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

+ **W.P.(C) 4946/2010 & CM APPL. 9782/2019, 19903/2010**

MSK PROJECTS INDIA LIMITED

..... Petitioner

Through: Mr Karan Luthra, Mr Rishi
Aggarwala, Ms Niyati Kohli, Ms
Aarushi Tiku, Advocates.

versus

**NATIONAL HIGHWAY AUTHORITY OF
INDIA AND ANR**

..... Respondents

Through: Ms Padma Priya, Ms Saumya
Priyadarshini, Advocates for
NHAI.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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28.01.2019

1. The petitioner has filed the present petition, *inter alia*, impugning the letters dated 07.05.2010, 24.05.2010 and 20.07.2010 sent by respondent no.1 (hereafter 'NHAI') holding that the petitioner's bid was unresponsive and further calling upon the petitioner to pay 5% of the bid security, furnished by the petitioner. NHAI has further threatened that it would invoke the bank guarantees furnished along with the bid as security, if the said demand of penalty is not satisfied. The petitioner further prays that directions be issued to NHAI restraining it from invoking the bank guarantees submitted by the petitioner along with its bid.

2. The petitioner's bid was considered as unresponsive, as it was not

accompanied by a second Power of Attorney (PoA) in favour of the persons signing the bid. The petitioner submits that it had submitted a copy of a Board Resolution, passed at a meeting held on 31.10.2009, indicating that the person signing the bid was duly authorised and, thus, there was no requirement for furnishing any additional PoA in the signatory's favour. The petitioner contends that the decision of the NHAI holding that the petitioner's bid was unresponsive is wholly arbitrary and contrary to the tender documents.

3. NHAI had invited applications for pre-qualification (Request for Qualification – RFQ) for Trichy-Karaikudi including Trichy bypass road Section of NH - 210 (km 10.00 to km 94.00) and bypass (km 109.558 to Km 135.930) in the state of Tamil Nadu under NHDP III on Design, Build, Finance, Operate and Transfer (DBFOT) Annuity basis.

4. In terms of the aforesaid notice, the petitioner applied and obtained a copy of the RFQ from the NHAI. Thereafter, on 30.11.2009, the petitioner submitted its application (RFQ) for being selected as a qualified bidder.

5. By a letter dated 19.02.2010, NHAI communicated to the petitioner that it was declared as a qualified bidder and, therefore, was eligible to participate in the second stage of the bidding process – submission of bids pursuant to a Request for Proposal (RFP).

6. Pursuant to being qualified as a bidder, the petitioner purchased the documents pertaining to the RFP. The petitioner submitted its proposal in terms of the said RFP documents, on 23.04.2010. The

petitioner also submitted a bank guarantee in the sum of ₹7.82 crores along with its bid in terms of clause 2.1.7 of the RFP (Instructions to Bidders) issued by the NHAI. The said bid was signed by Ms Vandana Patel, manager and was also accompanied by a PoA executed in her favour in the format as provided in Appendix III to the RFP documents. In addition, the petitioner had also submitted a copy of the Resolution of the Board of Directors dated 31.10.2009, *inter alia*, authorising Ms Vandana Patel to submit any tender or perform any other activity relating to the conduct of business with various authorities. Ms Patel was expressly authorised to sign bids on behalf of the petitioner.

7. On 07.05.2010, NHAI sent a letter, *inter alia*, stating that the petitioner's bid was found non-responsive, as it was accompanied by a PoA executed by Ms Vandana Patel in her own favour and further the PoA, as mentioned in the Board Resolution, was not filed. The petitioner was also called upon to pay a penalty of a sum of ₹37.40 lacs (being 5% of the bid security of ₹7.82 crores) within a period of seven days.

8. The petitioner responded to the above letter and pointed out that in terms of the notes to Appendix III of the RFP documents, a bidder was required to submit a PoA or a Board Resolution and the petitioner had complied with the said requirement by submitting a copy of the Board Resolution in favour of Ms Vandana Patel. It, accordingly, requested that no penalty be imposed.

9. NHAI sent a letter dated 24.05.2010, declining the petitioner's request for non-imposition of penalty and reiterated its demand for

payment of ₹37.40 Lacs failing which, it threatened to encash the bank guarantee furnished by the petitioner. The petitioner once again contested the aforesaid demand by its letter dated 01.06.2010, and requested for an opportunity of a personal hearing.

10. NHAI acceded to the aforesaid request and the representatives of the petitioner were heard at a meeting held on 01.07.2010. Thereafter, the NHAI sent a letter dated 20.07.2010 declining the petitioner's request for not imposing any penalty. NHAI adhered to its stand that the petitioner's bid was non-responsive. Aggrieved by the same, the petitioner has filed the present petition.

11. The controversy involved in the present petition is similar to the issues considered by this court in *MSK Projects India Limited v. National Highway Authority of India: W.P.(C) 4945/2010*. Thus, the decision rendered in that matter by a separate order passed today, is also determinative of the subject dispute in the present petition.

12. In *MSK Projects India Limited (supra)*, this Court observed that the petitioner was required to either submit a board resolution or a Power of Attorney (PoA) in support of the PoA already submitted, and not both the documents, as there was no requirement in the RFP Documents to submit the bid documents along with another PoA in favour of the authorised signatory. Further, the only requirement was that the bid document should be accompanied by a PoA as specified in Appendix III of the RFP documents, which, admittedly, was filed by the petitioner. The petitioner was also required to submit a resolution of the Board of

Directors or a PoA in favour of the authorised signatory and the petitioner had submitted a certified copy of the resolution as required. Thus, the petitioner's bid was fully compliant with the requirements of the RFP.

13. For the reasons stated in *MSK Projects India Limited (supra)*, the impugned decision of NHAI rejecting the petitioner's bid as unresponsive, is set aside. However, no further relief can be granted to the petitioner except to direct NHAI to return the discharged bank guarantees as furnished by the petitioner. It is so directed.

14. The petition is allowed in the aforesaid terms. All pending applications are also disposed of.

VIBHU BAKHRU, J

JANUARY 28, 2019