

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

% Judgment Reserved on: 15.03.2017

Judgment delivered on: 27.03.2017

+ W.P(C) 1097/2017 & CM 5018/2017

**M/S STATE CONSTRUCTION INTEGRATED
WORKS, UNIQUE CONSTRUCTION (JV) Appellant**

versus

**NATIONAL HIGHWAYS AUTHORITY OF
INDIA & ANR. Respondents**

Advocates who appeared in this case:

For the Appellant : Mr Rakesh Khanna, Sr.Adv. with
Mr K.G.Sukhwani, Mr P.K.Sukhwani, Mr Anil
K.Sharma, Ms Shefali Jain and Ms B. Kazim.

For the Respondent No.1 : Mr Sandeep Sethi, Sr.Adv. with Mr Mukesh
Kumar, Ms Gunjan S. Jain.

For the Respondent No.2 : Mr Rajiv Nayyar, Sr.Adv. with Ms Namrata
Kapoor Sharma and Mr P.P. Kanwar.

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. The petitioner which had participated in the bid, the tender for which was invited on 18.10.2016 for construction of a new 4 Lane Bridge across Varsova Creek and its approaches with interchange from km. 496.100 to km 498.350 (approx.2.250 Km) between Surat - Dahisar Section of NH-8 (new NH-48) in the State of Maharashtra, is aggrieved

by the action of the respondent in accepting the bid of respondent No.2 for consideration when the tender of respondent No.2 was allegedly technically non-compliant and had, in the first instance, been declared to be non-responsive by the technical evaluation committee.

2. It would be necessary to refer to certain facts preceding the invitation of tender in which the petitioner and respondent No.2 had participated. For the first time, EPC tenders were invited for the same work referred to above on 04.09.2015, which tender notice was later cancelled as there were no tenderers. For the second time, the tenders were invited on Hybrid Annuity basis on 10.03.2016 in which the petitioner was the only tenderer and, therefore, his tender was not opened. On the third occasion, the tenders were invited on Hybrid Annuity basis on 05.05.2016 in which the offer of the petitioner was the lowest, but it was higher by 55.32% of the estimated cost. As a result, tenders were re-invited by EPC mode on 18.10.2016 in which the petitioner, respondent No.2 and another participated.

3. In order to appreciate the contention of the petitioner, it would be necessary to extract the relevant eligibility and qualification requirements of a bidder set out in the RFP.

4. 2.2.2 *Qualification requirements of Bidders:*

2.2.2.1 XXXX XXXX XXXX XXXX

2.2.2.2 *Technical Capacity*

(i) *For demonstrating technical capacity and experience (the "Technical Capacity"), the Bidder shall, over the past 5 (five) financial years preceding the Bid Due Date, have received payments for construction of Eligible Project(s), 0.1" has undertaken construction works by itself in a PPP project, such that the sum total thereof is more than Rs. 394.10 crore (Rs Three hundred ninety four crore and ten lakh only) (the "Threshold Technical Capacity").*

(ii) *Provided that at least one similar work of 50% of Estimated Project Cost Rs. 78.82 crore (Rs. Seventy eight crore and eighty two lakh only) shall have been completed from the Eligible Projects in Category I and/or Category 3 specified in Clause 2.2.2.5. For this purpose, a project shall be considered to be completed, if more than 90% of the value of work has been completed and such completed value of work is equal to or more than 50% of the estimated project cost.*

2.2.2.3 Financial Capacity: *The Bidder shall have a minimum Net Worth (the "Financial Capacity") of Rs. 15.76 crore (Rs. Fifteen crore and seventy six lakh only) at the close of the preceding financial year.*

2.2.2.4 *In case of a Joint Venture:*

(i) *The Threshold Technical Capacity and Financial Capacity" of all the Members of Joint Venture would be taken into account for satisfying the above conditions of eligibility. Further, Lead Member shall meet at least 60% requirement of Bid Capacity, Technical and Financial Capacity required as per Clause 2.2.2.1, 2.2.2.2(i) and 2.2.2.3 and each of other JV members*

shall meet at least 30% requirement of Bid Capacity. Technical and Financial capacity as per Clause 2.2.2.1, 2.2.2.2(i) and 2.2.2.3. For avoidance of doubt it is further clarified that the Joint Venture must collectively and individually satisfy the above qualification criteria.

(ii) For requirement of 2.2.2.2 (ii) one similar work of 50% of Estimated Project Cost should have been completed from the Eligible Projects in Category 1 and/or Category 3 specified in Clause 2.2.2.5 individually by any of the JV members as a single work.

2.2.2.5 Categories and factors for evaluation of Technical Capacity:

*(i) Subject to the provisions of Clause 2.2.2 the following categories of experience would qualify as Technical Capacity and eligible experience (the "**Eligible** Experience") in relation to eligible projects as stipulated in Clauses 2.2.2.6 (i) & (ii) (the "**Eligible** Projects"). In case the Bidder has experience across different categories, the experience for each category would be computed as per weight of following factors to arrive at its aggregated Eligible Experience:*

<i>Category</i>	<i>Project/Construction experience on Eligible Projects</i>	<i>Factors</i>
<i>1</i>	<i>Project in highways sector that qualify under Clause 2.2.2.6(i)</i>	<i>1</i>
<i>2</i>	<i>Project in core sector that qualify under Clause 2.2.2.6(i)</i>	<i>0.50</i>
<i>3</i>	<i>Construction in highways sector that qualify under Clause 2.2.2.6(ii)</i>	<i>1</i>
<i>4</i>	<i>Construction in core sector that qualify under Clause 2.2.2.6(ii)</i>	<i>0.50</i>

(ii) The Technical capacity in respect of an Eligible Project situated in a developed country which is a member of OECD shall be further multiplied by a factor of 0.5 (zero point five) and the product thereof shall be the Experience Score for such Eligible Project.

(iii) For the purpose of this RFP:

(a) highways sector would be deemed to include highways, expressways, bridges, tunnels and airfields; and

(b) core sector would be deemed to include ports, airports, railways, metro rail, industrial parks/ estates, logistic parks, pipelines, irrigation, water supply, sewerage and real estate development.

(I) In case of projects executed by applicant under category 3 and 4 as a member of joint venture, the project cost should be restricted to the share of the applicant in the joint venture for determining eligibility as per provision under clause 2.2.2.2 (ii). In case Statutory Auditor certifies that, the work of other member(s) is also executed by the applicant, then the total share executed by applicant can be considered for determining eligibility as per provision under clause 2.2.2.2 (ii).

(II) Maintenance works are not considered as eligible project for evaluation as per Instruction NO.6 to Annex-IV. As such works with nomenclature like PR, OR, FDR, SR, site/micro grading, surface renewal, resurfacing work, Tarring, B.T. surface work, temporary restoration, urgent works, periodic maintenance, repair & rehabilitation, one time maintenance, permanent protection work of bank, external pre stressing, repair of central hinge, short term OMT contract of NHAI, any type of work related to boarder fencing, work of earthwork alone,

construction of buildings/ hostels/hospitals, etc, or not specified, shall not be considered.

(III) The works such as Improvement in Riding Quality work (IRQP/IRQ), riding quality shall be considered for threshold technical capacity [2.2.2.2 (i)] but not for single completed works [2.2.2.2 (ii)]

(IV) Project in Highway sector shall constitute the following for the purpose of consideration under category I or 3 as applicable. if:

(i) Widening / reconstruction / up-gradation works on NH/SH or on any category of road taken up under CRF, ISC/ EI, SARDP, LWE,

(ii) Widening/ re-construction/up-gradation works on MDRs with loan assistance from multilateral agencies or on BOT basis,

(iii) Widening/reconstruction /up-gradation work of roads in Municipal corporation limits, construction of Bypasses,

(iv) Construction of stand- alone bridges, ROBs, tunnels w.r.t roads,

(v) Long term OMT works of NHAI/MoRT&H.

(V) The projects with the title of RIDF, PMGSY road, link road, city roads, rural road, sector/ municipality road, Bridges for railway line, work of metro rails (bridges/ tunnel), real estate projects which demonstrate road development/construction bridges or culverts may be considered under category – 4

(VI) In case both the estimated cost of project and revised cost of project are provided, the revised cost of project shall be considered for evaluation.

(Emphasis provided)

2.2.2.6 Eligible Experience on Eligible Projects in respect of each category:

(i) For a project to qualify as an Eligible Project under Categories 1 and 2:

(a) It should have been undertaken as a PPP project on BOT, BOLT, BOO, BOOT or other similar basis for providing its output or services to a public sector entity or for providing non-discriminatory access to users in pursuance of its charter, concession or contract, as the case may be. For the avoidance of doubt, a project which constitutes a natural monopoly such as an airport or port should normally be included in this category even if it is not based on a long term agreement with a public entity;

(b) the entity claiming experience should have held, in the company owning the Eligible Project, a minimum of 26% (twenty six per cent) equity during the entire year for which Eligible Experience is being claimed:

(c) the capital cost of the project should be more than 10% of the amount specified as the Estimated Project Cost; and

(d) the entity claiming experience shall, during the last 5 (five) financial years preceding the Bid Due Date, have itself undertaken the construction of the project for an amount equal to at least one half of the Project Cost of eligible projects, excluding any part of the project for which any contractor, subcontractor or other agent was appointed for the purposes of construction.

(ii) For a project to qualify as an Eligible Project under Categories 3 and 4, the Bidder should have received payments

*from its client(s) for construction' works executed, fully or partially, during the 5 (five) financial years immediately preceding the Bid Due Date, and only the amounts (gross) actually received, during such 5 (five) financial years shall qualify for purposes of computing the Experience Score. However, receipts of less than Rs. **15.76 crore (Rs. Fifteen crore and seventy six lakh)** shall not be reckoned as receipts for Eligible Projects. For the avoidance of doubt, construction works shall not include supply of goods or equipment except when such goods or equipment form part of a turn-key construction contract/EPC contract for the project. Further, the cost of land shall not be included hereunder.*

(iii) The Bidder shall quote experience in respect of a particular Eligible Project under anyone category only. even though the Bidder (either individually or along with a member of the Joint Venture) may have played multiple roles in the cited project. Double counting for a particular Eligible Project shall not be permitted in any form.

(iv) Experience for any activity relating to an Eligible Project shall not be claimed by two or more Members of the Joint Venture. In other words, no double counting by a Joint Venture in respect of the same experience shall be permitted in any manner whatsoever."

5. The respondent No.1 had issued a circular dated 04.01.2017, displaying the result of the technical evaluation on their web-portal in which the respondent No.2 was stated to be non responsive with regard to the technical qualifications specified in clause 2.2.2.5 and hence non compliant with clause 2.2.2.2 (ii) of RFP. The bid of the petitioner only was found to be responsive after technical evaluation.

6. It is further contended that the petitioner was informed vide circular dated 05.01.2017 that financial bids for the work will be opened online on 12.01.2017 and, therefore, the petitioner as a bidder ought to furnish information in accordance with clause 3.2 of the RFP on or before 11.01.2017. Later, by letter dated 12.01.2017, the date of opening of the financial bid was postponed till further orders. Thereafter on 25.01.2017 a circular was issued by respondent No.1 intimating that the financial bids would be opened online on 27.01.2017 at 12 PM. However, the aforesaid circular was also marked to respondent No.2 whose technical bid was held to be non responsive as per circular dated 04.01.2017, raising suspicion in the mind of the petitioner of some foul play. It has been further submitted by the petitioner that the work in question is of an important nature, for which respondent No.2 does not have any experience of a single work as required by the conditions of tender and his bid has wrongly been processed for further/financial evaluation.

7. Mr Sandeep Sethi, the learned senior counsel appearing for NHAI, however, argued that the financial bid of respondent No.2 was opened as it met the eligibility condition and qualification requirement of the RFP. It was further asserted that the whole process of technical bid evaluation

was absolutely transparent, fair and objective with proper reasoning and no malafides could be alleged against respondent No.1 in opening the financial bid of respondent No.2.

8. Mr Sethi pointed out that the work was of utmost importance as the project was critical for ensuring smooth and uninterrupted flow of traffic. The present existing bridge is in a dilapidated state and is closed for heavy traffic since September, 2016. The Delhi-Mumbai corridor through NH-8 is the lifeline between the two metros, requiring immediate carrying out of the project. It was admitted by respondent No.1 that on earlier two occasions when the bids were invited for the project, either due to lack of interest by the contractors or because of quoting of highly exorbitant bid price by the bidders, the processes were annulled. In the light of the emergent situation, there was a necessity for awarding of the work on EPC mode (cash contract) so as to ensure that the work was started in right earnest shortly.

9. In order to satisfy ourselves, we had called for the extracts of the relevant records. On perusal of the records, it appeared that the technical evaluation committee did not consider the bid of respondent No.2 to be responsive as it did not fulfil the criteria of technical capacity as per

clause 2.2.2.2 (ii) i.e at least one similar work of 50% of estimated project cost of Rs.78.82 crores should have been completed from the eligible projects in category 1 and/or category 3 specified in Clause 2.2.2.5.

10. The respondent No.2 had claimed to have constructed flexible pavement roads in industrial estate which included Asphalt roads, SWD, CD works and street light works with five year free maintenance guarantee period at a cost of Rs.93.65 crores.

11. The bid of respondent No.2, in the opinion of the technical evaluation committee, was not covered under category 3 as per Clause 2.2.2.5 (iii) (iv) of RFP i.e. project in highway sector to constitute specified works for the purposes of consideration under category 1 or 3 as applicable. Therefore, as per document submitted by respondent No.2 for the subject project, the experience of the project work shown by respondent No.2 was not covered under category 3 as per RFP and, therefore, the respondent No.2 was not found to be eligible as per clause 2.2.2.2 (ii).

12. However, the convenor had expressed his view that all major eligibility conditions pertaining to threshold technical score, experience of similar single completed work, net worth and available bid capacity of

the bidders should be assessed uniformly at a benchmark as on bid due date or 31st March of the preceding financial year. The convenor was of the view that the RFP did not make any provision of updation/rationalisation of the eligibility parameters at a benchmark. Since there was no condition in the RFP, forbidding the updation of the major eligibility conditions for proper evaluation, it was suggested that any tenderer which completed a single bridge of about 770 mts with completion cost of Rs.77.15 crores in December, 2012 be deemed to meet the single work bid parameter for the requirement of Rs.78.82 crores in December, 2016 for construction of about 500 mts bridge across Versova Creek.

13. Thereafter, the recommendation of the evaluation committee was placed before the Member (Projects) for approval. The recommendations of the evaluation committee was also uploaded on the website in terms of clause 2.19 of RFP which made it mandatory for the authority to display the result of the technical evaluation committee on the web-portal for seven days with the reasons for declaring any bid being non-responsive as well as the directive/advisory of the Ministry of Road Transport and Highways for ensuring transparency and probity in the matter.

14. Respondent No.2, it has been stated by Mr Sethi, submitted its representations, challenging such decision of the technical evaluation committee of the bid being non responsive, which representations were forwarded to the evaluation committee again. For the second time also the evaluation committee, in its meeting held on 11.01.2017 reiterated its earlier recommendations of the bid of respondent No.2 being non responsive. The recommendations of the evaluation committee was, then, again, placed for consideration and approval of the competent authority viz. Member (Projects). The Member (Projects) forwarded the opinion of the technical evaluation committee and the differing opinion of the convenor to the Chairman, NHAI who was asked to take the last call.

15. The Chairman, NHAI, after due consideration of the material facts took a decision that the project experience relied upon by respondent No.2 qualified him as a responsive bidder since the project executed by respondent No.2 was a road project only and it would only be fair to accept such experience and not reject it on the slender ground that the road work executed by respondent No.2 was in an industrial area, which is not enumerated in the category of projects in highway sector (an eligibility condition). The value of the road project executed by

respondent No.2 was of Rs.93.65 crores which is above the value of work (Rs.78.82 crores) required under the RPF document for qualifying as an eligible project.

16. The principles of processing of a tender, award of contract etc have been clearly laid down in several decisions of the Supreme Court. The common strains which run in all the judgments are that public interest is paramount and that the process should be free from any arbitrariness in the matter of award of contracts in which all the participants should be treated alike. The Courts can interfere only when the agency inviting the tender, acts arbitrarily or contrary to public interest or the decision is discriminatory and unreasonable.

17. What is therefore required to be decided in the present case is whether it was fair for the respondent No.1 to have changed/tweaked the eligibility condition for respondent No.2, and whether such a decision is based on any rationale or it was for the sole purpose of accommodating respondent no.2 to the exclusion of others.

18. It is well settled that the terms of a tender cannot be given a go-by or be treated as superfluous or redundant requirements. If a particular condition has been set forth in the tender document as an eligibility

criterion, strict compliance with that requirement is a necessity in order to ensure the sanctity of the process of awarding a contract. In **Ramana Dayaram Shetty vs. International Airport Authority of India: (1979) 3 SCC 489**, the Supreme Court has cautioned that the Courts should not be prompt in ascribing superfluity to the language of a document and should suppose every word in a document to be intended to have some effect or be of some use. In **G.J.Fernandez vs. State of Karnataka: (1990) 2 SCC 488**, the principle of holding on to every word was reaffirmed and the Supreme Court was of the view that the party issuing the tender (the employer) has a right to punctiliously and rigidly enforce the terms of a tender and if a party approaches a Court for an order restraining the employer from strict enforcement of the terms of the tender, the Court should decline to do so. Thus, even the converse, viz. if an employer relaxes the terms of a contract in order to accommodate another, the same should be prevented, would also be true. However, what was emphasised in the aforesaid judgment was that changes which would affect all the intending applicants alike and which are not objectionable can be brought about, as a practical measure. Thus deviations from the terms and conditions is permissible so long as level playing field is maintained and

it does not result in any arbitrariness or discrimination. A distinction has also been made between essential and non-essential or ancillary/subsidiary terms of an NIT, holding that ancillary or subsidiary terms could be waived and technical literal compliance of any clause which is not essential but only ancillary, ought not to be pressed. Thus in several cases, the inherent authority of an employer to deviate from the terms and conditions of an NIT was affirmed but with the caveat that level playing field had to be accorded to all the bidders.

19. True it is that if the terms of the eligibility criteria are interpreted in such a way that it brings in another bidder who was earlier found to be non responsive, the “*privilege of participation*” theory would receive a jolt in as much as others who may have known that the technical eligibility criterion could be modified, would also have participated. Nonetheless one cannot lose sight of the fact that in **Tata Cellular vs. Union of India: (1994) 6 SCC 651**, the Supreme Court gave precedence to the lawfulness of a decision over soundness of such decision.

20. The Supreme Court in Tata Cellular (Supra) has referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, thus:

“(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative action. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. ... More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

(emphasis in original)

21. In **Sterling Computers Ltd vs. M & N Publications Ltd.:** (1993) 1

SCC 445, the Supreme Court observed:-

“18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity

in the ‘decision-making process’. ... the courts can certainly examine whether ‘decision-making process’ was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.”

(Emphasis provided)

22. In **Raunaq International Ltd vs. I.V.R.Construction Ltd: (1999) 1**

SCC 492, the Supreme Court dealt with the matter in some detail. It was held:

“9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:

- (1) the price at which the other side is willing to do the work;*
- (2) whether the goods or services offered are of the requisite specifications;*
- (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;*
- (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;*
- (5) past experience of the tenderer, and whether he has successfully completed similar work earlier;*
- (6) time which will be taken to deliver the goods or services; and often*
- (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.*

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision

to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.”

(Emphasis provided)

23. The two posers which have been suggested by the Supreme Court in **Michigan Rubber (India) Ltd vs. State of Karnataka and Others:** (2012) 8 SCC 216, before interfering in tender or contractual matters in exercise of power of judicial review are (i) whether the process adopted or decision made by the authority is malafide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: ‘the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached’; (ii) whether public interest is affected. If the answers to the posers are in the negative, there should be no interference under Article 226 of the Constitution of India.

24. In **Jagdish Mandal vs. State of Orissa:** (2007) 14 SCC 517, the Supreme Court had the occasion to examine the elements of public interest. The Supreme Court in the aforesaid case has expatiated as under:-

“10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work—thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g. a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

25. In **Master Marine Services (P) Ltd vs. Metcalfe & Hodgkinson (P) Ltd**: (2005) 6 SCC 138, the Supreme Court has affirmed the principle that the employer can choose its own method to arrive at a decision and is free to grant any relaxation for bonafide reasons, if the tender conditions permits such a relaxation. Even if some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. If a decision is taken purely on public interest, the Court should ordinarily not apply any judicial restraint.

26. In **B.S.N.Joshi & Sons Ltd vs. Nair Coal Services Ltd.:** (2006) 11 SCC 548, the Supreme Court reiterated the view that where a decision has been taken purely on public interest, the Court ordinarily should apply judicial restraint.

27. A clause in a document is best understood or interpreted by the author which only is the competent person to understand and appreciate its requirements.

28. In **Afcons Infrastructure Ltd vs. Nagpur Metro Rail Corporation Ltd.:** AIR 2016 SC 4305, the Supreme Court has ruled that the Constitutional Courts must defer the interpretation and appreciation of a clause of tender documents to the agency floating the tender unless malafides or perversity is apparent. The Supreme Court has also clarified that it may be possible that an owner or employer of a project may give an interpretation to the tender documents which may not always be acceptable to the Constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

29. Thus, from the records it appears that though the bid of respondent No.2 was initially found to be non responsive to the technical qualifications set forth in the tender document but the decision to bring in

respondent No.2 for further/financial evaluation was not without any reason or logic. The decision was not an abrupt one but was taken after due deliberation. The opinion of the convenor was twice put before the technical evaluation committee and finally the two opinions: one of the committee and the other of the convenor were forwarded by the Member (Projects) to the Chairman of respondent No.1 for taking a decision in the matter. One cannot ignore the fact that earlier also the bid of the petitioner was not opened because of the high price quoted by him (higher than the estimated cost). In the present case also, the financial bid of the petitioner is admittedly higher than the estimated cost and is about Rs.40 crores more than the offer made by respondent No.2.

30. Low price bids may not always be in public interest but in the present case, since the project is critical as the old existing bridge is not in proper condition and the petitioner had quoted an exorbitant price bid, we cannot find fault with the respondent No.1 in processing the bid of respondent No.2 as well, which was earlier declared to be non-responsive.

31. Normally, clauses dealing with technical eligibility need be strictly enforced because compliance with such conditions only makes or ensures

that a tenderer has the technical knowhow and capacity to perform the awarded work; however, some play in the joints is necessary for practical dispensation of the responsibility of awarding the contract. What is required is that a Government agency must behave practically and like a prudent businessman for serving its interest and since the Government is welfare oriented as well, public interest is also to be kept in mind. What is of utmost importance is that nobody (bidder) be put in any disadvantageous position. This can only happen when the decision of the authority is not arbitrary or malafide but is based on objective reasoning.

32. We feel that the decision to modify the eligibility criteria, through a liberal interpretation, was not with the purpose of favouring respondent No.2. It appears to be quite logical that the experience of respondent No.2 in construction of roads in an industrial area was taken as an experience in the highway sector even though construction of roads in an industrial area is not one of the enumerated conditions in the definition of highway sector in the RFP. It appears to us that the aforesaid technical eligibility condition was so interpreted/modified, as on earlier occasions, for the same work, the tender processes remained non-starters, either for the absence of any bidder or the petitioner being the sole bidder or because of

excessive price bids quoted by the petitioner. We, therefore, feel that the aforesaid relaxation of the technical eligibility criterion was based on logic and the decision was not actuated by any malafide.

33. Thus we are left with no alternative but to dismiss the present writ petition.

34. The interim order dated 07.02.2017 stands vacated. No order as to costs.

CM 5018/2017

1. In view of the petition having been disposed of, the application has become infructuous.
2. The application is disposed of accordingly.

ASHUTOSH KUMAR, J

BADAR DURREZ AHMED, J

MARCH 27, 2017/k