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

+ LPA 574/2017

ESSEL HIGHWAYS LTD

..... Appellant

Through: Mr. Parag P. Tripathi, Sr. Adv.,
Mr. Prashanto Sen, Sr. Adv. with Mr. Sudhir
Mishra, Ms. Ritwika Nanda & Ms. Mishika
Bajpai, Advs.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA

..... Respondent

Through: Mr. Shambhu Sharan with
Mr. Yaman Kumar & Mr. Shashaank Bhansali,
Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

ORDER

31.08.2017

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CM No.31655/2017 (*exemption*)

Allowed, subject to just exceptions.

LPA No.574/2017 & CM Nos.31654/2017 (*stay*) **& 31656/2017** (*to place on record addl. docs.*)

1. The appellant's grievance is with respect to a particular condition, which according to it, contained a bar from submitting its Request for Annual Qualification (RFAQ) score, which is in one sense a short listing of candidates who are deemed to be compliant as regards certain essential

experience, qualification and other parameters spelt out by the vendor agency i.e. the National Highways Authority of India (NHAI). The particular term, in the RFAQ read as follows:

“2.2.7 An Applicant including any Consortium Member or Associate should, in the last 3 (three) years, have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award against the Applicant, Consortium Member or Associate, as the case may be, nor has been expelled from any project or contract by any public entity nor have had any contract terminated any public entity for breach by such Applicant, Consortium Member or Associate.”

2. The Single Judge rejected the challenge and expressed the opinion that since the RFAQ constituted a kind of fast tracking or short listing process applicable only for a year, it did not *per se* bar an applicant from submitting bids naturally in the normal process. The appellant urges that the Single Judge failed to notice a clause which is a part of the regular tender condition, contained in the declaration. The same is reproduced below:

“6. I/ We certify that in the last three years, we/ any of the Consortium Members or our/ their Associates have neither failed to perform on any contract, as evidenced by imposition of a penalty by an arbitral or judicial authority or a judicial pronouncement or arbitration award, nor been expelled from any project or contract by any public authority nor have had any contract terminated by any public authority for breach on our part.”

3. The Single Judge rejected the appellant’s contention that the pre-qualification (RFAQ condition 2.2.7) constituted a disguised black -

listing for a definite period not preceded by a hearing primarily on the ground that it *per se* did not bar those desirous of applying through the regular process outside of the RFAQ procedure. The impugned judgment, however, has noted but not addressed the submission of the appellant on this aspect. The appellant's review petition too was rejected.

4. Having heard counsel for the parties, we are of the opinion that the question as to whether the regular condition (contained in Clause 6 of the declaration/undertaking) which is part of the RFP (i.e. Request for a Proposal) is also objectionable for the same reasons, was not gone into. The record also indicates that the appellant did not challenge that condition since its focus primarily was with respect to the RFAQ conditions - even though clause 6 of the RFP is worded similarly.

5. In these circumstances, if the appellant is aggrieved by the RFP conditions or any one of them, which tends to preclude or create a similar bar, it is open for it to challenge it in fresh proceedings which will be examined independently on its own merits. Nothing stated in the impugned judgment shall be treated as conclusive in this regard given that the findings were in respect of a different aspect i.e. the RFAQ conditions.

The appeal is accordingly disposed of in the above terms.

Copy of the order be given dasti under the signatures of the Court Master.

S. RAVINDRA BHAT, J

R.K. GAUBA, J

AUGUST 31, 2017/kks