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

% *Date of Judgment: 14th August, 2019*

\+ W.P.(C) 8312/2019

VARAHA INFRA - JCEG (JV) ..... Petitioner

Through Mr. Sandeep Sethi, Senior Advocate with Ms. Nina Nariman, Mr. A.K. Vali, Mr. Tuhin, Mr. Rajat Jain and Mr. Bhaskar Vali, Advocates

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA AND ANR. ..... Respondents

Through Mr. Ankur Mittal and Mr. Abhay Gupta, Advocates for respondent no.1. Mr. Vikram Jetly, CGSC for UOI/respondent no.2.

**CORAM:**

**HON'BLE MR. JUSTICE G.S.SISTANI**

**HON'BLE MS. JUSTICE JYOTI SINGH**

**G.S. SISTANI, J. *(ORAL)***

1. With the consent of the parties, the writ petition is set down for final hearing and disposal.
2. Before the rival submissions of the learned counsels for the parties can be noticed, we deem it appropriate to outline the facts which have led to the filing of this writ petition. An E-tender was invited on 09.02.2018 by the respondent no.1 NHAI inviting tenders for Six Laning of existing Four Lane road from Gundugolanu (Design km 1023.280) to Kalaparru (Design km 1050.680) of NH-5 (new NH-16) (Design length =27.400 km) in the State of Andhra Pradesh under Bharatmala

Pariyojana. As the said tender was an International Competitive Bidding, foreign companies/entities were permitted to bid and execute 100% project without there being any joint venture with an Indian partner. A Consortium was formed by the petitioner on 16.11.2018 and a formal Joint Venture Agreement was entered into between Varaha Infra Limited and M/s Jiangxi Construction Engineering (Group) Corporation Limited for the purpose of bidding and execution of the aforesaid project. The Indian company had 30% share while the Chinese partner had a 70% share.

3. The petitioner submitted its technical bid along with the financial bid with a Bank Guarantee towards the bid security on 19.11.2018, which was valid upto 22.07.2019. Although the bid validity was initially upto 18.03.2019, at the request of NHAI the bid validity was extended upto 19.07.2019. Admittedly, post 19.07.2019, there was neither any request from the petitioner nor from the respondents for extension of the bid validity. Admittedly, the petitioner's technical bid was accepted and found responsive on 28.12.2018. The financial bid was opened and the petitioner was declared L1 and accordingly, the Evaluation Committee recommended award of the project to the petitioner on 01.01.2019.

4. It is the case of the petitioner that although there was no requirement for security clearance of the Chinese company, yet clearance was sought on 08.01.2019 and respondent no.1 also sent reminders to the respondent no.2 for granting approval vide letters dated 14.02.2019, 12.04.2019 and 09.05.2019. Although, the petitioner was declared as the lowest bidder and recommended for award of the project, however a new Model EPC document was published with fresh norms prescribing "the

lead member was itself to undertake and perform at least 51% of the total length of the project highway". The new Model Document came into force on 05.03.2019. Post the petitioner having been declared lowest bidder, the petitioner was recommended for award of the project.

5. It is not in dispute that respondent no.1 requested the petitioner to extend the bid validity for a further period of four months, i.e., from 30.03.2019 upto 19.07.2019. The petitioner extended the bid validity by a communication dated 14.03.2019. Further documents were sought on 19.03.2019 from the petitioner which were submitted on 04.04.2019. The petitioner learnt from a reliable source that process had been initiated for annulling the bid process primarily on two grounds: (i) No approval from the Ministry of Home Affairs; and (ii) As per the new Model EPC document circulated by the Ministry on 05.03.2019, it was required that the lead member shall itself undertake and perform at least 51% of the total length of the project highway.

6. It is the case of the petitioner that the State Bank of India had issued a letter to the respondent no.1 extending the bid security in the form of Bank Guarantee dated 23.10.2018 upto 21.10.2019. On 25.07.2019, the petitioner addressed a communication to the respondent no.1 requesting them to expedite the process of accepting the letter of award and also extended the bid period by 90 days.

7. Learned counsels for the petitioner have submitted that undisputedly, the petitioner's technical bid was found responsive and the petitioner was qualified on 28.12.2018. Thereafter, the financial bid was opened and the petitioner was declared lowest L1 bidder on 01.01.2019. Simultaneously, the Evaluation Committee recommended award of the

project to the petitioner. It is thus, contended that the cut-off date would be 01.01.2019, when financial bid was found to be the lowest and the Evaluation Committee had recommended award of the project to the petitioner. Learned counsels for the petitioner submit that on the said date, the new Model EPC document had not come into existence and the same can only have prospective application.

8. Additionally, it has been submitted that the rules of the game could not have been changed once the game had begun and the respondents would be estopped from placing any reliance on a subsequent document dated 05.03.2019, which did not form part of the tender conditions. Placing any reliance on such a document would itself show the *mala fide* and arbitrary action on the part of the respondent no.1 to somehow keep the petitioner, who was successful bidder and L1 bidder, out of the tendering process. It is contended that in the facts of the present case, this Court would set aside the order of annulling the tender as the decision-making process is arbitrary and hit by *malafides* and thus any attempt on the part of the respondents to annul the tender and call for fresh bidding is liable to be quashed and set aside.

Learned counsels have further urged before this Court that the approval of the Ministry of Home Affairs was merely a formality for the reason that for road construction process, no such clearance was required. Moreover, the Chinese partner had also participated in at least seven projects and even otherwise China is not a country of concern and thus, placing any reliance on the clearance not having been received was yet another attempt on the part of respondent no.1 to deprive the petitioner of the fruits of the tender which was responsive.

9. Learned counsels have also produced a note with respect to another tendering process where such clearance was awaited and the bid validity had expired, however the bidders were called to extend the bid validity after the period had expired. Extract of this note is reproduced below:

> "5. It is to mention that as per provisions of RFP the bid validity of the lowest bidder is 120 days from the bid due date of 18.03.2019. The L-1 bidder has also submitted the bid security of 5.89 crores in form of bank guarantee valid upto 31.10.2019. As the approval regarding the national security and public interest/perspective is still awaited from MHA, it is proposed that we may ask the L-1 bidder "M/s Jiangxi Construction Engineering (Group) Corporation Ltd. and Shiv Build India Pvt. Ltd. (JV) to extend its bid validity upto 31.10.2019."

10. Learned counsels have also highlighted that not only the officer of the Department was the same, but the Chinese company was also the same. Learned counsels submit that the respondents cannot act differently for different projects and decide against the petitioner and this would by itself show that the act of annulling the bidding process is arbitrary.

11. Learned counsels have also submitted that the ground which is sought to be relied upon by the respondents that the validity had come to an end on 19.07.2019 and there was no extension either from the petitioner or from the respondents to annul the bid, the learned counsels for the petitioner submit, that at no point of time, the petitioner had shown any hesitation in extending the Bank Guarantee on validity of the bid. It is contended that it is normal practice in this industry that the bids are extended at the instance of the respondent and in case there was any

resistance, in that case the petitioner could have been blamed, but the respondents allowed the bidding period to expire knowing fully well that the petitioner was all along ready and willing to extend the Bank Guarantee which is evident from the fact that in fact the Bank Guarantee was extended from 20.07.2019 by the State Bank of India as well as to extend the validity of bid. Learned counsels submit that this is also evident from the fact that on 25.07.2019, a communication was addressed to the respondents calling upon the respondents to expedite the process.

12. Learned counsels for the petitioners submit that on account of three basic factors: (i) the petitioner was declared L1 on 01.01.2019; (ii) the Evaluation Committee recommended award of the project to the petitioner and also (iii) the policy of 05.03.2019 was not applicable to existing tenders, as the Chinese company has participated in seven earlier projects and the fact that the approval has since been granted on 30.07.2019, the decision of annulment should be set aside. Additionally, the Bank Guarantee stands extended upto 21.10.2019. The petitioner submits that it has an unblemished record and on account of these factors in favour of the petitioner, the petitioner would be satisfied if the respondents are directed to re-consider their decision to annul the tender which would be both in public interest as the petitioner is ready and willing to accept the project at the same terms and conditions which were offered in the month of January, 2019.

13. To justify the action taken by the respondents, Mr. Mittal learned counsel for respondent no.1, at the very outset, submits that the action by the respondent no.1 is neither *mala fide* nor arbitrary. It is

contended that the respondent no.1 was well within its right to annul the tender and such a right finds mentioned in Clause 2.16.2, which we reproduce below:

**"2.16 Rejection of BIDs**

2.16.1 Notwithstanding anything contained in this RFP, the Authority reserves the right to reject any BID and to annul the Bidding Process and reject all BIDs at any time without any liability or any obligation for such acceptance, rejection or annulment, and without assigning any reasons thereof. In the event that the Authority rejects or annuls all the BIDs, it may, in its discretion, invite all eligible Bidders to submit fresh BIDs hereunder.

2.16.2 The Authority reserves the right not to proceed with the Bidding Process at any time, without notice or liability, and to reject any BID without assigning any reasons."

14. It is next contended that the action for annulment has been taken for cogent reasons. While relying on the note, Mr. Mittal submits that admittedly on the date of cancellation/annulment, there was no approval from National Security with regard to the Chinese company. The approval required was part of the tender conditions and thus, the action of the respondents cannot be faulted. It is also contended that admittedly the bid validity was upto 19.07.2019. The respondents did not deem it appropriate to extend the date, as no request was made by the petitioner to extend the bid validity. Learned counsel highlights that reading of the tender condition 2.17 would show that extension could be

sought by either of the parties. Attention of the Court is drawn to Clause 2.17, which reads as under:

> **"2.17 Validity of BIDs**
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> The BIDs shall be valid for a period of not less than 120 (one hundred and twenty) days from the BID Due Date. The validity of BIDs may be extended by mutual consent of the respective Bidders and the Authority."

15. As far as extension of bid is concerned, reliance is placed on Clause 2.20. Mr. Mittal also contends that after File noting dated 19.07.2019, the noting dated 20.07.2019 would show that the respondent no.1 was conscious of the fact that security clearance from the Ministry of Home Affairs was still awaited. Another concern was expressed in the File noting dated 23.07.2019, where it has been noticed that the lowest bidder has not extended its bid security which expired on 19.07.2019 and thus, there was no bid for acceptance. In this backdrop, approval was sought from the competent authority to annul the process and re-invite the bids. In effect, the learned counsel for the respondents has submitted that the respondent no.1 was well within its right to cancel the tender. The right has been exercised for valid and cogent reasons, i.e., (i) no approval from the Ministry, from the National Security; (ii) bid validity had expired; (iii) Model EPC document had come into force on 05.03.2019. It is also the case of the respondents that the entire action of the respondents cannot be termed to be arbitrary, and no *mala fide* have been alleged, nor shown to this Court. Resultantly, no grounds are made out for quashing the decision of the respondents to annul the tender.

16. We have heard the learned counsels for the parties and considered their rival submissions. Some of the factors which we would like to highlight, even at the cost of repetition, are that the bid of the petitioner was found to be responsive on 01.01.2019, the Evaluation Committee recommended the award of the project to the petitioner. Between 01.01.2019 and till July, 2019, the petitioner had really no role to play in the completion of the tender process and accordingly the petitioner patiently waited. It is only on 19.07.2019, that a note was put up regarding the National Security clearance having not been received. The note also took into account the new Model EPC document which really had no relevance for the reason that when the tender was invited, the new Model EPC was not in existence and, in fact, even when the Evaluation Committee recommended award of the project, such a document was not in existence either. Therefore, in our view, the subsequent document could not have been taken into consideration nor any strong reasons have been stated in the note for taking the same into consideration on 19.07.2019 to annul the bid. As far as the validity of the bid is concerned, when the note was put up on 19.07.2019, the bid was valid. On that date, the respondents could have well decided to issue the LOA, but it was not done. Obviously, when the file moved between 20.07.2019 and 23.07.2019, the bid period had expired. It was really upon the respondents to consider whether they wanted to extend the bid or not. The petitioner has placed on record a communication dated 20.07.2019 from State Bank of India extending the Bank Guarantee which Mr. Mittal had contended that it is an ante dated letter. Though we refrain from making any comment except stating that State

Bank of India. being a nationalized Bank, would not issue such a document. Be that as it may, learned counsel has highlighted that even on 25.07.2019, the petitioner had addressed a communication to the respondents that the Bank requires a written request for extension, which Mr. Mittal submits that it would show that as on 25.07.2019, no such extension was granted.

17. Both the counsels for the parties have relied upon various judgments. Learned counsels for the petitioner relies on the judgment in the case of ***Inderjit Mehta v. Union of India & Ors.***, reported at (2015) 222 DLT 703(DB). Learned counsels for the respondents have relied upon the judgments in the case of State of ***Uttar Pradesh and Others v. Vijay Bahadur Singh and Others***, reported at (1982) 2 SCC 365, more particularly paragraph 3; ***Haryana Urban Development Authority and Others. v. Orchid Infrastructure Developers Private Limited***, reported at (2017) 4 SCC 24 more particularly paragraphs 14, 31 and 32 and ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Another,*** reported at (2016) 16 SCC 818, more particularly paragraph 11 to 15. However, in view of the submissions made by the learned counsels for the petitioner that the petitioner would be satisfied in case a direction is issued to the respondents to reconsider their decision, we see no reason to extract the relevant paragraphs or deal with them.

18. Accordingly, as prayed, we dispose of this writ petition with the following directions:

(i) The petitioner would make a representation to the Chairman of the respondent no.1 by Wednesday, i.e., 21.08.2019, in view of holidays;

(ii) The respondents will consider the representation of the petitioner in accordance with law; and

(iii) Till the representation of the petitioner is decided, any decision to annul the tender would be kept in abeyance.

19. The writ petition stands disposed of in above terms, as prayed.

**CM.APPL 34425/2019(stay)**

20. The application stands disposed of in view of the orders passed in the writ petition.

**G.S. SISTANI, J**

**JYOTI SINGH, J**

**AUGUST 14, 2019**
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