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

% Judgment delivered on: 30.08.2016

+ **W.P.(C) 7214/2016 & CM No.29721/2016**

S A INFRASTRUCTURE CONSULTANTS PVT LTD Petitioner

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Joy Basu, Senior Advocate with Mr Alok Agarwal,
Mr Sudhir Mishra, Ms Ritwika Nanda, Mr Milan Tomar
and Mr Abhinav Pandey, Advocates

For the respondent : Mr S. Nanda Kumar with Mr Parivesh Singh and Mr P.
Srinivasan, Advocates

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition has been filed in respect of the Request for Proposal ('RFP') for procurement of Independent Engineer Services for 8-Laning of a Section of NH-1 (new NH-44) from Mukarba Chowk at km 15.500 to Panipat at km 86.000 on BOT (Toll) basis in the state of Haryana.

2. The petitioner participated in the bidding process pursuant to the said RFP. However, the respondent decided to open the financial bids by excluding the petitioner. The methodology of the evaluation process was that there would be two stages. The first stage would be the technical evaluation stage and the next would be the opening of the financial bids. A marking system was devised whereby marks were to be awarded at the technical evaluation stage as well as at the financial evaluation stage. The bidders, who got the top five highest marks at the technical evaluation stage, would be the only bidders whose financial bids would be opened. Thereafter marks would be awarded to these five bidders for their financial bids and the total marks given to the bidders, both in respect of the technical evaluation and financial evaluation, would be considered for award of the contract. One more aspect which needs to be mentioned is that the weightage to be given to the technical evaluation marks was 80% and the remaining 20% weightage was to be given to the marks obtained in the financial evaluation.

3. It may also be pointed out that the petitioner (S A Infrastructure Consultants Pvt. Ltd.) obtained 94.97 marks in the final technical

scores after technical evaluation and was ranked third. Therefore, based on the technical evaluation marks, since the petitioner was within the top five bidders, it would, under normal circumstances, have progressed to the next stage and its financial bid would also be opened. However, by a letter dated 09.08.2016 issued by the NHAI (the respondent herein) all bidders were informed about the opening of the financial bids of the eligible firms which was slated to take place at 11:30 a.m. on 17.08.2016 at the NHAI Headquarter, New Delhi. The letter dated 09.08.2016 is of vital significance and therefore the same is reproduced herein below:-

“NHAI/BOT/IE/11023/1/MC-P/2015/HR/362

09.08.2016

To,

The Bidders

Sub: Procurement of Independent Engineer Services for 8-Laning of Section of NH-1 (New NH-44) from Mukarba Chowk at Km 15.500 to Panipat at Km 86.000 on BOT (Toll) basis in the State of Haryana: Finalization of Technical Evaluation and Opening of Financial Bids-Reg.

1. Vide letter no.NHAI/BOT/IE/11023/1/MC-P/2015/HR181 dt.13.04.2016, the summary of Technical Evaluation was displayed on E-tender portal of NHAI for information of bidders wherein bidders were given opportunity to respond by 20.04.2016 (upto 11:00 hrs.) in case of any objection. The objections raised by some of the bidders were scrutinised and with the approval of

Competent Authority final Technical Scores as mentioned below are hoisted for information of bidders:-

Sl. No.	Name of Firm	Marks	Rank
i.	LEA Associates South Asia Pvt. Ltd.	87.59	X
ii.	STUP Consultants Pvt. Ltd. in Association with Ayoleeza Consultants Pvt. Ltd.	88.24	IX
iii.	Aarvee Associates Architects Engineers & Consultants Pvt. Ltd.	92.41	V
iv.	Bloom Companies LLC, USA in Association with Credible Management And Consultants Pvt. Ltd.	86.66	XI
v.	Egis International S.A. in JV with Egis India Consulting Engineers Pvt. Ltd.	95.17	II
vi.	Artefact Projects Ltd.	85.28	XII
vii.	MSV International Inc. In Association with M/s. LSI Engineering & Consultants Ltd.	88.68	VII
viii.	Getinsa-Payma, S.L. In Association with Segmental Consulting and Infrastructure Advisory Pvt. Ltd.	93.06	IV
ix.	Louis Berger Consulting Pvt. Ltd.	89.01	VI
x.	URS Scott Wilson India Pvt. Ltd. in JV with Consulting Engineers Groups Ltd. and in association with AEOM India Pvt. Ltd.	95.49	I
xi.	SMEC International Ply Ltd. in Association with SMEC (India) Pvt. Ltd.	88.55	VIII
xii.	SA Infrastructure Consultants Pvt. Ltd.	94.97	III*

* There was Vigilance enquiry on account of submission of false/alterd work experience certificates by M/s. Nicholas O'Dwyer Ltd. JV with M/s SA Infrastructure Consultants Pvt. Ltd. Competent Authority approved initiating action against the Firm. Legal Opinion was sought. On the basis of Legal opinion, Competent Authority approved not to open the Financial Bid of M/s. SA Infrastructure Consultants Pvt. Ltd. It is further informed that the Financial Bids of eligible Firms shall be opened on 17.08.2016 at 11.30 AM, NHAI HQ New Delhi.

This issues with the approval of Competent Authority.

(P.K.Sabat)
Manager (Tech)-H.”
(underlining added)

4. Insofar as this case is concerned, the note given after the asterisk mark is what is relevant. It comprises of several parts:-

- (i) There was a vigilance enquiry on account of submission of false/alterd work experience certificates by Nicholas O' Dwyer & Co. Ltd. which had a joint venture with S A Infrastructure Consultants Pvt. Ltd. (the petitioner herein);
- (ii) The competent authority approved initiating action against the firm (presumably the petitioner herein);
- (iii) Legal opinion was sought;

- (iv) On the basis of legal opinion, the competent authority approved not to open the financial bids of the petitioner.

5. It is clear that a vigilance enquiry was initiated by the Vigilance Division of NHAI with regard to four work experience certificates submitted by Nicholas O' Dwyer & Co. Ltd. with whom the petitioner undertook projects on a joint venture basis. The final investigation report was submitted by the Vigilance Division of the NHAI and thereafter on 24.02.2016 the competent authority i.e., the Chairman, NHAI had approved initiation of action against Nicholas O' Dwyer & Co. Ltd. which had a joint venture with the petitioner (including its subsidiary).

6. The minutes of the meeting held on 24.02.2016, a copy whereof was placed before us, clearly indicate that the Vigilance Department was to make available the documents and proof with regard to the said allegations to the concerned technical division for taking necessary action against the alleged defaulter consultants "after following due process i.e. by issuing show cause notice and dealing with the case as per the RFP/bid document". Pursuant to this, three show cause notices were issued on 25.04.2016, 12.05.2016 and 16.05.2016 in

respect of the very same four certificates which had allegedly been submitted by Nicholas O' Dwyer & Co. Ltd. to indicate its work experience. The said show cause notices were issued in respect of a Bihar project, an Orissa project and a Jammu & Kashmir project, respectively. All these projects were awarded in 2010-2011. It was pointed out by the petitioner that insofar as the Bihar project was concerned, the initial JV with Nicholas O' Dwyer & Co. Ltd. was with one Upham International Corporation Ltd. and the petitioner was not party to the bidding process and in that the four alleged certificates of Nicholas O' Dwyer & Co. Ltd. had already been submitted.

7. In any event, the petitioner submitted replies to the said show cause notices on 09.05.2016, 25.05.2016 and 26.05.2016, respectively. These were interim replies inasmuch as the petitioner had asked for further information and also for copies of the relied upon documents. Personal hearing was also requested and a request was also made for cross-examination. However, nothing happened after the replies were received by the respondent. Admittedly, till date there has been no determination pursuant to the show cause notices mentioned above. In other words, there is no conclusive decision as

to whether Nicholas O' Dwyer & Co. Ltd. had submitted false/forged certificates of work experience and more importantly as to whether there was any complicity on the part of the petitioner herein in the submission of such certificates, even if it were to be concluded, that they were fake or forged.

8. Thereafter, the present request for proposal (RFP) was being processed, the bid by the petitioner having been submitted as far back as on 26.10.2015. A copy of the minutes of the evaluation committee held on 12.07.2016 was handed over to us by the learned counsel for the respondent which we are taking on record. As per the said minutes, the RFP for the subject project had been invited on 15.09.2015 on e-tender basis and the bid submission due date was on 26.10.2015. Thirteen bids had been received by the bid due date. A meeting of the evaluation committee was held on 12.07.2016 to deliberate upon the legal opinions and to finalise the technical evaluation.

9. It is evident from the said minutes that the committee had a meeting on 11.04.2016 and recommended to post the draft results of the technical evaluation on the e-tender portal to give an opportunity

to the bidders to respond within seven days in case they had any objection to the marks thereunder. After the approval of the competent authority, the marks of the technical evaluation of the bidders were uploaded on the e- tender portal of NHAI on 13.04.2016 and the bidders were given opportunity to respond by 20.04.2016 in case they had any objection. After considering the objections which had been received, the financial consultant submitted its report dated 21.04.2016 and the evaluation committee in its meeting held on 21.04.2016 itself deliberated upon the report and prepared the revised summary of the final evaluation scores which is the same as appears in the letter dated 09.08.2016 which we have already extracted above. It will be remembered that the petitioner was shown at rank No.3 having obtained 94.97 marks.

10. Thereafter, the recommendation of the evaluation committee to seek legal opinion regarding the opening of financial bids of the petitioner was approved by the competent authority and accordingly the legal opinion of the Legal Department of NHAI was obtained on 19.05.2016 whereby the Legal Department opined as under:-

“Legally speaking NHAI’s action of not opening of financial bid of said two firms may not be legally tenable.

However, the terms and conditions of RFP of the specific bid could only be referred to in each case on merit and decided objectively whether the bid submitted be declared as responsive. It may be noted that any action out of extraneous influence may invite litigation.”

11. The evaluation committee deliberated upon the said opinion on 01.06.2016 and thought it fit to obtain a second opinion from a Government empanelled advocate firm before taking a final decision in the matter. Accordingly the legal opinion was obtained from the said firm. The opinion was submitted through a letter dated 16.06.2016 and was to the following effect:-

“In view thereof, in our opinion, the financial bid of M/s. SA Infrastructure Consultants Pvt. Ltd. may be opened. However, M/s. SAICPL, may be informed that the opening of its Financial Bid is subject to the pending proceedings.

Generally, considering that the issue is long pending, it would be advisable that the matter is dealt expeditiously as pendency of such matters are likely to have an adverse view being taken against NHAI, in both the cases where the contract is awarded to SAICPL or otherwise.”

12. The evaluation committee after considering the said opinion discussed the matter with the member (PPP) (public private partnership) (who also happens to be the Chief Vigilance Officer in the Vigilance Department of NHAI).

13. It appears that the said Member (PPP) advised the committee that legal opinion from a named senior central Government standing counsel be also obtained. The opinion of such a senior central Government standing counsel was obtained and was to the following effect:-

“In the opinion of the undersigned, it is always advisable given the circumstances that the Chairman of NHAI has directed to initiate inquiry into the allegations against the company that it has used fraudulent means to gain the work contracts with NHAI and which inquiry is still pending shows a taint upon the company that during the pendency of the inquiry, the financial bid of the company should not be opened.”

14. Thereafter the evaluation committee was apprised that the technical division sought a final opinion in the matter from the Chief General Manager (Legal), NHAI and the opinion so given was as under:-

“The Bidder has used fraudulent mean/misrepresented in NHAI project therefore not to be entertained and be debarred in future projects also till he conclusively proves, bonafide with documents including foreign origin certificates. We may therefore not entertain this bid.”

15. Thereafter it was concluded in the said meeting of 12.07.2016 as under:-

“13. After deliberation of above legal opinions & on the

basis of the final legal opinion dt. 11.07.2016 of CGM (Legal), Evaluation Committee recommends as under:-

(a) Not to open the Financial Bid of SA Infrastructure Consultants Pvt. Ltd. subject to approval of Competent Authority,

(b) To forward Legal Opinion dt. 11.07.2016 to GM (Vig.) for further necessary action,

(c) Approval of the revised Technical Score of the Firms as under:-

Sl. No.	Name of Firm	Marks	Rank
I.	LEA Associates South Asia Pvt. Ltd.	87.59	X
II.	STUP Consultants Pvt. Ltd. in Association with Ayoleeza Consultants Pvt. Ltd.	88.24	IX
III.	Aarvee Associates Architects Engineers & Consultants Pvt. Ltd.	92.41	V
IV.	Bloom Companies LLC, USA in Association with Credible Management And Consultants Pvt. Ltd.	86.66	XI
V.	Egis International S.A. in JV with Egis India Consulting Engineers Pvt. Ltd.	95.17	II
VI.	Artefact Projects Ltd.	85.28	XII
VII.	MSV International Inc. In Association with M/s. LSI Engineering & Consultants Ltd.	88.68	VII
VIII.	Getinsa-Payma, S.L. In Association with Segmental Consulting and Infrastructure Advisory Pvt. Ltd.	93.06	IV

IX.	Louis Berger Consulting Pvt. Ltd.	89.01	VI
X.	URS Scott Wilson India Pvt. Ltd. in JV with Consulting Engineers Groups Ltd. and in association with AEOM India Pvt. Ltd.	95.49	I
XI.	SMEC International Ply Ltd. in Association with SMEC (India) Pvt. Ltd.	88.55	VIII
XII.	SA Infrastructure Consultants Pvt. Ltd.	94.97	III*

* In view of above recommendations the Financial Bid shall not be opened subject to approval of Competent Authority.

(d) To hoist the revised summary of scores for information of bidders.

(e) To open the Financial Bids of Top Five Technically qualified bidders after excluding SA Infrastructure Consultants Pvt. Ltd. in line with the final Legal opinion are as under:-

Sl. No.	Name of the Consultancy Firm	Technical Score	Rank
i.	URS Scott Wilson India Pvt. Ltd. in JV with Consulting Engineers Group Ltd. and in association with AECOM India Pvt. Ltd.	95.49	1 st
ii.	Egis International S.A. in JV with Egis India Consulting Engineers Pvt. Ltd.	95.17	2 nd
iii.	Getinsa-Payma, S.L. In Association with	93.06	3 rd

	Segmental Consulting and Infrastructure Advisory Pvt. Ltd.		
iv.	Aarvee Associates Architects Engineers & Consultants Pvt. Ltd.	92.41	4 th
v.	Louis Berger Consulting Pvt. Ltd.	89.01	5 th

14. In view of above, approval of Competent Authority may be solicited for the Minutes of the Meeting of Evaluation Committee dt. 12.07.2016 and for opening of Financial proposals of the Consulting Firms as per para 13(e) above.”

(underlining added)

16. The Chairman, NHAI being the competent authority approved the above recommendation and thereafter the letter dated 09.08.2016 was issued to all the bidders informing them of the date of opening of the financial bid on 17.08.2016 after excluding the petitioner.

17. After hearing counsel for the parties, we are of the view that the course of action taken by the respondents insofar as the petitioner is concerned cannot be accepted. There are several reasons for this. First of all, there has been no determination on the show cause notices which were issued to *inter alia* the petitioner. Thus, there is no conclusive finding with regard to the four certificates of work experience submitted by Nicholas O’ Dwyer Limited were alleged to

be false or fabricated. Apart from this, there is no finding that there was any complicity on the part of the petitioner. The respondent should have taken a final decision in the matter and if and only if there was a finding against the petitioner could the respondent have taken the decision to exclude the petitioner from the stage of opening of financial bids. The second reason is that we get the impression that the respondent was bent upon excluding the petitioner from the stage of opening of financial bids and that is why it went on seeking opinions after the first two opinions were against the course of action which they have taken. We are of the view that the first two opinions given by the Vigilance Department of NHAI in the first instance and by the legal consulting firm of NHAI were correct and sufficient to enable the respondent to open the financial bid of the petitioner. The respondent ought to have followed that course of action and permitted the petitioner to participate in the second stage i.e., opening of the financial bids yet, it persisted and sought further opinion from a Senior Government Standing Counsel and furthermore from the CGM (Legal), NHAI. We do not understand as to how the CGM (Legal) could have given an opinion that the petitioner had used fraudulent

means/misrepresented in the NHAI projects and that therefore the petitioner should not be entertained and be debarred from future projects also till he conclusively proves his bona fides with documents. This understanding of the law is completely contrary to what it actually is. Once show cause notices had been issued to the petitioner, unless they were taken to their logical end, there could not be any finding against the petitioner. Furthermore, we do not know how the CGM (Legal), NHAI could have given an opinion that the petitioner be debarred from future projects without even considering petitioner's replies to the show cause notices. This would clearly militate against the principles of natural justice. Even the opinion given by the Senior Central Government Standing Counsel to the effect that it is always advisable that during the pendency of enquiry the financial bids of the company should not be opened is erroneous and contrary to law. Thirdly, we do not see as to why the respondents did not take heed of the earlier two opinions and sought to rely on the latter two opinions which we have already indicated are contrary to settled legal principles.

18. Therefore, the decision of the competent authority not to open the financial bids of the petitioner in the circumstances narrated above is clearly not warranted in law. Consequently, we direct that the petitioner would be entitled to participate in the next stage and that the petitioner's financial bids would be opened because it is otherwise placed at rank No.3.

19. We are making it clear that we have not made any observation with regard to the merits of the show cause notices and the replies given by the petitioner and the final decisions to be taken in the matter.

20. The writ petition stands allowed as above. There shall be no order as to costs.

BADAR DURREZ AHMED, J

AUGUST 30, 2016
ns

ASHUTOSH KUMAR, J