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

+ **W.P.(C) 4945/2010 & CM APPL. 9779/2019, 19899/2010**

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

VIBHU BAKHRU, J

Introduction

1. The petitioner has filed the present petition, *inter alia*, impugning the letters dated 13.05.2010, 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 had been considered as unresponsive as it was not accompanied by a 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.

Factual Background

3. NHAI had invited applications for pre-qualification (Request for Qualification – RFQ) for execution of the works relating to two laning with paved shoulder of Dindigui-Theni Section from Km 2.750 to km 73.400 of NH-45 (Extn.) and Theni-Kumli Section from Km 215.500 to Km 273.600 of NH-220 in the State of Tamil Nadu.

4. In terms of the aforesaid notice, the petitioner applied and obtained a copy of the RFQ from the NHAI. Thereafter, on 01.12.2009, the petitioner submitted its application (RFQ) for being selected as a qualified bidder.

5. By a letter dated 05.03.2010, 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 ₹9.7 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, 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 13.05.2010, 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 the further PoA as mentioned in the Board Resolution, was not filed. Further, the petitioner was also called upon to pay a penalty of a sum of ₹48.5 lacs (being 5% of the bid security of ₹9.7 crores) within a period of seven days.

8. The petitioner responded to the above letter on 19.05.2010. The petitioner 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, *inter alia*, declining the petitioner's request for non-imposition of penalty and reiterated its demand for payment of ₹48.5 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.

Submissions

11. Mr Karan Luthra, learned counsel appearing for the petitioner referred to various Clauses of the RFP, and submitted that the petitioner's bid was compliant with all the requirements of the RFP. Next, he submitted that the petitioner had not suffered any loss as it had awarded the bid to a successful tenderer. He submitted that in the circumstances, the petitioner could not recover any amount by way of penalty or damages from the petitioner. He also submitted that the

levy of penalty was *in terrorem*, and not a genuine pre-estimate of any loss that was suffered by the NHAI.

12. He further submitted that no evidence was required to be led by either parties and, therefore, the petitioner ought not to be relegated to file a suit. He referred to orders dated 18.01.2018 and 16.03.2018 passed in ***IL &FS Transportation Networks Ltd. v. National Highway Authority of India (NHAI) and Ors.: CS(COMM) 703/2017*** wherein, under a similar set of facts, NHAI had conceded that no further evidence was required to be led by the parties and had also agreed to discharge of the bank guarantees submitted by the petitioner therein. He also relied on the decision of the Division Bench of this Court in ***IVRCL Infrastructures and Projects Ltd. v. National Highways: W.P.(C) 235/2011, decided on 10.03.2011*** whereby, the Division Bench of this Court had allowed the Writ Petition, holding that the defects in the submission of a power of attorney were minor and insignificant, and did not take away from the authorisation granted to the signatory. The Court had further held that the seriousness of the bids could not be disputed as the RFP papers were purchased by paying hefty costs and the bid was supported by earnest money deposits. The Court had further held that even if the bid was considered to be non-responsive, 5% of the bid security amount could not be forfeited.

13. Ms Padma Priya, learned counsel appearing for NHAI countered the aforesaid submission. She submitted that the dispute raised by the petitioner could not be decided by way of a writ petition

and the petitioner ought to be relegated to filing a suit. She relied upon the decision of the Supreme Court in *National Highway Authority of India v. MEIL-EDB LLC (JV): Civil Appeal No. 3053 of 2015, decided on 18.03.2015* in support of her contention.

Discussion and Conclusion

14. At the outset, it would be relevant to refer to the relevant Clauses of RFP documents. In terms of Clause 1.2.4 (read with Clause 2.1.7 and Addendum-VII) of the RFP, the bidder was required to submit a bid security of a sum of ₹9.70 crores (hereafter ‘the bid security’). The bidders also had the option to provide the bid security in the form of a bank guarantee as per the format stipulated in Appendix II of the RFP document.

15. Clause 3.2.1, *inter alia*, provided that prior to the evaluation of bids, NHAI would determine whether the bid was responsive to the requirements of the RFP. Clause 3.2 of the RFP document is relevant and is set out below:-

“3.2 Tests of responsiveness

3.2.1 Prior to evaluation of Bids, the Authority shall determine whether each Bid is responsive to the requirements of this RFP. A Bid shall be considered responsive only if:

- (a) it is received as per the format at Appendix-I;
- (b) it is received by the Bid Due Date including any extension thereof pursuant to Clause 2.12.2;

- (c) it is signed, sealed, bound together in hard cover and marked as stipulated in Clauses 2.10 and 2.11;
- (d) it is accompanied by the Bid Security as specified in Clause 2.1.7;
- (e) it is accompanied by the Power(s) of Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be;
- (f) it contains all the information (complete in all respects) as requested in this RFP and/or Bidding Documents (in formats same as those specified);
- (g) it does not contain any condition or qualification; and
- (h) it is not non-responsive in terms hereof.”

16. The controversy in the present case relates to the bid submitted by the petitioner being declared as non-responsive on account of it not being accompanied by a PoA as required under Clause 2.1.9 of the RFP document. In terms of Clause 2.20.7(a), NHAI was entitled to forfeit 5% of the value of bid security, if the bidder had submitted a non-responsive bid. Clause 2.20.7(a) is set out below:-

“2.20.7 The Bid Security shall be forfeited and appropriated by the Authority as mutually agreed genuine pre-estimated compensation and damages payable to the Authority for, inter alia,, time cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority hereunder, or otherwise, under the following conditions:

(a) If a Bidder submits a non-responsive Bid;

Subject however that in the event of encashment of Bid Security occurring due to operation of para 2.20.7 (a), the damage so claimed by the Authority shall be restricted to 5% of the value of the Bid Security.”

17. In the present case, NHAI seeks to recover an amount equal to 5% of the bid security on account of the petitioner’s bid being declared as non-responsive. As stated earlier, the petitioner’s bid was considered as non-responsive because NHAI claimed that it did not comply with the provision of 2.1.9 of the RFP documents (Instructions to Bidders). The said clause (clause 2.1.9) is set out:-

“2.1.9 The Bidder should submit a Power of Attorney as per the format at Appendix-III, authorising the signatory of the Bid to commit the Bidder.”

18. In terms of Clause 2.1.9 of the RFP documents, the petitioner was required to submit the bids along with the PoA in favour of the signatory. The said PoA was required to be in the format as provided in Appendix III to the RFP documents.

19. In the present case, there is no dispute that the bid documents were accompanied along with the power of attorney in the prescribed format. The power of attorney was executed by Ms Vandana Patel and also bore the stamp/seal of the petitioner company. The controversy, essentially, relates to the question whether the said PoA was required to be accompanied by another PoA. NHAI contends that it was necessary because the Resolution of the Board of Directors which was

filed along with the bid documents also included a resolution for execution of the PoA by any Director, in favour of Ms Vandana Patel. NHAI submits that this was necessary in terms of the notations appended to Appendix III. The said notations are set out below:-

“Notes:

The mode of execution of the Power of Attorney should be in accordance with the procedure, if any laid down by the applicable law and the charter documents of the executants(s) and when it is so required, the same should be under common seal affixed in accordance with the required procedure.

Wherever required, the Bidder should submit for verification the extract of the charter documents and documents such as a board or shareholders resolution/ power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.

For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention, 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Apostille certificate.”

20. It is clear from the above that PoA, as executed in the format in Appendix III was required to be supported by other documents “*such as a Board or Shareholders’ Resolution/Power of Attorney*”. In the present case, the petitioner had also submitted a certified copy of the resolution of its Board of Directors. The certified true copy of the

resolution furnished by the petitioner is set out below:-

**“CERTIFIED TRUE COPY OF RRESOLUTION
PASSED BY THE BOARD OF DIRECTORS OF
MSK PROJECTS (INDIA) AT ITS MEETING HELD
ON 31st OCTOBER, 2009 AT 04.00 P.M. AT THE
REGISTERED OFFICE OF THE COMPANY AT
707 – STERLING CENTRE R.C. DUTT ROAD,
ALKAPURI, VADODARA:-**

(iii) AUTHORITY TO MS. VANDANA PATEL –
MANAGER TO SIGN /EXECUTE ETC. THE TENDER
RELATED DOCUMENTS –

The Board discussed about conferring authority to Ms. Vandana Patel – Manager of the Company to Sign, Execute various deeds and documents that may be required in connection with or incidental to the submission of any Application, Pre-Qualification, Request for Qualification, Tenders, Request for Proposal etc. After due deliberation the following resolution was passed –

“RESOLVED THAT , Ms Vandana Patel – Manager, of the Company be and is hereby authorized, to do on behalf of the Company, all such acts, deeds an things as are necessary or required in connection with or incidental to the submission of any Application, Pre-Qualification, Request for Qualification, Tenders, Request for Proposal or any other activity related to the conduct of the Business with various authorities such Government, Semi Government, State Governments, government Undertakings, Bodies, Public Sector Units, Private Organisation and any other entity, including signing and submission of all applications, Bids and other Documents and writings, Participate or Authorise any Person to Participate in Pre-Bid or any other Conferences, Providing information/responses to various Authorities,

representing the Company in all matters before the Authority, Signing and execution of all Contracts related Documents including Contract/Concession Agreement and Undertakings, Acceptance to Bid, dealing with Authority in all matters in connection with the Respective Project, authorise any person to do any or particular part of the Work on behalf of the Company.

RESOLVED FURTHER THAT a General Power of Attorney favouring her in respect of this matter be executed under the signature of any director of the Company and the Common Seal of the Company be affixed thereto.

RESOLVED FURTHER THAT the copy of this resolution certified as true by any Director or Company Secretary of the company may be given to the concerned authority/ies, and the said authority/ies be requested to act thereon.” //CERTIFIED CORRECT//

For MSK Projects (India) Limited

Amit Khurana
Managing Director.”

21. Admittedly, in terms of resolution passed by the Board of Directors of the petitioner, Ms Vandana Patel was duly authorised to do all acts in connection with submission of the bids. She was expressly empowered to sign the bid and other documents in writing including signing and executing all contracts and documents. There is, thus, little doubt that Ms Vandana Patel was duly authorised to execute the bid documents in terms of the resolution filed along with the bid documents.

22. The Board of Directors of the petitioner had also resolved that a

General Power of Attorney (GPA) be executed in favour of Ms Patel. This Court is further informed that although such a GPA was executed, it was not filed along with the bid documents. However, there is no requirement in the RFP Documents that the bid documents be accompanied by another PoA in favour of the authorised signatory. The only requirement was that the bid document should be accompanied by a PoA as specified in Appendix III, which admittedly was filed by the petitioner. In terms of the notes, the said PoA was also required to be accompanied by documents, such as a Board Resolution, indicating that the signatory had obtained the necessary corporate authority. In the present case, a copy of the resolution furnished by Ms Patel clearly indicated that she was authorised to sign all document for furnishing the bid. The language of the resolution in her favour was extremely wide and unrestricted. The fact that the GPA executed in terms of further resolution was not filed along with the bid make little difference insofar as compliance with the requirements of the Instructions to Bidders (RFP documents) is concerned. It is relevant to note that the Notes to Appendix III merely required that the bidder should submit “Shareholders’ resolution / Power of Attorney”. It is well settled that the punctuation mark “/”, means “or”. Thus, the petitioner was required to either submit a board resolution or a PoA in support of the PoA in the format as specified in Appendix III, and not both the documents.

23. In any view of the matter, once the petitioner had submitted a board resolution in Ms Vandana Patel’s favour as the authorised

signatory, there could be no reason to doubt the same and the conditions of the instructions to bidders were fully complied with.

24. In ***Poddar Steel Corporation v. Ganesh Engineering Works and Ors. : (1991) 3 SCC 273***, the Supreme Court classified the requirements of a tender notice into two categories – first, which laid down essential conditions of eligibility; and the second which were merely ancillary or subsidiary with the main object to be achieved by the condition. The Court held that whereas in the first case the condition was required to be enforced rigidly while in the second category, it was open for the authority to deviate from and not to insist upon the strict literal compliance with the conditions in appropriate cases.

25. Following the aforesaid distinction, a Division Bench of this Court in ***IVRCL Infrastructures and Projects Ltd. v. National Highways Authority of India: 2011 SCC OnLine Del 1246*** held that minor technical irregularities could be waived. In that case, this Court had considered the case where the PoA submitted did not have the signatures of the Company Secretary as was required in terms of the resolution of the Executive Committee of the Board of Directors. This Court held that the absence of the signatures of the Company Secretary was not fatal to the PoA. The Court also observed as under:-

“28. We cannot lose sight of the fact that the authority, which was vested in Mr. K. Ashok Reddy originated from the Board Resolution of 28.05.2008. The minutes of the meeting of 25.08.2010 are of the Executive Committee of the Board of Directors, which in respect of the particular

contract bid authorized the Power of Attorney to be executed, but in no manner take away the general powers vested in Mr. K. Ashok Reddy in pursuance of the Resolution of 28.05.2008. As noticed above, a bare perusal of the resolution dated 25.8.2010 would show that the Executive Committee which was a delegatee of the BoD exceeded its powers in putting in caveats which did not find mention in the BoD's resolution dated 28.5.2008. Even if the document / resolution of 26.08.2010 is considered in isolation, the alleged defect, if any, is of a very minor and insignificant character in the Power of Attorney and does not take away from the authorization of Mr. R.K. Singh to present the bid.

29. It cannot be lost sight of that the seriousness of the bid cannot be disputed as even the RFP papers are purchased after paying lakhs of rupees and the bid is supported by the EMD of `14 Crores. If at all, there was any doubt in the mind of the respondent regarding the same, a clarification or information could have easily been sought from the petitioner in terms of sub-clause (b) of Clause 2.6.2 of the RFP which gives adequate discretion to the respondent to consult with any bidder in order to receive clarification or further information. We may also refer to Clause 2.6.2(b) where the authority has the right to reject a bid if the bidder did not provide the supplemental information sought for. In the present case, the petitioner itself volunteered the information even of the earlier Board Resolution dated 28.05.2008 under the cover of its letter dated 18.10.2010 reiterating the authority of Mr. R.K. Singh and undertaking to abide by the bid.

30. There is no doubt about the proposition that the terms & conditions of a tender document must be strictly adhered to. However, the legal position in this behalf is enunciated in *Poddar Steel Corporation Vs. Ganesh Engineering Works & Ors.* (1991) 3 SCC 273. It was held that deviations from non-essential or ancillary / subsidiary requirement being a minor technical irregularity can be waived. The issue, thus,

arises whether the discrepancy in the present case can be stated to be of such minor technical nature.”

26. The decision in the case of ***Poddar Steel Corporation*** (*supra*) was doubted by the Supreme Court in the later decision in ***Central Coalfields Ltd. and Ors. Vs SLL-SML (Joint Venture Consortium) and Ors.: (2016) 8 SCC 622***. In that case, the Court observed that “*issue of acceptance or rejection of a bid of a bidder should be looked at not only from the point of view of an unsuccessful party but also from the point of view of the employer.*” The Supreme Court reiterated the principal that the soundness of an administrative decision may be questioned only if it is irrational or malafide or intended to favour someone. It referred to its earlier decisions in ***Jagdish Mandal v. State of Orissa: (2007) 14 SCC 517*** and ***M/s Michigan Rubber (I) Ltd. v. State of Karnataka: (2012) 8 SCC 216*** wherein the Court had opined that a decision which no responsible authority acting reasonably and in accordance with relevant law could have reached, was also susceptible to challenge on that ground.

27. This Court is of the view that in the facts of the present case, the terms of the RFP were duly compliant with the RFP documents and requirement of the bid being accompanied by an additional PoA along with the Board resolution was not a term of the instructions to bidders, let alone an essential term. Clearly, the decision of NHAI to reject the petitioner’s bid as unresponsive is irrational and falls squarely within the limited scope of challenge available in respect of administrative decisions.

28. As observed by the Supreme Court in *Central Coalfields Ltd. and Ors. Vs SLL-SML (Joint Venture Consortium) and Ors (supra)*, the issue of acceptance of a bid must be examined from the point of view of the employer. In this case, the only object of NHAI in including provisions for a PoA in favour of the signatory was to ensure that the bid was signed by a person duly authorised to do so. Given the wide language of the Board of Resolution furnished in favour of Ms Patel, there could be no doubt that she was duly authorised to sign the bid.

29. It may also be mentioned that Ms Patel had also submitted the RFQ (which was the first stage of the bidding process) and the same was accepted by NHAI.

30. This court is also not persuaded to accept the contention that the petitioner be relegated to file a suit mainly for the reason that there is no dispute regarding the facts. Ms Priya could not dispute the contention that the facts in the present case were not materially different from the case in *IL &FS Transportation Networks Ltd. v. National Highway Authority of India (NHAI) and Ors (supra)*. It is clear that the controversy involved in the present petition is in a narrow compass and, essentially, relates to the question whether the decision of NHAI to declare the petitioner's bid as unresponsive is irrational. And, no trial is required to address this dispute.

31. In view of the above, the decision of NHAI to reject the petitioner's bid as unresponsive is flawed and is, accordingly, 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.

32. The petition is allowed in the aforesaid terms.

33. The pending applications also stand disposed of.

JANUARY 31, 2019
RK

VIBHU BAKHRU, J

