

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 02.03.2017

+ **W.P.(C) 10471/2016 & CM Nos. 41071/2016 and 44266/2016**

**M/S BRIJ GOPAL CONSTRUCTION CO. PVT. LTD. & M/S
RAMKY INFRASTRUCTURE LTD. (CONSORTIUM) ... Petitioner**

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA ... Respondent

Advocates who appeared in this case:-

For the Petitioner : Mr Dushyant Dave and Mr Balbir Singh, Senior
Advocates with Mr Bhupesh Narula, Mr Gaurav
Kakar, Mr Mayank Jain, Mr Gautam Jain and
Mr Madhur Jain
For the Respondent : Mr Sandeep Sethi, Senior Advocate with Ms Gunjan
Sinha Jain and Mr Mukesh Kumar
For applicant in CM 44266/16: Mr S. Ganesh, Senior Advocate with Mr Priyabrat
Tripathy and Mr Ajay Saroya

CORAM:-

**HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE ASHUTOSH KUMAR**

JUDGMENT

BADAR DURREZ AHMED, J

1. This writ petition pertains to the Request for Proposal (RFP) concerning the International Competitive Bidding under a Single Stage Bidding Process for development of the Delhi–Meerut Expressway from Km 0.000 to Km 27.500 including 6/8 Laning of NH – 24 from Km. 0.000 to Km. 49.346 (Hapur Bypass) in the State of Delhi and Uttar Pradesh under on DBOT basis- Package II from existing KM 8.360 to existing Km

27.740. (UP Border to Dasna) in the State of Uttar Pradesh- Hybrid Annuity Model (3rd Call). The petitioner, which is a consortium of Brij Gopal Construction Company Private Limited and Ramky Infrastructure Limited responded to the said Request for Proposal.

2. The petitioner is aggrieved by the communication dated 31.10.2016 from the respondent [National Highways Authority of India] ('NHAI'), whereby the petitioner was informed that its bid was not found to be technically responsive on the following grounds:-

- (i) Does not meet the condition of eligibility for Financial Capacity as per Clause 2.2.2 (B) of the RFP i.e., minimum Net Worth:
- (ii) Does not meet the test of Responsiveness as per Clause 3.2.1 (g) of the RFP.

It is the case of the petitioner that the manner in which the net worth has been sought to be computed by the respondent is not proper and that the petitioner, in fact, meets the minimum net worth requirement. It was also submitted on behalf of the petitioner that Clause 3.2.1(g) of the RFP was also not attracted in the present case and the petitioner's bid could not be considered as not being responsive. On the other hand, the learned counsel

for the respondent submitted that on both counts, the petitioner's bid was found to be technically non-responsive.

3. Before we enter into the details of the controversy between the parties, it would be necessary and indeed appropriate to set out the relevant clauses of the Instructions to Bidders contained in the RFP document. Clauses 2.2.2, 2.2.4 and 3.2.1(g) to the extent relevant are reproduced hereinbelow:-

“2.2.2 To be eligible for this RFP a Bidder shall fulfill the following conditions of eligibility:

(A) xxxx xxxx xxxx xxxx

(B) **Financial Capacity:** The Bidder shall have a minimum Net Worth (the "**Financial Capacity**") of Rs 350.48 Crore (Rupees Three Hundred Fifty Crore and Forty Eight Lakh only) at the close of the preceding financial year¹.

In case of a Consortium, the combined technical capability and net worth of those Members, who have and shall continue to have an equity share of at least 26% (twenty six per cent) each in the SPV, should satisfy the above conditions of eligibility; provided that each such Member shall, for a period of 2 (two) years from the date of commercial operation of the Project, hold equity share capital not less than: (i) 26% (twenty six per cent) of the subscribed and paid up equity of the SPV; and (ii) 5% (five per cent) of the Total Project Cost specified in the Concession Agreement².

¹ In case a Bidder has issued any fresh Equity Capital during the current financial year, the same shall be permitted to be added to the Bidder's Net Worth subject to the Statutory Auditor of the Bidder certifying to this effect.

² The Authority may, in its discretion, impose further obligations in the Concession Agreement, but such obligations should provide sufficient mobility for partial divestment of equity without compromising the interests of the Project.

Provided further that each member of the Consortium shall have a minimum Net Worth of 12.5% of Estimated Project Cost in the immediately preceding financial year.

2.2.4 The Bidders shall enclose with its bid, to be submitted as per the format at Appendix-IA, complete with its Annexes, the following:

i) xxxx xxxx xxxx xxxx

ii) Certificate(s) from its statutory auditors specifying the net worth of the Bidder, as at the close of the preceding financial year, and also specifying that the methodology adopted for calculating such net worth conforms to the provisions of this Clause 2.2.4 (ii) For the purposes of this RFP, net worth (the "Net Worth") shall mean the aggregate value of the paid-up share capital and, all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write back of depreciation and amalgamation.

xxxx xxxx xxxx xxxx

3.2.1 As a first step towards evaluation of Technical Bids, the Authority shall determine whether each Technical Bid is responsive to the requirements of this RFP. A Technical Bid shall be considered responsive only if:

xxxx xxxx xxxx xxxx

(g) Technical Bid does not contain any condition or qualification;

xxxx xxxx xxxx xxxx”

4. From the above clauses, it is evident that the eligibility condition with regard to financial capacity is provided in Clause 2.2.2(B). It, *inter alia*, prescribes that the bidder must have a minimum net worth of Rs 350.48 crores at the close of the preceding financial year, which, in this case was considered to be 31.03.2016. It is further provided in the said clause that in the case of a consortium (which is the case in the present matter), it is the combined net worth of those members of the consortium who have at least 26% equity share in the SPV. Each member of the consortium is also required to have a minimum net worth of 12.5% of the estimated project cost in the immediately preceding financial year.

5. Clause 2.2.4 and, in particular, sub-clause (ii) prescribes the manner in which the net worth is to be computed. It stipulates that for the purpose of the present RFP, net worth shall mean the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write back of depreciation and amalgamation.

6. The Evaluation Committee held its meetings on 25.10.2016, 26.10.2016 and 28.10.2016. The copies of the minutes of the meetings held on these dates were placed before us. With reference to an earlier meeting held on 03.10.2016, it is pointed out that four applications in response to the RFP had been received and opened and had been handed over to the Financial Consultant (M/s JPS Associates Private Limited). This included the bid submitted by the petitioner consortium. The minutes further disclosed that the Financial Consultant by its letter dated 10.10.2016 submitted an interim report on evaluation after review and examination of the technical bids submitted by the bidders and proposed to seek clarifications from two bidders, which included the petitioner consortium. Thereafter, pursuant to a meeting held on 10.10.2016, the Evaluation Committee decided to seek clarifications from, *inter alia*, the petitioner and accordingly letters of the same dates were issued to, *inter alia*, the petitioner consortium. A reply was received from the petitioner consortium on 13.10.2016 and was handed over to the Financial Consultant.

7. Thereafter, the Financial Consultant, through a letter dated 20.10.2016, submitted the final report on evaluation after review and examination of the technical bids submitted by the said four bidders.

Insofar as the final report is concerned, it was found that the financial capability, as assessed by the Financial Consultant of Brij Gopal Construction Private Limited, was Rs 68.98 crores. However, with regard to Ramky Infrastructure Limited (which is the other consortium member), the Financial Consultant gave two figures. One figure of the financial capability was of Rs 281.85 crores and the other figure was of Rs 4.634 crores. If the first figure of 281.85 crores was taken for Ramky Infrastructure Limited, then the total net worth of the consortium would come to Rs 350.82 crores, which was higher than the minimum of Rs 350.48 crores prescribed under Clause 2.2.2 (B). However, if the figure of Rs 4.634 crores, as representing the financial capability of Ramky Infrastructure Limited, was taken, then the total net worth of the consortium would be Rs 73.612 crores. This would clearly be below the minimum benchmark of Rs 350.82 crores.

8. The two figures had been given for Ramky Infrastructure Limited because of the qualification contained in the statutory auditor's certificate pertaining to Ramky Infrastructure Limited.

9. At this juncture itself, it would be necessary to set out the relevant portions of the Statement of Audited Standalone Financial Results for the year ended 31.03.2016 insofar as Ramky Infrastructure Limited is concerned, which are as under:-

“RAMKY INFRASTRUCTURE LIMITED
STATEMENT OF ASSETS AND LIABILITIES

All amounts in India Rupees lakhs, except share data

SL No.	Particulars	As on 31.03.2016	As on 31.03.2015
		(Audited)	(Audited)
A	EQUITY AND LIABILITIES		
1	Shareholder's funds		
	(a) Share capital	5,719.78	5,719.78
	(b) Reserves and surplus	16367.56	15,131.62
		22087.34	20,851.40
2	Non-current liabilities		
	(a) Long-term borrowings	1,01,627.75	19,460.98
	(b) Deferred tax liabilities(net)	—	—
	(c) Other long-term liabilities	2,478.25	2,865.54
	(d) Long-term provisions	401.41	131.14
		1,04,507.41	22,457.66
3	Current liabilities		
	(a) Short-term borrowings	53,210.57	1,16,193.46
	(b) Trade payables	79,988.41	95,419.69
	(c) Other current liabilities	74,053.86	87,963.73
	(d) Short-term provisions	1,579.86	3,785.46
		2,08,832.70	3,03,362.34
	TOTAL EQUITY AND LIABILITIES	3,35,427.45	3,46,671.40
B.	ASSETS		
1	Non-current assets		
	(a) Fixed assets	21,146.85	26,831.13
	(b) Non-current investments	40,428.14	40,438.14
	(c) Deferred tax asset(net)	39,601.66	40,908.23
	(d) Long-term loans and advances	33,813.43	29,020.68
	(e) Other non-current assets	183.33	777.92
		135,173.41	1,37,976.10

2	Current assets		
	(a) Inventories	45,739.60	77,194.38
	(b) Trade receivables	84,420.97	65,361.22
	(c) Cash and cash equivalents	7,461.91	4,505.41
	(d) Short-term loans and advances	58,462.66	59,572.26
	(e) Other current assets	4,168.90	2,062.03
		2,00,254.04	2,08,695.30
	TOTAL - ASSETS	3,35,427.45	3,46,671.40

Notes:

1 xxxxx xxxxx xxxxx xxxxx

2 The Statutory Auditors of the Company have carried out audit of the aforesaid results and their report is being forwarded to Stock Exchanges. Further the statutory auditors of the Company have qualified their Audit report on the financial results for the quarter and year ended March 31, 2016 in respect of the following matters.

Deferred tax assets as at March 31, 2016 aggregating to Rs 39,601.66 Lakhs (as at March 31, 2015 Rs 40,908.23 lakhs), including an amount of (Rs 8,621.31) Lakhs and (Rs 1,306.57) Lakhs recognised during the quarter ended and Year ended March 31, 2016 on account of the timing differences arising on the unabsorbed depreciation, business losses and other timing differences, has been recognised on the basis of the management assessment of the existing unexecuted orders on hand, which in the opinion of the management does meet the criteria of establishing the virtual certainty of availability of sufficient future taxable income for realization of the said assets as enunciated in Accounting Standard 22 "Accounting for Taxes on Income" (AS 22)."

10. The statutory auditor (Chaturvedi & Partners) expressed its opinion on the said statement and particularly with regard to the above mentioned

Note 2 in the following manner:-

"3. We refer to Note 2 with regard to recognition of deferred tax assets on unabsorbed depreciation, business losses and other timing differences, amounting to Rs 39,601.66 Lakhs, incurred by the Company. Based on unexecuted orders on hand, the

Management is confident that sufficient future taxable income will be available against which such deferred tax assets will be realized. However, in our opinion, in absence of virtual certainty supported by convincing evidence that sufficient future taxable income will be available against which the deferred tax assets can be realized, such recognition is not consistent with the principles enunciated under Accounting Standard 22, “Accounting for Taxes on Income” (AS 22). Had the aforesaid deferred tax assets not been recognised, profit after tax for the period ended would have been lower by Rs 39,601.66 Lakhs.”

(underlining added)

11. From the above, it is evident that as per the management deferred tax assets have been indicated to aggregate to Rs 39,601.66 lacs as on 31.03.2016 and this represented timing differences, arising on the unabsorbed differences, business losses and other timing differences. As per the management of Ramky Infrastructure Limited, the said amount has been recognized as a deferred tax asset on the basis of the management’s assessment of the existing unexecuted orders on hand, which in the opinion of the management met the criteria of establishing virtual certainty of availability of sufficient future taxable income for realization of the said assets as enunciated in Accounting Standard 22 “Accounting for Taxes on Income” (AS22). However, in the opinion of the statutory auditor, as there was lack of virtual certainty and supporting convincing evidence that sufficient future taxable income would be available against which the deferred tax assets could be realized, such a recognition by the management

was not consistent with the principles enunciated under AS 22. It was further observed by the statutory auditor that if the said deferred tax assets had not been recognized as such, profit after tax for the period ended on 31.03.2016 would have been lower by Rs 39,601.66 lacs.

12. Based on the qualification given in the statutory auditor's certificate concerning Ramky Infrastructure Limited, a lower net worth was computed at Rs 73.612 crores which is far below the minimum requirement as per Clause 2.2.2 (B) of the RFP, i.e., Rs 350.48 crores.

13. Both the computations with and without the qualification were placed by the Financial Consultant before the NHAI for it to take a view in the matter. It was also observed by the Financial Consultant that as per AS 22 and, in particular, Point 17 thereof, deferred tax assets should be recognized only to the extent that there is a virtual certainty supported by convincing evidence that sufficient future taxable income will be available against which such deferred tax assets could be realized. A further reference was made to Point 18 of AS 22 which provided that the existence of unabsorbed depreciation or carry forward of losses under tax laws is strong evidence that future taxable income may not be available.

Therefore, when an enterprise has a history of recent losses, the enterprise recognizes deferred tax assets only to the extent that it has timing differences, the reversal of which will result in sufficient income or there is other convincing evidence that sufficient taxable income will be available against which such deferred tax assets can be realized. And, in such circumstances, the nature of the evidence supporting its recognition is disclosed. It is because there was no supporting evidence that the statutory auditor gave a qualified report as there was absence of virtual certainty that the future taxable income would be available against which the deferred tax assets could be realized as per the requirement of AS 22. For the purposes of clarity, the relevant extracts of AS 22 are set out hereinbelow:-

**“Accounting Standard (AS) 22
Accounting for Taxes on Income**

XXXX XXXX XXXX XXXX

Objective

The objective of this Standard is to prescribe accounting treatment for taxes on income. Taxes on income is one of the significant items in the statement of profit and loss of an enterprise. In accordance with the matching concept, taxes on income are accrued in the same period as the revenue and expenses to which they relate. Matching of such taxes against revenue for a period poses special problems arising from the fact that in a number of cases, taxable income may be significantly different from the accounting income. This divergence between taxable income and accounting income arises due to two main reasons. Firstly, there are differences between items of revenue and expenses as appearing in the statement of profit and

loss and the items which are considered as revenue, expenses or deductions for tax purposes. Secondly, there are differences between the amount in respect of a particular item of revenue or expense as recognised in the statement of profit and loss and the corresponding amount which is recognised for the computation of taxable income.

Scope

1. This Standard should be applied in accounting for taxes on income. This includes the determination of the amount of the expense or saving related to taxes on income in respect of an accounting period and the disclosure of such an amount in the financial statements.

XXXX XXXX XXXX XXXX XXXX

5. Taxable income is calculated in accordance with tax laws. In some circumstances, the requirements of these laws to compute taxable income differ from the accounting policies applied to determine accounting income. The effect of this difference is that the taxable income and accounting income may not be the same.

6. The differences between taxable income and accounting income can be classified into permanent differences and timing differences. Permanent differences are those differences between taxable income and accounting income which originate in one period and do not reverse subsequently. For instance, if for the purpose of computing taxable income, the tax laws allow only a part of an item of expenditure, the disallowed amount would result in a permanent difference.

7. Timing differences are those differences between taxable income and accounting income for a period that originate in one period and are capable of reversal in one or more subsequent periods. Timing differences arise because the period in which some items of revenue and expenses are included in taxable income do not coincide with the period in which such items of revenue and expenses are included or considered in arriving at accounting income. For example, machinery purchased for scientific research related to business is fully allowed as deduction in the first year for tax purposes whereas the same would be charged to the statement of

profit and loss as depreciation over its useful life. The total depreciation charged on the machinery for accounting purposes and the amount allowed as deduction for tax purposes will ultimately be the same, but periods over which the depreciation is charged and the deduction is allowed will differ. Another example of timing difference is a situation where, for the purpose of computing taxable income, tax laws allow depreciation on the basis of the written down value method, whereas for accounting purposes, straight line method is used. Some other examples of timing differences arising under the Indian tax laws are given in Illustration 1.

8. Unabsorbed depreciation and carry forward of losses which can be set-off against future taxable income are also considered as timing differences and result in deferred tax assets, subject to consideration of prudence (see paragraphs 15-18).

XXXX XXXX XXXX XXXX XXXX

15. Except in the situations stated in paragraph 17, deferred tax assets should be recognised and carried forward only to the extent that there is a reasonable certainty that sufficient future taxable income will be available against which such deferred tax assets can be realised.

16. While recognising the tax effect of timing differences, consideration of prudence cannot be ignored. Therefore, deferred tax assets are recognised and carried forward only to the extent that there is a reasonable certainty of their realisation. This reasonable level of certainty would normally be achieved by examining the past record of the enterprise and by making realistic estimates of profits for the future.

17. Where an enterprise has unabsorbed depreciation or carry forward of losses under tax laws, deferred tax assets should be recognised only to the extent that there is virtual certainty supported by convincing evidence that sufficient future taxable income will be available against which such deferred tax assets can be realised.

Explanation:

1. *Determination of virtual certainty that sufficient future taxable income will be available is a matter of judgment based on convincing evidence and will have to be evaluated on a case to case basis. Virtual certainty refers to the extent of certainty, which, for all practical purposes, can be considered certain. Virtual certainty cannot be based merely on forecasts of performance such as business plans. Virtual certainty is not a matter of perception and is to be supported by convincing evidence. Evidence is a matter of fact. To be convincing, the evidence should be available at the reporting date in a concrete form, for example, a profitable binding export order, cancellation of which will result in payment of heavy damages by the defaulting party. On the other hand, a projection of the future profits made by an enterprise based on the future capital expenditures or future restructuring etc. submitted even to an outside agency, e.g., to a credit agency for obtaining loans and accepted by that agency cannot, in isolation, be considered as convincing evidence.*

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18. The existence of unabsorbed depreciation or carry forward of losses under tax laws is strong evidence that future taxable income may not be available. Therefore, when an enterprise has a history of recent losses, the enterprise recognises deferred tax assets only to the extent that it has timing differences the reversal of which will result in sufficient income or there is other convincing evidence that sufficient taxable income will be available against which such deferred tax assets can be realised. In such circumstances, the nature of the evidence supporting its recognition is disclosed.”

14. The Financial Consultant computed the standalone net worth of Ramky Infrastructure Limited in terms of Clause 2.2.4 (2) of the RFP as under:-

“Standalone **Net Worth** of Ramky Infrastructure Ltd. as per clause 2.2.4(ii) of the RFP is as follows:

Aggregate value of paid up share capital	= Rs.57.20 Cr.
Add: All reserves created out of Profits and Securities Premium	= Rs.428.13 Cr.
Less: Aggregate value of the Accumulated losses	= Rs.264.46 Cr.
Less: Deferred Expenditure	= Rs.0.00
Less: Reserves created out Of revaluation of assets	= Rs.0.00
Less: Misc. Exp. not written off	= Rs.0.00
Less: Reserve not available to distribution for equity shareholders	= Rs.0.00
Less: Write back of depreciation and amalgamation	= Rs.0.00
Total Net Worth	=Rs.220.87 Cr”

The Financial Consultant also computed the net worth of Ramky Infrastructure Limited after taking into account the financial impact of the statutory auditor’s qualification referred to above. The same is as under:-

“However, in order to know the correct financial health of the bidder we agree with the effect of qualification in the SA certificate and the Qualified Audit Opinion in the Independent Auditors that has been provided after taking into account the provisions of AS 22 “Accounting for Taxes on Income” that had the aforesaid deferred tax asset not been recognized, profit after tax for the period ended would have been lower by Rs. 396.02 Cr.

As a practice while calculating the Net Worth as per clause 2.2.4(ii) of the RFP Deferred Tax Asset is not taken into account. However in this particular case the Statutory Auditor Certificate submitted to NHAI contain a qualification as mentioned above. Accordingly after taking into account the financial impact of the qualification the Net Worth of the Bidder is calculated as below:

Aggregate value of paid up share capital	= Rs.57.20 Cr.
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Add: All reserves created out of Profits and Securities Premium	= Rs.428.13 Cr.
Less: Aggregate value of the accumulated losses	= Rs. 264.46 Cr.
Less: Loss as per Qualified Opinion given in the Statutory Audit Report attached with the Balance Sheet	= Rs.396.02 Cr.
Less: Deferred Expenditure	= Rs.0.00
Less: Reserves created out of revaluation of assets	= Rs.0.00
Less: Mis. Ex. not written off	= Rs.0.00
Less: Reserve not available to Distribution for equity shareholders	= Rs.0.00
Less: Write back of depreciation and amalgamation	= Rs.0.00
Total Net Worth	= Rs.(175.15) Cr”

15. It was, therefore, suggested by the Financial Consultant that the NHAI (the respondent herein) may take a view with respect to the net worth of the petitioner consortium based on the two alternatives before it.

16. As stated above, the Evaluation Committee deliberated upon the same and discussed the report of the Financial Consultant on 25.10.2016, 26.10.2016 and 28.10.2016 but the Committee was not able to arrive at a consensus in the case of Ramky Infrastructure Limited. Two opinions were expressed. One was that of the convener [Chief General Manager (T)] and the other was that of the other members of the Evaluation Committee. The opinion of the convener was as under:-

“8.1.1)For M/s Ramky Infrastructure Ltd in case of bidder, M/s Brij Gopal Construction Co. Pvt. Ltd. and M/s Ramky Infrastructure Ltd. (Consortium)

Clause No.2.2.4(ii) of RFP defines the methodology for computation of net worth which is reproduced below:

“..... For the purposes of this RFP, net worth (the “Net Worth”) shall mean the aggregate value of the paid-up share capital and all reserves created out of the profits and securities premium account, after deducting the aggregate value of the accumulated losses, deferred expenditure and miscellaneous expenditure not written off, as per the audited balance sheet, but does not include reserves created out of revaluation of assets, write back of depreciation and amalgamation”.

As per the aforesaid methodology deferred tax assets shall not be deducted while calculating the net worth of any bidder. Further, irrespective of the fact that whether there is a qualification or not in the statutory auditor’s report, the impact of deferred tax assets remains the same.

Also, deferred tax assets have been recognised by almost all the bidders in NHAI, which is also allowed by AS 22, but as per methodology prescribed in the RFP for computation of net worth, the same is not to be deducted while calculating the net worth of such bidders. And just because of qualification in the Statutory Auditor’s Report, the decision of deducting the same from net worth calculation is not prudent when the meaning / impact of deferred tax assets remains the same irrespective of qualification in the Statutory Auditor’s Report.

Further, the fact that the deferred tax assets shall not be deducted from the net worth as per RFP is also certified by the statutory auditor in its revised certificate certifying the net worth submitted along with the replies.

The Financial Consultant, M/s JPS Associates Pvt. Ltd. in its report has admitted the following facts:-

- a) Financial Capacity of M/s. Ramky Infrastructure Ltd. & M/s Brij Gopal Construction Pvt. Ltd as per clause 2.2.4(ii) of the RFP is Rs.350.82 cr.
- b) As a practice while calculating the Net Worth as per clause 2.2.4(ii) of the RFP Deferred Tax Asset is not taken into account. However in this particular case the Statutory Auditor Certificate submitted to NHAI contain a qualification as mentioned above. Accordingly after taking into account the financial impact of the qualification the Net Worth of the Bidder is calculated.

Therefore, as per provisions of bid document, the bidder is declared as Qualified.”

17. The opinion of the members, other than the convener, was as under:-

“9.1.2)For M/s Ramky Infrastructure Ltd in case of bidder, M/s Brij Gopal Construction Co. Pvt. Ltd. and M/s Ramky Infrastructure Ltd. (Consortium)

The Members (except the Convener) observed that as per the decision of Committee in Meeting dated 20.10.2016, the bidder was asked to submit unambiguous, true and fair Certificate for Net Worth of M/s Ramky Infrastructure Limited from M/s Birj Gopal Construction Co. Pvt. Ltd. and M/s Ramky Infrastructure Ltd. (Consortium). However, the SA Certificate dated 20.10.2016 (**Annexure-V**) submitted by the bidder vide their Letter No.BGCC/2016/1526 dated 24.10.2016 still does not clearly specify the unambiguous, true and fair Certificate for Net Worth of M/s Ramky Infrastructure Limited and mentions that “the computation of net worth is arithmetically correct and the computation of net worth is in accordance with the methodology for calculation as set out in the Clause 2.2.4(ii) of the Bid Document.

Further, the Members (except the Convener) also observed that as per Independent Auditors Report, at page 45 of Annual Report for the year 2015-16 (**Annexure-VI**), the

SA has given a qualification mentioning “*Accounting for Taxes on Income*” (AS 22). *Had the aforesaid deferred tax assets not been recognized, profit after tax for the period ended would have been lower by Rs. 396.02 Crore*”. After taking into consideration the qualification amounting to Rs. 396.02 Crore, the standalone Net Worth of M/s Ramky Infrastructure Limited works out to be negative i.e. Rs.(175.15) Crore. Accordingly, the Total Net Worth of the Consortium works out to be Rs. 73.612 Crore.

As per Clause 3.2.1(g) of the RFP a Technical Bid shall be considered responsive only if Technical Bid does not contain any condition or qualification.

In view of above considering the qualification mentioned in the Independent Auditors Report of M/s Ramky Infrastructure Limited in the Annual Report for the year 2015-16 and net worth calculated thereof as well as the provisions of RFP Clause 3.2.1(g), CGM (Finance) was of the considered view that the bidder should be considered Technically Non-Responsive.

After detailed deliberations, the Members agreed to declare M/s Brij Gopal Construction Co. Pvt. Ltd. and M/s Ramky Infrastructure Ltd. (Consortium) Technically Non-Responsive.”

18. From the above, it is clear that as per the convener, the petitioner’s bid was technically qualified but as per the other members of the Evaluation Committee, the petitioner’s bid was technically non-responsive. Therefore, it was recommended by the Committee that the case of the petitioner be decided at a higher level because no consensus could be arrived at.

19. On 28.10.2016 itself, the General Manager (Technical) prepared a note that as there was no unanimous view of the Evaluation Committee, the matter may be placed before the Executive Committee. However, the CGM (Tech) BSS recommended that the agenda be placed before the Executive Committee for decision “or the Chairman may take a view”. When the file went to the Member (Finance), he noted that the Chairman may like to take a view at his level. Thereafter, the file was placed before the Chairman, NHAI who placed his views on record on 31.10.2016. After examining the views of the Committee (Evaluation Committee), the Chairman decided to go along with the view that the petitioner’s bid was non-responsive. It is thereafter that the impugned letter dated 31.10.2016 was issued to the petitioner informing it that its bid was found to be technically non-responsive on the ground that it did not meet the eligibility for financial capability as per Clause 2.2.2 (B) of the RFP nor did it meet the test of responsiveness as per Clause 3.2.1(g).

20. From the narration of events, it is evident that the entire case hinges upon whether deferred tax assets to the extent of Rs 39,601.66 lacs is to be recognized or not and whether the same is to be considered while computing net worth. It is clear that under AS 22 unless there is virtual

certainty supported by convincing evidence that there would be sufficient future taxable income against which the deferred tax assets can be realized, recognizing deferred tax assets would be inconsistent with AS 22. It is obvious that the statutory auditor was of the view that there was absence of such virtual certainty and, therefore, the amount of Rs 39,601.66 lacs ought not to be recognized as deferred tax assets which, in turn, would mean that the said amount would depress the figure of profits after tax. In other words, there would be no entry of deferred tax assets but the quantum would get reflected in enhanced losses. The result of which would be a negative net worth of Rs 17,514.32 lacs. This would be evident from the statement of impact of audited qualifications submitted along with the Annual Audited Financial Results (Standalone) of Ramky Infrastructure Limited, which is as under:-

“RAMKY INFRASTRUCTURE LIMITED

Statement on Impact of Audit Qualifications (for audit report with modified opinion) submitted along-with Annual Audited Financial Results – (Standalone)

<u>Statement on Impact of Audit Qualifications for the Financial Year ended March 31, 2016</u>				
[See Regulation 33 of the SEBI (LODR) (Amendment) Regulations, 2016]				
I	Sl. No.	Particulars	Audited Figures (as reported before adjusting for qualifications)	Adjusted Figures (audited figures after adjusting for qualifications)
	1.	Turnover/Total income	179285.14	179285.14

	2.	Total Expenditure	178049.19	217650.85
	3.	Net Profit/(Loss)	1235.95	(38365.71)
	4.	Earnings Per Share	2.16	(67.08)
	5.	Total Assets	335427.45	295825.78
	6.	Total Liabilities	335427.45	295825.78
	7.	Net Worth	22087.34	(17514.32)
	8.	Any other financial item (s) (as felt appropriate by the management)	Nil	Nil

21. It is evident from the sequence of events and the manner in which the issue has been analyzed by the Financial Consultant, the Evaluation Committee and the Chairman that the view taken by the statutory auditor in its qualification has been given due credence. Experts have examined the matter and after examining the same have arrived at a conclusion which does not appear to be arbitrary or whimsical. We may point out at this juncture that there was some debate as to why the matter had not been referred to the Executive Committee but to the Chairman even when there was a recommendation by the General Manager (Tech) that the decision of the Executive Committee may be taken. We need not elaborate on this aspect of the matter as we have seen the National Highways Authority of India (Transaction of Business) Regulations, 1997 and various circulars issued from time to time. We note that whatever course is taken, the final approval is at the level of the Chairman. The latter being the highest

authority in the respondent (NHAI). Therefore, it cannot be said that the decision which was communicated by the impugned letter dated 31.10.2016 has been issued without the backing of requisite authority.

22. In *Montecarlo Limited v. NTPC: 2016 (10) SCALE 50*, the Supreme Court observed as under:-

“We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner’s organization is taken. This ensures objectivity. Bidder’s expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be

called for if the approach is arbitrary or *malafide* or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

23. From the above, it is evident that exercise of power of judicial review is to be called for only where the approach adopted in a tender matter, which involves technical issues, is arbitrary or *malafide* or discriminatory or is meant to favour someone. Technical evaluation or comparison by the Court is normally not permissible. The decision in the present case has been taken after a great degree of consideration and deliberation and it would not be proper on our part to substitute our views, even if we did have a contrary view, over those of the decision making authority.

24. It is clear that if deferred tax assets are not to be recognized as such, and this would not be an imprudent decision, then the petitioner consortium would certainly not qualify under the minimum net worth criteria.

25. Insofar as the ground that the bid of the petitioner does not meet the test of responsiveness as per Clause 3.2.1 (g) of the RFP is concerned, we find that this is not a valid ground. The condition or qualification that is referred to in Clause 3.2.1 (g) is a condition or a qualification made by the bidder in its bid and not the qualification in a statutory auditor's certificate with regard to the statement of financial accounts of a bidder. Therefore, this ground was clearly not available to the respondent. However, the other ground of not meeting the minimum net worth was certainly available to the respondent and does not call for any interference on our part.

26. Consequently, the writ petition is dismissed. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

ASHUTOSH KUMAR, J

MARCH 02, 2017
SR