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

Date of Decision : 08.05.2020

+ **W.P.(C) 3076/2020**

M/S CHINA RAILWAY NO.10 ENGINEERING
GROUP CO. LTD.

..... Petitioner

Through: Mr. Neeraj Kishan Kaul, Sr. Adv. with
Mr. Bhaskar Vali, Mr. Rajat Jain, Mr.
Chanan Parwani and Ms. Nimisha,
Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA
& ANR.

..... Respondents

Through: Mr. Ankur Mittal, Adv. for NHAI
Mr. Ripu Daman Bhardwaj, CGSC.

+ **W.P.(C) 3079/2020**

M/S CHINA RAILWAY NO.10 ENGINEERING
GROUP CO. LTD.

..... Petitioner

Through: Mr. Neeraj Kishan Kaul, Sr. Adv. with
Mr. Bhaskar Vali, Mr. Rajat Jain, Mr.
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NATIONAL HIGHWAYS AUTHORITY OF INDIA
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..... Respondents

Through: Mr. Ankur Mittal, Adv. for NHAI
Mr. Ripu Daman Bhardwaj, CGSC.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE RAJNISH BHATNAGAR

VIPIN SANGHI, J (ORAL)

**CM APPL. 10698/2020 in W.P.(C) 3076/2020 & CM APPL. 10704/2020
in WPC 3079/2020**

The court fees be paid within two weeks. The applications stand disposed of.

**W.P.(C) 3076/2020& CM APPL. 10697/2020 AND W.P.(C) 3079/2020 &
CM APPL. 10703/2020**

1. Since the parties to the present petitions and, the facts relevant for the decision of two writ petitions are the same, and the petitioner as well as the respondents have advanced the same set of submissions, we proceed to dispose of these two writ petitions by this common order. These two writ petitions have been preferred by the petitioner M/s. China Railway No.10 Engineering Group Co. Ltd. seeking similar reliefs, namely, to assail the two similar letters dated 20.03.2020 issued by the respondent/ National Highways Authority of India (NHAI) to the petitioner, declaring the petitioner's two technical bids in respect of two different bids submitted by the petitioner in response to two Requests for Proposal (RFPs) issued by the respondent for construction of portions of a highway, to be non-responsive. The particulars of the two RFPs find mention in the "Subject" of the two impugned communications.

2. The communication dated 20.03.2020, which forms the subject matter of W.P. (C) No.3076/2020 reads as follows:

To,

All bidders as per list below

Subject: Construction of Eight Lane access controlled Expressway starting near Junction with SH-37A to Junction with NH-76 (Ch. 359.170 - 388.420) section of Delhi - Vadodara Green field Alignment (NH-148N) on EPC Mode under Bharatmala Pariyojana in the State of Rajasthan- Technical Responsiveness and opening of financial bids regarding.

Please refer to RFP invitation for the above project. RFP applications of the respective bidders have been evaluated as per eligibility and qualifications requirements as per the RFP document. The result of the technical evaluation as approved by the Competent Authority in NHAI is as under:

(a) Technically non-responsive bidders

S. No.	Name of the Bidders	Remarks
1	M/s China Railway No. 10 Engineering Group Co. Ltd. - Varaha Infra Limited (JV)	M/s China Railway No. 10 Engineering Group Co. Ltd., Lead member of the bidder M/s China Railway No. 10 Engineering Group Co. Ltd. - Varaha Infra Limited (JV) has claimed the project- "Fourth Section of Line Construction of Newly built Yunnan-Guangxi Line (Yunnan section)" in additional criteria required under Clause 2.2.2.2 (n) of RFP. However, the client certificate attached in the bid submitted for the said project is in Chinese language and is not clear. Further the said certificate is not signed by the client. Hence, it has been noted that the said certificate is not accepted for evaluation purpose and thus, the bidder is declared as non responsive in terms of clause 2.2.2.2 (n) of RFP.

(b) Technically responsive bidders

S. No.	Name of the Bidders	Remarks
1	M/s CCS Infra Projects Limited	Technically Responsive
2	M/s Satbhav Engineering Limited	Technically Responsive
3	M/s Ashoka Buildcon Limited	Technically Responsive

2. Representations, if any, on the Technical Evaluation shall be submitted to the Authority up to 26.03.2020.

3. The Financial Bids of the Technically Responsive Bidders shall be opened on 27.03.2020 at 11:30 hrs in the Training Room, Ground Floor, NHAI HQ, G 566, Sector-10, Dwarka, New Delhi. The Responsive bidders are, therefore, requested to depute their authorized representative to be present at the time of opening of Financial Bids.

(Rohin Kumar Gupta)
General Manager (T)
Bharatmala

3. Similarly, the impugned letter dated 20.03.2020 issued to the petitioner, which is assailed in W.P. (C) No.3079/2020 reads as follows:

To,

All bidders as per list below

Subject: Construction of Eight Lane Carriageway starting near Major Bridge on Mej River to Junction with SH-37A (Ch. 331.030 - 359.170) section of Delhi - Vadodara Access Controlled Green field Alignment (NH-148N) on EPC Mode under Bharatmala Pariyojana in the State of Rajasthan- *Technical Responsiveness and opening of financial bids regarding.*

Please refer to RFP invitation for the above project. RFP applications of the respective bidders have been evaluated as per eligibility and qualifications requirements as per the RFP document. The result of the technical evaluation as approved by the Competent Authority in NHAI is as under:

(a) Technically non-responsive bidders

S. No.	Name of the Bidders	Remarks
1	M/s China Railway No. 10 Engineering Group Co. Ltd.- Varaha Infra Limited (JV)	M/s China Railway No. 10 Engineering Group Co. Ltd., Lead member of the bidder M/s China Railway No. 10 Engineering Group Co. Ltd.- Varaha Infra Limited (JV) has claimed the project- "Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line (Yunnan section)" in additional criteria required under Clause 2.2.2.2 (ii) of RFP. However, the client certificate attached in the bid submitted for the said project is in Chinese language and is not clear. Further the said certificate is not signed by the client. Hence, it has been noted that the said certificate is not accepted for evaluation purpose and thus, the bidder is declared as non responsive in terms of clause 2.2.2.2 (ii) of RFP.

(b) Technically responsive bidders

S. No.	Name of the Bidders	Remarks
1	M/s Larsen & Toubro Limited	Technically Responsive
2	M/s Constructora San Jose S.A. - M/s S.P. Singla Constructions Pvt. Ltd. (JV)	Technically Responsive
3	M/s GR Infraprojects Limited	Technically Responsive
4	M/s Ashoka Buildcon Limited	Technically Responsive

2. Representations, if any, on the Technical Evaluation shall be submitted to the Authority up to 26.03.2020.

3. The Financial Bids of the Technically Responsive Bidders shall be opened on 27.03.2020 at 11:30 hrs in the Training Room, Ground Floor, NHAI HQ, G 5&6, Sector-10, Dwarka, New Delhi. The Responsive bidders are, therefore, requested to depute their authorized representative to be present at the time of opening of Financial Bids.

20/03/20
(Rohin Kumar Gupta)
General Manager (T)
Bharatmala

4. During the hearing, the record of W.P. (C) No.3079/2020 has been referred to by learned counsel. We shall be referring to the same hereinafter.

The primary submission of Mr. Neeraj K. Kaul, learned senior advocate appearing for the petitioner is that the premise on which the technical bids of the petitioner have been found to be non responsive is incorrect. Mr. Kaul submits that the ground taken for holding the technical bid to be non responsive is that the experience certificate of the petitioner, which forms a part of the bid documents, is in Chinese language and is not clear, and that the said certificate is not signed by the petitioner. On that ground, the experience certificate furnished by the petitioner has not been accepted for evaluation purpose and, consequently, the bid has been held to be non responsive in terms of clause 2.2.2.2 (ii) of the RFP.

5. Mr. Kaul submits that the petitioner submitted the certificate issued by the statutory auditor, which fully complies with the requirement of certifying the previous works done by the petitioner, and reliance placed by the respondent on the additional certificate issued in Chinese – of which the English translation was also submitted with the bid documents, to reject the petitioners technical bid is erroneous inasmuch, as, it was not even necessary for the petitioners to have submitted any other experience certificate, since the petitioner had submitted the certificate issued by the Statutory Auditor in terms of the RFP.

6. To examine this primary submission of the petitioner, we may, at this stage, notice the relevant provisions of the RFPs, which have been relied upon by the parties in support of their respective submissions. Clause 2.2.2 of the RFP, which is similar in both the RFPs, deals with the aspect of qualification required for bidders. Clause 2.2.2.2 deals with the aspect of Technical

Capacity. We may reproduce herein below the relevant extract of clause 2.2.2.2. The same reads as follows:

“2.2.2.2 Technical Capacity

- (i) For demonstrating technical capacity and experience (the “Technical Capacity”), the Bidder shall, over the past [5 (five)] years preceding the Bid Due Date, have received payments for construction of Eligible Project(s), or has undertaken construction works by itself in a PPP project, such that the sum total thereof, as further adjusted in accordance with clause 2.2.2.5 (i) & (ii), is more than Rs.2105.96 (Rs. Two thousand one hundred five crore and ninety six lakh only) (the “Threshold Technical Capacity”).*
- (ii) Provided that at least one similar work of 25% of Estimated Project Cost Rs.263.25 crore (Rs. Two hundred sixty three crore and twenty five lakh only) shall have been completed from the Eligible Projects in Category 1 and/or Category 3 specified in Clause 2.2.2.5. For this purpose, a project shall be considered to be completed, if more than 90% of the value of work has been completed and such completed value of work is equal to or more than 25% of the estimated project cost.*

The sole Bidder or in case the Bidder being a Joint Venture, any member of Joint Venture shall necessarily demonstrate additional experience in construction of Major Bridge/ROBs/Flyovers in the last 5 (Five) financial years preceding the Bid Due Date i.e. shall have completed atleast one similar Major Bridge/ROB/Flyover having span equal to or greater than 60 meters”. (emphasis supplied)

7. Reliance has been placed by Mr. Kaul on clause 2.2.2.7, which deals with ‘Submission in support of Technical Capacity’ and reads as follows:

“(i) The Bidder should furnish the details of Eligible Experience for the last 5 (five) financial years immediately preceding the Bid Due Date.

(ii) The Bidder must provide the necessary information relating to Technical Capacity as per format at Annex-II of Appendix-IA.

(iii) The Bidder should furnish the required Project-specific information and evidence in support of its claim of Technical Capacity, as per format at Annex -IV of Appendix-IA”,

8. Mr. Kaul has also referred to Annexure II appended to the RFP, which reads as follows:

ANNEX-II

Technical Capacity of the Bidder[®]

(Refer to Clauses 2.2.2.2, 2.2.2.5 and 2.2.2.7 of the RFP)

Applicant type	Project Code ⁺	Category ⁵	Experience ^{2*} (Equivalent Rs. crore) ⁵⁵		Technical Experience ⁶
			Payments received for construction of Eligible Projects in Categories 3 & 4	Value of self-construction in Eligible Projects in Categories 1 and 2	
(1)	(2)	(3)	(4)	(5)	(6)
Single entity Bidder or Lead Member including other members of the Joint Venture	A				
	B				
	C				
	D				
	E				
	F				
Aggregate Technical Experience =					

[®] Provide details of only those projects that have been undertaken by the Applicant, or its Lead member including members in case of joint venture, under its own name separately and/ or by a project company eligible under Clause 2.2.2.6(i)(b). In case of Categories 1 and 2, include only those projects which have an estimated capital cost exceeding the amount specified in Clause 2.2.2.6(i)(c) and for Categories 3 and 4, include only those projects where the payments received exceed the amount specified in Clause 2.2.2.6(ii). In case the Bid Due Date falls within 3 (three) months of the close of the latest financial year, refer to Clause 2.1.13.

* Refer Annex-IV of this Appendix-I. Add more rows if necessary.

⁵ Refer Clause 2.2.2.5(i)

** Construction shall not include supply of goods or equipment except when such goods or equipment form part of a turn-key construction contract/ EPC contract for the project. In no case shall the cost of maintenance and repair, operation of Highways and land be included while computing the Experience Score of an Eligible Project.

⁵⁵ For conversion of US Dollars to Rupees, the rate of conversion shall be Rupees ** (**)³ to a US Dollar.

⁶ In the case of an Eligible Project situated in an OECD country, the Experience Score so arrived at shall be further multiplied by 0.5, in accordance with the provisions of Clause 2.2.2.5(ii) and the product thereof shall be the Experience Score for such Eligible Projects.

³ The conversion rate of USD into Rupees shall be the daily representative exchange rates published by the Reserve Bank of India for the relevant date. Where relevant date should be as on the date 28 (twenty eight) days prior to the Application Due Date.

Construction of Eight Lane Carriageway starting near Major Bridge on Ma River in Junction with SH-37A (Ck. 331.030 - 359.170) section of Delhi – Vadodara Access Controlled Green field Alignment (NH-148N) on EPC Mode under Bharatmala Pariyojana in the State of Rajasthan.

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NOTE: In case of a Joint Venture, information in Annex-II and Annex-IV of Appendix-I shall be provided separately for other Members so as to establish that each such Member has 20 percent or more of the Threshold Technical Capacity. (Refer Clause 2.2.2.4).

9. Mr. Kaul submits that in compliance with the aforesaid clauses of the RFP, the petitioner duly submitted the Statutory Auditors Certificate, which reads as follows:



石家庄华富会计师事务所（普通合伙）
HUA FU CERTIFIED PUBLIC ACCOUNTANTS GP
河北省石家庄市中山西路108号万象城
电子邮箱：sjzhfcpa@163.com
邮编：050001 电话：+86 13931178299

Certificate from the statutory Auditors regarding construction works

Based on its books of accounts and other published information authenticated by it, this is to certify that **M/s China Railway No.10 Engineering Group Co., Ltd.** was engaged by **Yunnan-Guangxi Railway Yunnan Co., Ltd.** to execute **Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line (Yunnan section) for Railway Sector.** The construction of the project commenced on **1st June, 2010** and the project was commissioned on **30th May 2016.** It is certified that Bidder received payments from its Clients for Construction Works executed by them or work executed and certified by the Engineer - in - Charge/Independent Engineer/Authority's Engineer, in the aforesaid construction works.

We further certify that the total estimated capital cost of the project is **Rs 3,887.31 Cr (Rupees Three Thousand Eight Hundred Eighty Seven Crores and Thirty One Lakhs Only)** of which the Applicant received or has executed the work as certified by the Engineer - in - Charge/Independent Engineer/Authority's Engineer **Rs 1,515.940 Cr (Rupees One Thousand Five Hundred Fifteen Crores and Ninty Four Lakhs Only),** during the past five financial years as per year-wise details noted below:

Sr. No.	Year	Amount in INR Crores
1	2016	173.25
2	2015	644.28
3	2014	698.42

Name of Audit Firm: HUA FU CERTIFIED PUBLIC ACCOUNTANTS GP.

Seal of Audit Firm:

Signature of Authorised Signatory:

Name of Authorised Signatory: Liu Jingwen
Designation of Authorised Signatory: Registered Accountant

Date: 11.11.2019.



中国
注册会计师
刘景文
11000001001



Han Hui
Manager Director

10. Mr. Kaul then drew our attention to the documents – on the basis of which the petitioners bids have been held to be non responsive. The original of the said document is in Chinese language.

11. We may observe that, as pointed out by Mr. Ankur Mittal, learned counsel for the respondent/ NHAI, the said document does not bear any signature or date. All that it bears is a stamp/ seal, which we assume, is of the petitioner. We may observe that the seal itself is also in Chinese language and, therefore, we are in no position to state with certainty as to whether, or not, the said seal is of the petitioner company.

12. Along with the said document, the petitioner also submitted – what it claims to be, the true translation of the said Chinese document. The English translation also does not bear any date or signature. The said English translation reads as follows:

Evaluation Form of Construction Performance



Project Name: Fourth Section of Line Construction of Newly-built
Yunnan-Guangxi Line(Yunnan section)

Employer: Yunnan-Guangxi Railway Yunnan Co., Ltd.

Contractor: China Railway No.10 Engineering Group Co., Ltd.

Catalog

Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line(Yunnan section) totally contains five parts: Fourth section of line construction, Sub grade Engineering, Bridge Engineering, Tunnel Engineering, Non-ballasted line engineering and others. They all have passed the completion acceptance on May 30, 2016. Details of the completion acceptance of this project are as follows:

1. Evaluation Form of Construction Performance of Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line(Yunnan section)-the Fourth section of line construction part
2. Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line(Yunnan section)- Sub grade Engineering part
3. Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line(Yunnan section)-the Bridge Engineering part
4. Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line(Yunnan section)-the Tunnel Engineering part
5. Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line(Yunnan section)-the Non-ballasted line engineering and others part



Engineering Group Co. Ltd. (seal)

Evaluation Form of Construction Performance

Project name	Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Liner(Yunnan section)	Project site	Yunnan
Project content	Fourth section of line construction		
Employer	Yunnan-Guangxi Railway Yunnan Co., Ltd.		
Design unit	China Railway Eryuan Engineering Group Co., Ltd.		
Supervision unit	SCTK Construction Supervision Co., Ltd.	Resident Engineer	Wei Jiaqichuan
Construction unit	China Railway No. 10 Engineering Group Co., Ltd.		
Time of commencement	June 1, 2010		
Time of completion	May 30, 2016		
Contract price	3880.8077 million yuan		
Project profile	Railway Grade: Class I, Number of mainline: double line, Passenger train speed: 200km/h, Reserved speed 250km/h, Traction type: Electric power. The mileage of this railway section is from DK473+300 to DK519+120 with mainline length of 65.818km. The regional route of this section basically goes through the Yunnan-Guizhou plateau, the landscape of which consists of low-middle-mountain, hilly and plateau basins and karst rock and passes through the Puoshu Provincial Natural Scenic Reserve. The main engineering geological problems along the route include active faults and adverse geologic phenomena such as earthquakes, karst, landslides, rockfall and rock piles, bedding, sand liquefaction, reservoir banks, harmful gases, high ground temperature and high ground stress as well as artificial disposal of filled soil, soft soil, loose soil, expansive rock, red clay and other special rock and soil. The groundwater mainly includes Quaternary pore water, bedrock fissure water and karst water. The total length of the subgrade works is 16017.779m, the earthwork of the mainline section is 2317875.8m³, and the earthwork of the mainline station is 4,183,666.4m³. There are 7 newly-built extra-large bridges with a total length of 16990.68 km, 10 large bridges with a total length of 2770.39m, 3 medium bridges with a total length of 254.93m, 1 frame short bridge with a total length of 292.52m³, and 33 culverts with a total length of 1028.75 horizontal linear meters. There are 12 newly-built tunnels with a total length of 40.733 km, all of which are double-line tunnels. The technical standard is 200km/h and 250km/h is reserved. The GRTS I-type double-block non-ballasted bed with 80.014km-long single line is laid on the main line and there is a prefabricated field for the sleeper and 127360 GRTS I-type double-block sleepers. During the implementation of this project, the standardized management and "shelves team" management model was implemented with good results, ensuring that the "six in one" of the construction period, quality, safety, environmental protection, efficiency and technological innovation fully achieve to the expected goals.		
Evaluation of Employer	(Construction unit seal) Date Yunnan-Guangxi Railway Yunnan Co., Ltd. (seal)		
Evaluation of Design unit	(Design unit seal) Date Yunnan-Guangxi Railway Cooperation Construction Project Department of China Railway Eryuan Engineering Group Co., Ltd. (seal)		
Evaluation of supervision unit	(Supervision unit seal) Date Yunnan-Guangxi Railway Yunnan Section Supervision Lot 2 Project Department of SCTK Construction Supervision Co., Ltd. (seal)		

Evaluation Form of Construction Performance

Project name	Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line(Yunnan section)	Project site	Yunnan
Project content	Sub grade Engineering		
Employer	Yunnan-Guangxi Railway Yunnan Co., Ltd.		
Design unit	China Railway Eryuan Engineering Group Co., Ltd.		
Supervision unit	SCTK Construction Supervision Co., Ltd.	Resident Engineer	Wei Jiangchuan
Construction unit	China Railway No. 10 Engineering Group Co., Ltd.		
Time of commencement	June 1, 2010		
Time of completion	May 30, 2016		
Contract price	427.6628 million yuan		
Project profile	The subgrade engineering of this section is mainly soft soil treatment, excavation and filling of subgrade, subgrade reinforcement and protection works within the range of DK473+300-DK539+120 from Zhulin (including) to Xingfu Tunnel Exit with a total length of 16017.779m. The area of the main line section consists of soil, soft soil, expansive soil, soft rock, strong weathered hard rock, karst section with 2317875.8m³ of earthworks, of which the gravel is 1293924m³, excavation of stone is 349885m³, filling of the excavated stone is 535479m³, graded crushed stone is 138432.8m³, silt is 160m³, 418866.4m³ of earthwork for main line station, including gravel of 1538086m³, stone of 2546846m³, graded crushed stone is 103724.4m³. In addition, the project also features section-subgrade green protection of 363814m², steel flexible protection network of 12685m², geosynthetic material of 382120m², cement mixing pile of 129745m, cement mortar mixing pile of 103596m, CFG pile of 1287m, heavy compaction of 44728m², dry stone pitching of 3681m², anchor rod of 112433m, anti-slide pile of 15065.7 m² (reinforcement, masonry and concrete), prestressed anchor cable of 2356m, sound barrier of 2053.055m², sound insulation window of 400m², 1300m² surrounding wall for cutting, 217 point subgrade monitoring point. The types of subgrade worksites are: protection of cutting slopes, full protection of roadside embankments, soft soil subgrades, slightly soft subgrades, steep slope subgrades, rock masting subgrades, retaining walls, etc. The foundation treatment mainly uses cement mixing piles, CFG piles, excavation and replacement, etc. The slope protection mainly includes anchor rod frame girder, sheet pile retaining wall, dry block retaining wall, mortar block retaining wall, prestressed anchor cable and anti-slide pile (anchor piles, soil nail wall, etc.). The maximum depth of the cutting is 40m. The soft, soft rock and strong weathered hard rock cuttings are mechanically excavated and the hard rock cuttings are excavated by blasting.		
Evaluation of Employer	Construction unit(s): Date: Yunnan-Guangxi Railway Yunnan Co., Ltd. (seal)		
Evaluation of design unit	Design unit(s): Date: Yunnan-Guangxi Railway Cooperation Construction Project Department of China Railway Eryuan Engineering Group Co., Ltd. (seal)		
Evaluation of supervision unit	Supervision unit(s): Date: Yunnan-Guangxi Railway Yunnan Section Supervision Lot 2 Project Department of SCTK Construction Supervision Co., Ltd. (seal)		



Evaluation Form of Construction Performance

Project name	Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line (Yunnan section)	Project site	Yunnan
Project content	Bridge Engineering		
Employer	Yunnan-Guangxi Railway Yunnan Co., Ltd.		
Design unit	China Railway Eryuan Engineering Group Co., Ltd.		
Supervision unit	SCTK Construction Supervision Co., Ltd.	Resident Engineer	Wai Jiangchuan
Construction unit	China Railway No. 10 Engineering Group Co., Ltd.		
Time of commencement	June 1, 2010		
Time of completion	May 30, 2016		
Contract price	441.9287 million yuan		
	In this lot, there are 7 newly-built extra-large bridges with a total length of 6990.631m, 10 large bridges with a total length of 2705.59m, 3 medium bridges with a total length of 254.95m, 1 frame bridge with a total length of 292.52m², and 33 culverts with a total length of 1028.75 horizontal linear meters. Nanqiu River Bridge adopts 68+128+68m long-span prestressed concrete continuous rigid frame girder crossing the Nanqiu River. Other bridges use 24m and 32m double-line whole-span precast box girders. The total length of the Tianxing double-line extra-large bridge is 1526.677m, the span is 2-24+10-32+24+34-32m, the length of the Tonghong double-line extra-large bridge is 1043.442m, and the span is 2-24+30-32m. The Nanqiu River double-line complex bridge is 400.28m in length and is crossing the Nanqiu River with steep rocks on both sides, using 2-32+(68+128+68) continuous rigid frame +32-24m span type, with high piers (maximum pier height of 110m, thin-walled rectangular pier), rigid-frame continuous girder. Continuous rigid frame uses balance cantilever method casting in symmetrical. One girder precasting and storage field is setting for this Lot to precasting, storing the girders used for double box girders between DK494+322 and DK516+704. 215 spans of Double-line simple supported prestressed concrete box girders are precast and transported for the whole Lot, including 200 spans of 32m double-line box girder and 15 spans of 24m double-line box girder. The post-tensioned method is used for box girders. And the box girders are precasted in the precasting yard and are loaded and handled by girder lifting equipment. The precasted box girder is transported with a DCY 900 900t tyre conveyor. One DP900D bridge girder erection machine is used for the erection of the box girder. The erection sequence shall be from the girder storage yard to both sides.		
Evaluation of Employer	Construction unit (seal) Date Yunnan-Guangxi Railway Yunnan Co., Ltd. (seal)		
Evaluation of Design unit	Design unit (seal) Date Yunnan-Guangxi Railway Cooperation Construction Project Department of China Railway Eryuan Engineering Group Co., Ltd. (seal)		
Evaluation of supervision unit	Supervision unit (seal) Date Yunnan-Guangxi Railway Yunnan Section Supervision Lot 2 Project Department of SCTK Construction Supervision Co., Ltd. (seal)		

Evaluation Form of Construction Performance

Project name	Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line(Yunnan section)		Project site	Yunnan
Project content	Tunnel Engineering			
Employer	Yunnan-Guangxi Railway Yunnan Co., Ltd.			
Design unit	China Railway Eryuan Engineering Group Co., Ltd.			
Supervision unit	SCTK Construction Supervision Co., Ltd.	Resident Engineer	Wei Jiangchuan	
Construction unit	China Railway No. 10 Engineering Group Co., Ltd.			
Time of commencement	June 1, 2010			
Time of completion	May 10, 2016			
Contract price	2298.5183 million yuan			
Project profile	There are 12 newly-built tunnels with a total length of 40,733 km, all of which are double-line tunnels. The technical standard is 200km/h and 250km/h is reserved. There are 6 double-line tunnels with a length of 1km and above (effective section is larger than 92m²), of which the Xingfu tunnel is 12787m (class I high-risk tunnel) and the Chang qingpo tunnel is 12676m in length (maximum buried depth is 309m, class-I high-risk Tunnel). The length of the Jiaxing tunnel is 6550 m, the length of the Laopo tunnel is 2990 m, the length of the Lan gishan tunnel is 2524 m and the length of the Nanqin tunnel is 1027 m. The geological conditions of tunnel for this Lot are complex and there are four types of surrounding rock types II, III, IV, and V. Many of them pass through fault fracture zone, rock burst, high temperature, karst, water rich, gas, high ground stress, soft soil, expansive soil. Except for the open-pit construction for the open tunnel, the rest of the tunnel will be constructed in accordance with the New Austrian Tunneling Method. Advanced support will be used in the form of advanced anchors, advanced small ducts, advanced pipe sheds, etc. The initial support will combine with anchor-spray-crete and steel supports. Transporting parallel adits in tunnels apply rail transport. Excavation and tunneling in the tunnels apply flexible transport. Underground cavern excavation follows the surrounding rock conditions class-II surrounding rock to apply full-section construction, class-III and IV surrounding rock applies step excavation method construction. The general section of class-V is mainly excavated by step excavation method coupled with temporary struts. Furthermore, the faults and extremely soft sections are mainly based on three steps and seven steps construction method. Some of the entrance of tunnel are shallowly buried and the bias pressure section adopts the CD (intermediate wall) method and CRD method or double sidewalk pit construction method; parallel adits generally use full section excavation method.			
Evaluation of Employer	Construction unit (seal) Date Yunnan-Guangxi Railway Yunnan Co., Ltd. (seal)			
Evaluation of design unit	Design unit (seal) Date Yunnan-Guangxi Railway Cooperation Construction Project Department of China Railway Eryuan Engineering Group Co., Ltd. (seal)			
Evaluation of supervision unit	Supervision unit (seal) Date Yunnan-Guangxi Railway Yunnan Section Supervision Lot 2 Project Department of SCTK Construction Supervision Co., Ltd. (seal)			



Evaluation Form of Construction Performance

Project name	Fourth Section of Line Construction of Newly-built Yunnan-Guangxi Line (Yunnan section)		Project site	Yunnan
Project content	Non-ballasted line engineering and others			
Employer	Yunnan-Guangxi Railway Yunnan Co., Ltd.			
Design unit	China Railway Eryuan Engineering Group Co., Ltd.			
Supervision unit	SCTK Construction Supervision Co., Ltd.	Resident Engineer	Wei Jiangchuan	
Construction unit	China Railway No. 10 Engineering Group Co., Ltd.			
Time of commencement	June 1, 2010			
Time of completion	May 30, 2016			
Contract price	199.3709 million yuan			
Project profile	The content of the non-ballasted line undertaken by this Lot includes: precasting, transportation and installation of the sleeper for this Lot and the precasting and supplying of non-ballasted sleeper from the entrance of Atu tunnel to the section of the Qubei Nanpanjiang Bridge (DK419+087-DK598+340, with a length of 140.602 railway track kilometer). The CRTSI double-block non-ballasted bed is laid on the main line of this Lot. The bed length of the non-ballasted line is 80.014km, and the precasting field of the sleeper is set with a total of 127360 CRTSI I-type double-block sleepers been precasted. Signal comprehensive grounding total is 65.818km, integrated pipe ditch of 170km and underpass of 6181.006m²3.			
	Construction unit (seal) Date: Yunnan-Guangxi Railway Yunnan Co., Ltd. (seal)			
Evaluation of design unit	Design unit (seal) Date: Yunnan-Guangxi Railway Cooperation Construction Project Department of China Railway Eryuan Engineering Group Co., Ltd. (seal)			
Evaluation of supervision unit	Supervision unit (seal) Date: Yunnan-Guangxi Railway Yunnan Section Supervision Lot 2 Project Department of SCTK Construction Supervision Co., Ltd. (seal)			



13. Mr. Kaul submits that the respondent, prior to issuance of the impugned communication, issued a letter dated 6/9.03.2020 seeking certain clarifications latest by 16.03.2020. The petitioner provided the requisite clarifications, including in respect of the alleged non compliance of clause 2.2.2.2 (ii) vide letter dated 14.03.2020. The alleged discrepancy pointed out by the respondent NHAI and the reply of the petitioner thereto, vis-à-vis, clause 2.2.2.2 (ii) (Additional Experience) is extracted herein below, and reads as follows:

<i>Clause 2.2.2.2 (ii) (Additional Experience)-</i> <i>As per clause 2.2.2.2 (ii) “The sole Bidder or in case the Bidder being a Joint Venture, any member of Joint Venture shall necessarily demonstrate additional experience in construction of Major Bridge/ROBs/Flyovers in the last 5 (Five) financial years preceding the Bid Due Date i.e. shall have completed atleast one similar Major Bridge/ROB/Flyover having span equal to or greater than 60 meters”.</i> <i>Project claimed by the Bidder for Additional Experience under the name of Lead Member, maximum span length in the subject project is</i>	<i>The Certificate which we have submitted as Additional Experience for construction of Major Bridge/ROBs/Flyovers in the last 5 (Five) financial years preceding the Bid Due Date is duly stamped by the Employer, Design Consultant. The same certificate is also notarized, legalized and Finally Stamped by Indian Embassy in China.</i> <i>In the same certificate, it is clearly mentioned that Nanqui River Bridge adopts 68+128+68m long-span pre-stressed concrete continuous rigid frame girder crossing</i>
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<i>not clear. Also the certificates submitted in Chinese Language are not clear & not signed by Client.</i>	<i>the Nanqui River. So the longest span executed is for 128 meters.</i>
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14. Mr. Kaul submits that the respondents have ignored the clarification furnished by the petitioner and disregarded the documents submitted by it with its bid, and proceeded to issue the impugned communication dated 20.03.2020, as aforesaid.

15. Mr. Kaul submits that after the issuance of the impugned communication, the petitioner once again submitted a detailed reply in relation to the alleged non compliance of clause 2.2.2.2 (ii) of the RFP vide letter dated 23.03.2020. The reply given by the petitioner is extracted herein below and reads as follows:

“The Experience Certificate of M/s China Railway No.10 Engineering Group Co. Ltd. Lead Member of the Bidder, in Chinese language has been signed by the client duly stamped, which can be seen on Page No.184 Volume I of IV of the submitted bid. English translation of the said certificate has also been provided in the Bid document on PDF Page No.193 of Volume I of IV containing seal of the Client, which has also been apostilled by the Indian Embassy in China and Notarised as per Law of China. However, we hereby once again submit a legible signed and sealed copy of the said Certificate duly Notarised by Indian Notary.

Further, in this regard, it may not be out of place to mention that the Statutory Auditor of Lead Member of the bidder has also submitted a certificate certifying the payments received

for captioned work during last five years as mentioned in the said certificate available at page 168 of Vol I of IV of Bid document and client certificate (in question) is only a supporting document for having carried out the work. “Fourth Section of Line Construction of Newly Built Yunnan – Guangxi Line (Yunnan Section)” to meet out the additional criteria as required under Clause 2.2.2.2 (ii) of RFP.

We further assure that we will show you the said certificate (in original) in case, we emerged as the lowest bidder.

*We, therefore, request your good self to kindly consider our bid and enable us to participate in financial bid opening”.
(emphasis supplied)*

16. Mr. Kaul submits that the petitioner is a well established construction company performing several construction contracts worth thousands of crores, including in India, and for the NHAI itself. The respondents are, therefore, aware of the technical capacity of the petitioner. He submits that the respondents have adopted a hyper technical approach in rejecting the technical bid of the petitioner, which is not justified.

17. In response to the aforesaid submission of Mr. Kaul, Mr. Mittal, learned counsel for the respondent NHAI submits that the rejection of the technical bid of the petitioner as non responsive is completely justified. He emphasizes that clause 2.2.2.2, which deals with the aspect of technical capacity, provided in clause (ii) that the bidder, or in case the bidder is a joint venture, any member of the joint venture “*shall necessarily demonstrate additional experience in construction of Major Bridge/ ROBs/ Flyovers in the last 5 (Five) financial years preceding the Bid Due Date i.e. shall have completed*

atleast one similar Major Bridge/ ROB/ Flyover having span equal to or greater than 60 meters”. Mr. Mittal submits that even the petitioner was conscious of the fact that this is an additional experience requirement for technical qualification, and to demonstrate that the petitioner has the requisite experience, it submitted the Chinese certificate (unsigned and undated) alongwith a purported English translation (again unsigned and undated). He submits that the Statutory Auditors Certificate relied upon by the petitioner nowhere certifies that the petitioner has the experience of constructing Major Bridge/ ROBs/ Flyovers, or that it had executed a work involving the construction of a Bridge/ROB/Flyover with a span of 60 meters or more in the last five years. The Statutory Auditors Certificate only certifies, on the basis of the books of accounts of the petitioner, that the petitioner was engaged by Yunnan-Guangxi Railway Yunnan Co. Ltd. to execute Fourth Section of Line Construction of Newly Built Yunnan-Guangxi (Yunnan Section) for Railway Sector. It certifies as to when the construction of the project commenced, and when the project was commissioned, and that the petitioner had received payments from the clients for construction works. It also certifies the estimated capital cost of the said project and the amount received by the petitioner during the past five financial years, of which the breakup is given.

18. At this stage, we may observe that though the said certificate purports to give breakup of the amounts received in the past five financial years, the tabulation actually discloses the amount received only in the three years, namely, 2014, 2015 and 2016.

19. Mr. Mittal submits that the said Statutory Auditor Certificate is, therefore of no avail to the petitioner, since the statutory auditor, in this certificate, did not certify the execution of work by the petitioner in the last five years relating to construction of Bridge/ ROBs/ Flyovers. Mr. Mittal submits that the submission of a Chinese document purporting to certify the execution of works relating to Major Bridge/ ROBs/ Flyovers, which was neither signed nor dated, was meaningless, since the ownership of the said document was not established. Moreover, in the absence of the date, it was not even clear as to when the said certificate was drawn. The mere affixation of a seal in Chinese language, which the Technical Evaluation Committee (TEC) of the respondent could not have appreciated, was also meaningless. He submits that the English translation submitted by the petitioner was again merely stamped, and was neither signed nor dated. The mere fact that the documents were apostilled by the Indian Embassy in China, and that they were Notarised by a Notary Public in India, does not resolve the deficiency in the said documents of them not being signed not being dated. Consequently, even the ownership of the translations was not established. Unless signed, the petitioner could not be held bound by the certificate, and could escape from legal consequences if it were to renege from its offer contained in the bid. Thus, the TEC of the respondent rightly did not rely upon the said documents while evaluating the technical bid of the petitioner.

20. To this, the submission of Mr. Kaul is that as per the Chinese law, once a document is stamped, it does not require signatures. We may, at this stage itself, observe that when the petitioner submits its bids in India in response to the RFPs issued by NHAI, it is imperative for the petitioner to meet the

requirement of the RFPs and the Indian laws, and it would be no excuse to claim that as per the Chinese law, the certificates once stamped, do not require to be signed. In any event, Mr. Kaul has offered absolutely no justification for either the Chinese certificate, or its purported English translation, not being affixed with the date on which the said certificates were drawn or stamped.

21. Mr. Kaul, in response to the aforesaid submission of Mr. Mittal, further submits that the petitioner, even now, is in a position to submit the requisite certificate in English language and the petitioner has vast experience of building Bridge/ ROBs/ Flyovers.

22. Having heard the submission of Mr. Kaul, learned senior counsel for the petitioner, and the submission of Mr. Mittal on behalf of the NHAI, and having perused the record, we are of the view that there is no merit in these petitions and the rejection of the petitioners technical bids on account of non compliance of clause 2.2.2.2 (ii) was completely justified. The process of bid evaluation is undertaken by a Technical Evaluation Committee (TEC) of the employer which, in this case, is the NHAI. The RFPs are detailed, and lay down in specific terms the requirements that each of the bidders is required to meet. It is for the bidders to ensure that they meet all the requirements of the RFP. The rules of the game are contained in the terms of the RFP, and all bidders are equally bound thereby. No bidder can claim any relaxation or leeway in the matter of compliance of the said rules, lest it would lead to discrimination, arbitrariness and unfair treatment to other bidders who may

have met all the requirements of the RFP scrupulously when submitting their bid.

23. Neither the TEC, nor this Court is concerned with the claimed technical capacity of the petitioner. What is relevant to be examined is the technical capacity demonstrated by the bidder in his bid, which included the certificates that he may annex with his bid. It is only on the basis of the said documents, that the bid has to be evaluated, and nothing more.

24. The first submission of Mr. Kaul that the Statutory Auditors Certificate itself was sufficient to establish the technical capacity of the petitioner, and that there was no obligation for the petitioner to produce any other certificate – including the certificate in Chinese and its true translation - on the basis of which the petitioners bid has been held to be non responsive, is completely fallacious. As noticed herein above, clause 2.2.2.2 (ii) requires the bidders to establish their additional capability in the matter of construction of Major Bridges/ ROBs/ Flyovers. This capability has been described as “*shall necessarily demonstrate additional experience in construction of Major Bridge/ ROBs/ Flyovers in the last 5 (Five) financial years preceding the Bid Due Date i.e. shall have completed atleast one similar Major Bridge/ ROB/ Flyover having span equal to or greater than 60 meters*”. Thus, the bidder necessarily had to demonstrate its experience in the matter of construction of Major Bridge/ ROBs/ Flyovers, and that too in the last five financial years preceding the bid due date, having a span equal to or greater than 60 meters. The Statutory Auditors Certificate furnished by the petitioner is completely silent on this aspect. Therefore, the first submission of Mr. Kaul that the

Statutory Auditor Certificate was sufficient to establish the additional Technical Capacity required vide clause 2.2.2.2 (ii) of the RFP is rejected.

25. The fallback submission of Mr. Kaul that the Chinese certificate submitted by the petitioner alongwith its English translation should have been accepted by the respondents, also has no merit. This is for the reason that neither the Chinese certificate, nor its English translation bear the signature of the authorized representative of the petitioner, or even the date on which the said certificate was purportedly drawn. In the absence of the signatures, the respondents were not obliged to act upon the said document, merely because they bear some stamp in Chinese language.

26. Acceptance of submission of Mr. Kaul that mere affixation of the seal on the documents was sufficient for their acceptance, can lead to uncertain situations. A bidder may subsequently - after the bid opening, disown a document forming part of the bid, on the ground that the same had not been signed by him or his authorized representative, when it suits him to renege from the document. The TEC cannot be expected to act on the basis of uncertainty vis-à-vis any bidder, as that may jeopardize the entire bidding process which, in such like cases, is very elaborate, and time and expense consuming. Therefore, the insistence of the respondent on submission of duly signed and dated documents/ certificates cannot be trivialized, merely because it suits the petitioner to own up the said documents at this stage. The petitioner was obliged to submit the duly signed and sealed bid which, obviously, meant that the documents and certificates forming part of the bid documents were also required to be duly signed and sealed. The process of apostilling a

document, or its notarization, do not take away the lacuna in the document that is not signed. The Apostille is attached to the original document to verify that it is legitimate and authentic, so it could be accepted in one of the other countries, who are members of the Hague Apostille Convention. Thus, the apostille only certifies that the documents, as produced by the petitioner before the Indian Embassy, were genuine. The same does not tantamount to creation of a legally binding obligation on the person submitting the apostilled document, in respect of the contents of the said document. Similarly, Notarisation of the document does not create a binding obligation, since it does not establish the ownership of the document. Thus, the fact that the Chinese certificate, or its translation was apostilled or notarized, is neither here, nor there.

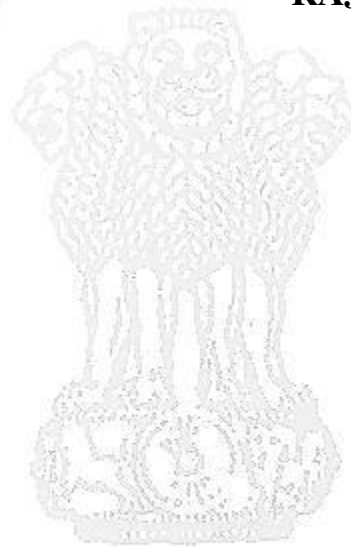
27. The submission of Mr. Kaul that the petitioner may be granted time, even now, to submit the certificate in compliance of clause 2.2.2.2 (ii) has only to be noticed to be rejected. To do so, would be to strike at the sacrosance of the RFP and the bidding process itself. It would not be fair to the other bidders, who were more careful while submitting their bid. There may be other bidders, whose bid may have been found to be non-responsive for other reasons. Even they may seek similar relaxation which would undermine the sanctity of the bidding process, and result in arbitrariness and discrimination. The petitioner must take responsibility for its own lapse, and cannot find fault with the respondents in rejecting its technical bids when the petitioner itself has been lax in the matter of submission of its bids.

28. For the aforesaid reasons, we do not find any merit in the present petitions, and dismiss the same leaving the parties to bear their respective costs.

VIPIN SANGHI, J

RAJNISH BHATNAGAR, J

MAY 08, 2020



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