

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 3743/2020**

Date of decision: 14th December, 2020

IN THE MATTER OF:

TRACK AND TOWERS INFRATECH P LTD Petitioner
Through **Mr. R.K. Sanghi and Mr. Ishan Sanghi, Advocates.**

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA Respondent
Through **Mr. Dayan Krishnan, Sr. Advocate with Ms. Madhu Sweta and Ms. Raveena Dewan, Advocates.**

CORAM:
HON'BLE MS. JUSTICE HIMA KOHLI
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The petitioner seeks quashing of communication No. NHAI/KNT/Aurad-Bidar/Mainwork/2020/153524, dated 18.6.2020, issued by the respondent No.1/NHAI holding its bid as non-responsive for Two laning with paved shoulder from km.0.000 to km.45.878 of Aurad-Bidar Section of NH-161A on EPC Mode under Bharatmala Pariyojana in the State of Karnataka.
2. The brief facts of the case are that on 17.01.2020, the respondent/NHAI issued a tender notice vide reference No. NHAI/KNT/Aurad-Bidar/Mainwork/2020/153524. The relevant clauses of

the tender which are necessary for the purpose of deciding this case read as under:

"2.2.2 Qualification requirements of Bidder:

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2.2.2.2 Technical Capacity

- i. *For demonstrating technical capacity and experience(the "**Technical Capacity**")*, the Bidder shall, over the past [5(five)] financial years preceding the Bid Due Date, have received payments for construction of Eligible project(s), or has undertaken construction works by itself in a PP project, such that the sum total thereof, as further adjusted in accordance with clause 2.2.2.5 (i) & (ii), is more than **Rs.504.96 crore (Rs. five hundred four crore and ninety six lakh only)** (the "**Threshold Technical Capacity**").
- ii. *Provided that at least one similar work of 25% of Estimated Project Cost of Rs. 84.16 crore (Rs. eighty four crore and sixteen 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 years preceding the Bid Due Date i.e. shall have completed at least one similar Major Bridge/ROB/Flyover having span equal to or greater than 16.25 meters.*
- iii. *Deleted.*

- iv. *The up-dation factor to update the price of the eligible projects for the year indicated in table below:*

<i>Year</i>	<i>Year-1</i>	<i>Year-2</i>	<i>Year-3</i>	<i>Year-4</i>	<i>Year-5</i>
<i>Up-dation factor</i>	<i>1.05</i>	<i>1.05</i>	<i>1.10</i>	<i>1.15</i>	<i>1.20</i>

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2.2.2.5 Categories and factors for evaluation of Technical Capacity:

- i. *Subject to the provisions of Clause 2.2.2 the following categories of experience would qualify as Technical Capacity and eligible experience (the "Eligible Experience") in relation to eligible projects as stipulated in Clauses 2.2.2.6 (i) & (ii) (the "Eligible Projects"). In case the Bidder has experience across different categories, the experience for each category would be computed as per weight of following factors to arrive at its aggregated Eligible Experience:*

<i>Category</i>	<i>Project/Construction experience on Eligible Projects</i>	<i>Factors</i>
<i>1</i>	<i>Project in Highway sector that qualify under Clause 2.2.2.6 (i)</i>	<i>1</i>
<i>2</i>	<i>Project in core sector that qualify under Clause 2.2.2.6 (i)</i>	<i>0.70</i>
<i>3</i>	<i>Construction in Highway sector that qualify under Clause 2.2.2.6 (ii)</i>	<i>1</i>
<i>4</i>	<i>Construction in core sector that qualify under Clause 2.2.2.6 (ii)</i>	<i>0.70</i>

- ii. *The Technical capacity in respect of an Eligible Project situated in a developed country which is a*

member of OECD shall be further multiplied by a factor of 0.05 and the product thereof shall be the Experience Score for such Eligible Project.

iii. For the purpose of this RFP:

- a) highways sector would be deemed to include highways, expressways, bridges, tunnels, runways, railways (construction/reconstruction of railway tracks, yards for keeping containers etc.) metro rail and other ports (including construction/reconstruction cost of Jetties, any other linear infrastructure including bridges etc.) and**
- b) core sector would be deemed to include civil construction cost of power sector, commercial setups, airports, industrial parks/estates, logistic parks, pipelines, irrigation, water supply, sewage and real estate development.**

I. *In case of projects executed by applicant under category 3 and 4 as a member of Joint Venture the project cost should be restricted to the share of the applicant in the joint venture for determining eligibility as per provision under clause 2.2.2.2 (ii). In case Statutory Auditor certifies that, the work of other members is also executed by the applicant, then the total share executed by the applicant can be considered for determining eligibility as per provision under Clause 2.2.2.2 (ii).*

II. *Maintenance works are not considered as eligible projects for evaluation as per instruction No.6 to Annex-IV. As such works with nomenclature like PR, OR, FDR, SR, site/micro grading surface renewal, resurfacing periodic maintenance, repair & rehabilitation, one time maintenance permanent protection world of bank external pre stressing repair of central hinge, short term OMT contract of NHAI, any type of work related to border fencing work or earthwork alone construction of building/hostels/hospitals, etc. or not specified shall not be considered. However such maintenance*

works shall be considered as eligible projects in case of Maintenance works to be taken up on EPC mode.

III. The works such as Improvement in Riding Quality work (IRQP/IRQ), shall be considered for Technical Capacity 2.2.2.2 (ii). However such work shall be considered for single completed works 2.2.2. (i) in case of Maintenance works to be taken up on EPC mode.

IV. Project in Highway sector shall constitute the following for the purpose of considering under category 1 & 3 as applicable, if:]

- i. widening/reconstruction/up gradation works on NH/SH or on any category of road taken up under CRF, ISC, EI, SARDP, LWE*
- ii. Widening/ reconstruction/ up gradation works on MDRs with loan assistance from multilateral agencies or on BOT basis*
- iii. widening/ reconstruction/ up gradation work of roads in Municipal corporation limits, construction of Bypasses.*
- iv. construction of stand-alone bridges, ROBs, tunnels w.r.t. roads.*
- v. Long term OMT works of NHAI/MoRT&H.*

V. The projects with the title of RIDF, PMGSY road, link road, city roads, rural road, sector/ municipality road, Bridges for railway line, work of metro rails (bridges/tunnels) real estate projects which demonstrate road development construction bridges or culverts may be considered under category--4.

VI. In case both the estimated cost of project and revised cost of project are provided, the revised cost of project shall be considered for evaluation. "

(emphasis added)

3. The petitioner submitted its bid and in the Pre-Bid Meeting, it raised a query as to whether construction of railway tracks is considered a “*similar work*” for qualifying in the eligibility criteria. The said query was replied to by the respondent/NHAI in the following words:-

"Name of the work: Two laning with paved shoulder from km.0.000 to km.45.878 of Aurad-Bidar Section of NH-161A under Bharatmala Pariyojana in the State of Karnataka on EPC Mode.

Ref:- NIT No. NHAI/KNT/Aurad-Bidar/Mainwork/2020/153524 dated 17.01.2020.

Reply to the Pre-Bid Query

<i>Clause No.</i>	<i>Clause</i>	<i>Query</i>	<i>Reply</i>
<i>Clause 2.2.2.2 (ii) and Clause 2.2.2.5 (i)</i>	<i>Provided that at least one similar work of 25% of Estimated Project Cost Rs. 84.16 crore 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.</i>	As per clause 2.2.2.5 (i), Railway works are under category 1 & 3. Request you to clarify whether construction of Railway tracks are considered as similar work for eligibility criteria ? In continuation to the above, please clarify the completion date for the certificate should be current year before the bid submission or previous financial year ?	Refer clause 2.2.2.5 (iii) (a) which is amply clear. Experience over the past 5 financial years preceding the bid due date shall be considered for evaluating the experience.

4. Records show that on 12.05.2020, the respondent/NHAI had sought a clarification from the petitioner as to how the projects which it had executed, satisfies the terms and conditions specified in the tender document. The respondent's letter dated 12.05.2020, reads as under:-

"Sub: Two laning with paved shoulder from km.0.000 to km.45.878 of Aurad-Bidar Section of NH-161A on EPC Mode under Bharatmala Pariyojana in the State of Karnataka-Query on evaluation of Technical Bids-reg.

Ref: NIT No. NHAI/KNT/LOT3/AURAD-BIDAR/2020/147603 dated 17.01.2020.

This has reference to your bid submitted for the subject project. The online bids were opened on 19.03.2020 at 11:30 AM at NHAI HQ. The Evaluation Committee has raised the following queries vide letter no.151446 dated 20.03.2020.

1.	Annex IV	<i>Project Code A,B,C,D,I: Please clarify why project should not be considered under category 4.</i> <i>Project Code E, F, G, H: The scope of Project is majorly earthwork which does not fall under category of eligible project. Please clarify why the project should be considered or determining technical capacity.</i>
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2. You were requested to submit your reply latest by 5:00 PM on 24.03.2020 which was further extended upto 07.04.2020 due to lockdown.

3. Now, since the lockdown has been partially opened in many states, therefore it is requested to submit your replies for the above observations latest by 20.05.2020. It may be noted that no further extensions

will be given for submission of reply of the queries and evaluation will be done for the bidders who's replies have been received. The bidders who have not submitted their replies till 20.05.2020, will be considered as non-responsive."

5. The petitioner gave its reply on 15.05.2020, stating *inter alia* that under Clause 2.2.2.5 (iii) (a), highway sector includes the projects involving construction/re-construction of railway tracks, yards for keeping containers etc. and therefore, the works mentioned by it are qualified to be considered under Category 3.

6. The respondent/NHAI declared the result of the technical evaluation on 18.06.2020 and the petitioner was disqualified on the ground that its bid did not satisfy the conditions prescribed in Clause 2.2.2.2 (ii) of the tender.

7. On a query raised by the petitioner as to why it has been disqualified, the respondent/NHAI replied on 25.06.2020, stating that *"the completed 'construction/re-construction of railway tracks' railway projects have been considered in category-3 but such projects cannot be construed as similar work as the nature of work does not pertain to construction of Highways and railway works cannot be considered under similar capacity."* The result of the technical evaluation dated 18.06.2020, whereby the bid of the petitioner was held to be non-responsive, has been challenged in the instant petition.

8. Arguing for the petitioner, Mr. Sanghi, learned counsel contended that Clause 2.2.2.5 (iii) of the tender categorically states that the highways sector would be deemed to include highways, expressways, bridges, tunnels, runways, railways (construction/reconstruction of railway tracks, yards for

keeping containers etc.) metro rail and other ports. In view of the clear stipulation, rejection of the petitioner's bid on the ground that construction/re-construction of the railway tracks cannot be construed as a '*similar work*', is completely erroneous. He argued that when a specific query was raised for a clarification as to whether construction of Railway tracks is considered as '*similar work*' for qualifying the eligibility criteria, the respondent/NHAI stated that Clause 2.2.2.5 (iii) (a) is amply clear. He therefore contends that to the specific query raised by the petitioner, the respondent/NHAI having stated that Clause 2.2.2.5 (iii) (a) is the answer, then the obvious conclusion is that highway sector would be deemed to include projects including highways, expressways, bridges, tunnels, runways, railways (construction/reconstruction of railway tracks). Therefore, reconstruction of railway tracks must be considered a '*similar work*' for qualifying the eligibility criteria.

9. *Per contra*, Mr. Dayan Krishnan, learned Senior Advocate appearing for the respondent/NHAI contended that as per the eligibility criteria laid down in the tender documents, the bidder has to show that it has received payments (after adjustments) of over Rs.495.51 crores in the last five financial years preceding the bid due date. Apart from this, the second criteria which the bidder has to satisfy is that it had to undertake "*at least one similar work*" of 25% of Estimated Project Cost of Rs. 84.16 crores (Rupees eighty four crore and sixteen lakh only). He submitted that a perusal of Clause 2.2.2.5 would show that railway projects would be eligible for being considered as projects in the highway sector as they would fall in Category 1 and/or Category 3, but Clause 2.2.2.5 (iii) (IV) provides that for the purpose of consideration under Category 1 and/or 3, the bidder has to

satisfy the conditions prescribed in Clause 2.2.2.5 (iii) (IV). He contended that if Clause 2.2.2.5 (iii) (IV) is read with Clause 2.2.2.2 (ii), then the bidder should have executed any of the five works referred to therein and since the petitioner has not executed any of the works mentioned in Clause 2.2.2.5 (iii) (IV), it cannot be said to have qualified. Mr. Krishnan concluded by submitting that the decision making process adopted by NHAI in the technical evaluation has been fair, unbiased and reasonable it does not warrant any interference under Article 226 of the Constitution of India.

10. In rejoinder Mr. Sanghi, learned counsel for the petitioner sought to contend that the Clause 2.2.2.2 (ii) when read with Clauses 2.2.2.5 (iii) (a) and Clauses 2.2.2.5 (iii) (IV), is ambiguous because once it is mentioned that the highway sector includes construction/re-construction of railway tracks, then the petitioner could not have been disqualified. He placed reliance on the judgment of the Supreme Court in Reliance Energy Vs. Maharashtra State Road Development Corp Ltd., reported as **(2007) 8 SCC 1**, to canvass that if there is vagueness or subjectivity in the norms specified, then in such a case, courts must interfere otherwise it would result in arbitrariness and not provide a level playing field to all the bidders.

11. We have heard Mr. R.K. Sanghi, learned counsel appearing for the petitioner and Mr. Dayan Krishnan, Senior Advocate appearing for the respondent/NHAI and have carefully perused the records.

12. The extent of judicial review in matters relating to award of contract, interpretation of the clauses of the contract/notice inviting tenders is well settled. In Jagdish Mandal v. State of Orissa, reported as **(2007) 14 SCC 517**, the Supreme Court has observed as under:-

"22. Judicial review of administrative action is

*intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. **If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out.** The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. **Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold.** Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:*

*(i) **Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;***

or

Whether the process adopted or decision made

is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.”
(emphasis added)

If the answers to the questions posed in the aforesaid judgment are in the negative, there should be no interference by courts under Article 226 of the Indian Constitution.

13. In Michigan Rubber (India) Ltd. v. State of Karnataka, reported as **(2012) 8 SCC 216**, after examining the case law laid down on the scope of interference by courts in tender matters, the following principles have been carved out:-

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."

(emphasis added)

14. It is also well settled that the owner of the project being the author of the tender documents, is the best person to appreciate its requirement and interpret the documents and the High Court must defer to the understanding of the author in matters of appreciation of the terms and conditions of the tender documents. Unless there are some *mala fides* or perversity in the understanding or appreciation of the author, the interpretation given by the author must be given primacy. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., reported as (2016) 16 SCC 818, the Supreme Court has observed as under:-

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless

there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.”

(emphasis added)

The aforesaid judgment has been cited and followed in JSW Infrastructure Ltd. v. Kakinada Seaports Ltd., reported as (2017) 4 SCC 170.

15. In Nabha Power Ltd. v. Punjab SPCL, reported as (2018) 11 SCC 508, the Supreme Court made the following observation:-

“72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any “implied term” but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract.”

(emphasis added)

The view expressed above, has been followed in Caretel Infotech Ltd. v. Hindustan Petroleum Corpn. Ltd., reported as **(2019) 14 SCC 81**, where after quoting the abovementioned paragraphs in Nabha Power Ltd.(supra), the Supreme Court has observed as under:-

“43. We have considered it appropriate to, once again, emphasise the aforesaid aspects, especially in the context of endeavours of courts to give their own interpretation to contracts, more specifically tender terms, at the behest of a third party competing for the tender, rather than what is propounded by the party framing the tender. The object cannot be that in every contract, where some parties would lose out, they should get the opportunity to somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit”. (emphasis added)

16. A perusal of the aforementioned judgments would show that constitutional courts must show restraint in interfering with administrative actions. The correctness of the decision taken by the employer cannot be interfered with. Only the decision making process can be subjected to judicial review. The soundness of the decision may be in question only if it is irrational or so perverse that no responsible authority acting reasonably and in accordance with law could have reached such a decision or it is found that the process was meant to favour someone. Keeping these principles in mind, the question that has to be considered is whether in the instant case, rejection of the bid of the petitioner would warrant any interference or not?

17. The records placed before us would show that the tender submitted by 19 bidders have been accepted by the respondent/NHAI as responsive and

they have cleared the first stage of evaluation. Their financial bids are yet to be opened. They could not be opened because of the order dated 25.06.2020, passed in the present proceedings, restraining the respondent/NHAI from proceeding ahead with opening of the financial bid. The principle argument of the petitioner hinges on Clause 2.2.2.5 (iii) (a) of the tender documents which states that highway sector would be deemed to include railways (construction/re-construction of railway tracks, yards for keeping containers, etc.). The petitioner therefore states that the projects which it has executed, should be considered as '*similar work*', to satisfy the requirements of the Notice inviting tender.

18. The Request For Proposal (for short "RFP") issued by the respondent/NHAI is for executing a road project. Under Section 2.2.2.2 (i) of the RFP, the bidder has to demonstrate that over the past five years preceding the bid due date, it has received payments for construction of eligible projects or has undertaken construction works by itself in a PPP project and that payment received by the bidder after adjustment as provided for under the RFP, is more than Rs.504.96 crores. Under Clause 2.2.2.2 (ii), the bidder has to further establish that he has undertaken at least one "*similar work*" of 25% of estimated cost of Rs.84.16 crores from eligible projects in Category 1 and/or Category 3, as specified in Clause 2.2.2.5. The short question that arises for consideration is as to whether the projects undertaken by the petitioner shows that it has undertaken a '*similar work*' in Category 1 and/or Category 3, as specified in Clause 2.2.2.5 of the RFP.

19. Category 1 and Category 3 mentioned in Clause 2.2.2.5, deal with projects in the highway sector that qualify under Clause 2.2.2.6 (i) or construction in the highway sector that qualify under Clause 2.2.2.6 (ii).

Though Clause 2.2.2.5 (iii) states that highway sector would be deemed to include railways (construction/re-construction of railway tracks, yards for keeping containers, etc.), Clause 2.2.2.5 (iii) (IV) states that the project in the highway sector shall constitute the following for the purposes of consideration under Category 1 and/or Category 3, as applicable if it relates to:-

- i. Widening/reconstruction/up gradation works on NH/SH or on any category of road taken up under CRF, ISC, EI, SARDP, LWE,
- ii. Widening/ reconstruction/ up gradation works on MDRs with loan assistance from multilateral agencies or on BOT basis,
- iii. Widening/ reconstruction/ up gradation work of roads in Municipal corporation limits, construction of Bypasses,
- iv. Construction of stand-alone bridges, ROBs, tunnels w.r.t. roads,
- v. Long term OMT works of NHAI/MoRT&H.

20. A conjoint reading of Clause 2.2.2.2 (i), Clause 2.2.2.5 (ii), Clause 2.2.2.5 (iii) (a) and Clause 2.2.2.5 (iii) (IV) would show that in order to qualify under Clause 2.2.2.2 (ii), even though highway sector includes railways and a company which has done projects in railways would be eligible, but the bidder must satisfy the requirements prescribed in Sub clause (IV) of Clause 2.2.2.5 (iii). Unless the bidder satisfies the requirement in Sub clause (IV) of Clause 2.2.2.5 (iii), it will not be eligible under Clause 2.2.2.2 (ii). Even though the NIT has been drafted rather unhappily, it cannot be said that the interpretation/consideration which is sought to be placed by the respondent/NHAI before us, is so perverse or irrational that would warrant interference under Article 226 of the Constitution of India.

21. In reply to the pre-bid query raised by the petitioner, the respondent/NHAI had specified that Clause 2.2.2.5 (iii) (a) is amply clear. That the respondent/NHAI in its clarification did not mention Clause (IV) of 2.2.2.5 (iii), by itself can not lead to a conclusion that the decision making process has not been fair. It must be kept in mind that 19 other parties have successfully cleared the first step of the bidding process. Nor can it be said that the petitioner has been discriminated against. Failure on the part of the respondent/NHAI to refer to Clause 2.2.2.5 (iii) (IV) in their reply to the pre-bid query, will not vitiate the entire bidding process.

22. Vide order dated 02.11.2020, the petitioner was called upon to file an affidavit stating *inter alia* as to whether it has fulfilled any of the works specified in sub-clauses (i) to (v) of Clause 2.2.2.5 (iii) (IV) of the RFP. The affidavit filed by the petitioner does not specify that it has indeed executed any of the works which can fall under Clause 2.2.2.5 (iii) (IV). The reasoning given by learned counsel for the petitioner that the railway track project executed by it would be a project that can be considered in Category 3 and that alone must be considered for purposes of eligibility, is unacceptable. The bidder must have executed a work mentioned in Clause 2.2.2.5 (iii) (IV) in order to be eligible under Clause 2.2.2.2 (ii). This interpretation sought to be given by the respondent/NHAI is found to be tenable and cannot be termed as perverse, illogical or arbitrary.

23. Reliance placed by Mr. Sanghi, learned counsel for the petitioner, on Reliance Energy(supra) is misplaced in view of the fact that there is no ambiguity in the terms of the subject RFP. Even though the language used in the RFP is not happily worded, it cannot be said that these clauses have resulted in an unequal or discriminatory treatment vis-à-vis the petitioner or

that it violates the doctrine of providing a level playing field to all the bidders. We may reiterate the view expressed by the Supreme Court in Caretel Infotech Ltd.(supra) that constitutional courts cannot give their own interpretation against the terms of the tender at the behest of a third party competing for the tender, rather than what is propounded by the party issuing the tender, being its author.

24. In the result, this court is of the opinion that the decision of the respondent/NHAI in declaring the bid of the petitioner as non-responsive, does not warrant any interference. The petitioner has not been able to demonstrate that the decision making process adopted by the respondent/NHAI is perverse, irrational or tainted with *mala fides* or is designed to favour a particular party.

25. The writ petition is dismissed as meritless but with no orders as to costs.

SUBRAMONIUM PRASAD, J

HIMA KOHLI, J

DECEMBER 14, 2020

rs/ap