-responsive, there was no option left with NHAI but to forfeit 5% of the security amount, as stipulated in Clause 2.20.6 read with Clause 2.20.7. Therefore, according to the learned counsel for the respondent, there was no question of the respondent compensating the petitioner for the sum of Rs.20,38,756/-, which it had incurred for keeping the bank guarantees alive during the present proceedings.

17. Several decisions were cited at the bar by the counsel on both sides. The learned counsel for the petitioner referred to judgment dated 10.03.2011 in **Madhucon Projects Ltd. v. National Highways Authority of India: WP(C) No.8418/2010**; judgment dated 10.03.2011 in **IVRCL Infrastructures & Projects Ltd. v. National Highways Authority of India: WP(C) No.235/2011**; judgment dated 10.03.2011 in **Gayatri DLF**

Consortium & Ors. v. National Highways Authority of India & Anr.:
WP(C) No.6833/2010; and **Agrawal Roadlines Pvt. Ltd. v. Indian Oil**
Corporation Ltd. and Ors.: 2003(1) Arb. LR 600 (Bombay) (DB).

18. The learned counsel for the respondent referred to the Supreme Court's decision dated 18.03.2015 in **NHAI v. MEIL-EDB LIC (JV): Civil Appeal No.3053/2015**. The learned counsel for the respondents strongly relied on this decision to submit that the Supreme Court had, in similar circumstances, relegated a party to the Civil Courts to determine the exact extent of the damages that NHAI had suffered on account of a non-responsive bid. Accordingly, he requested that this Court should also direct the petitioner to file a civil suit where the exact quantum of the damages could be ascertained and to that extent, the forfeiture could be sustained.

19. At this juncture, we would like to indicate that we had asked the learned counsel appearing for the respondent NHAI to indicate the exact quantum of damages which, according to it, it had suffered on account of processing of the petitioner's bids which were held to be non-responsive. Unfortunately, the learned counsel for the respondent was unable to come out with any figure and stated that it was yet to be computed. The learned counsel for the respondent NHAI was also unable to point out, despite having sought instructions, as to under which heads the damages were sought to be claimed. However, he has indicated that there were some direct costs which had been incurred by NHAI which would go towards accounting for damages. The said direct costs given by him are as under:-

“Direct Cost:

- (i) Project preparation : The Govt. has to hire the expertise services of detailed project report consultants who prepares design and drawings of the project related to its alignment, structures, social and environmental impact, pre-construction assessment including land acquisition, forest clearances, statutory approvals from Railways, MoEF, ASI, TTZ, etc., and other concerning authorities, financial analysis including traffic surveys. This not only involves hiring of technical and financial consultants which amounts to approximately Rs.3-4 lakhs per km. but also the examining the proposal by the Govt. officials at various levels such as in the project units and HQ and at Ministry level.*
- (ii) The project is to be appraised at various levels in the different level of meetings at NHAI and Ministries including MoRTH, Planning Commission, Ministry of Finance, Cabinet depending upon level of project.*
- (iii) The considerable cost and time input from junior level officer to the very senior level management goes into approval process.*
- (iv) The bids are to be invited only after approval of Competent Authority after this steps followed mentioned above. Bidding process involved press advertisement, pre-bid conferences, processing of pre-bid replies, recalibration of project parameters etc.*
- (v) The award process involve the appraisal of bids in the different committees consisting of senior level Govt. officers (Technical and Financial) and approval of Competent Authority.*

Therefore, the time and cost inputs is considerable in the whole process.

(vi) The infrastructure required in carrying out above works at different level also cost heavily on the Govt.

There are several factors which contribute indirectly in case rebid is resorted to such as cost escalation with time, maintenance cost of the road till such time new work is awarded, enhanced road user cost due to poor roads besides other impacts such as social, environmental, etc.”

20. It would be seen that the component of the so-called direct costs are for project preparation, appraisal of the project at various levels, by the various officials, costs and time inputs from Junior Officer level to Senior Officer level in the approval process of the project, advertisement costs, pre-bid conferences, processing of pre-bid replies, recalibration of project parameters. Thereafter, it is also provided, that the award process in which the petitioner, in any event, is not involved would require the appraisal of bids in the different Committees consisting of Senior Government Officers and approval of the Competent Authority. Therefore, it was suggested that the time and costs inputs would be considered in the whole process and final infrastructure required in carrying out the above works at different levels also put a heavy costs burden on the Government. We are amazed at the fact that for submission of the bids in response to the RFPs, no such costs can be imposed on the petitioner, yet the respondent is claiming project preparation, project appraisal and other costs which are common to all the

bidders. We may also point out that till the opening of the hard copies of the documents, the petitioner had committed no error and, therefore, it is difficult to comprehend as to how those costs can be foisted on the petitioner. Insofar as the evaluation of the bids is concerned, the only thing that has happened is that the hard copies of the documents, which were submitted on-line, were opened by the Bid Evaluation Committee and then the bids of the petitioner were declared to be non-responsive. It is quite incomprehensible that such an exercise would cost Rs.78.65 lakhs in one case and Rs.65.35 lakhs in the other case. Anyhow we need not dwell any further on this aspect of the matter because of the view we are taking on the first point argued by the learned counsel for the petitioner.

21. After considering the totality of the circumstances, and after going through the various decisions, we are of the view that the error committed by the petitioner was inadvertent and it was in respect of an ancillary and non-essential condition of the bid. In any event, strictly speaking, the petitioner had submitted the hard copies of the Powers of Attorney in respect of both the projects. Further, in our view, in the peculiar facts and circumstances of this case, the petitioner's bids would have to be regarded as responsive. It is another matter that this would not result in the petitioner being considered for the said projects because of various reasons. The first reason being that the petitioner was, in any event, not L-1, as admitted by the learned counsel for the petitioner after having known the prices of other bidders after the opening of the bids. Secondly, the projects had already been awarded and have now been completed. Furthermore, the petitioner itself had requested that the only leniency that

it was seeking was that the bid security amounts to the extent of 5% should not be forfeited.

22. Having held that the bids of the petitioner would have to be regarded as responsive, we do not feel the need and necessity to examine the other aspects with regard to the quantum of damages in the context of the submission made by the learned counsel for the petitioner under Section 74 of the Indian Contract Act, 1872.

23. Although the petitioner has sought compensation for bank charges it had to incur to keep the bank guarantees alive during the pendency of the present proceedings, we feel that since the matter was debatable and arguable, it would not be appropriate on our part to grant that request to the petitioner.

24. In these circumstances, the writ petition is allowed to the extent that the respondent shall forthwith release the bank guarantees to the petitioner and the petitioner shall not be required to renew the bank guarantees, which are, in any event, expiring on 03.02.2016. There shall be no order as to costs.

BADAR DURREZ AHMED, J

SANJEEV SACHDEVA, J

FEBRUARY 01, 2016
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