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

\+ W.P.(C) 5943/2020 and CM APPL. 21472/2020, 21951/2020

M/S VARAHA INFRA LTD ..... Petitioner

Through: Mr. Arvind Nigam, Sr. Advocate with Mr. Muneesh Malhotra, Mr. Avishkar Singhvi, Mr. Bhaskar Vali, Mr. Achin Mittal, Mr. Aditya Malhotra, Mr. Rajat Jain, Mr. Pranav Singhal, Mr.Nipun Katyal, Mr. Mohit Singhvi and Ms. Manpreet Bhatia, Advocates

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA & ORS ..... Respondents

Through: Mr. Ankur Mittal, Advocate for R-1. Mr. Asheesh Jain, CGSC for R-2. Mr. Ravi Bhansali, Senior Advocate with Mr. Shubham Modi and Mr. Robin Bhansali, Advocates for R-4/CREC.

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

O R D E R

% **14.09.2020**

HEARD THROUGH VIDEO CONFERENCING.

1. The petitioner has approached this court praying *inter alia* for issuance of a writ of mandamus to the respondent No.1/National Highways Authority of India (NHAI) and the respondent No.2/Ministry of Road Transport and Highways, Union of India that it be awarded the project of construction of 6-lane access-controlled GH from km 67.000 to km 99.000 of Rajasthan-Gujarat Border to Santalpur Section of NH-754K as a part of

Amritsar-Jamnagar Economic Corridor in the State of Gujarat under Bharatmala Pariyojna (Phase-I) on EPC Mode. Further, the petitioner seeks directions to the respondent No.1/NHAI to consider its representation for awarding the subject contract in its favour with the condition that the said project shall be executed by it as the lead member of the respondent No.3/Joint Venture comprising of the petitioner and the respondent No.4/Ms. China Railway No.10 Engineering Group Co. Ltd. Lastly, the petitioner seeks a restraint order against the respondent No.1/NHAI, restraining it from taking any steps to scrap the subject tender or issue a LoA to any third party in respect of the subject project.

2. We may note that this is the second petition filed by the petitioner for the same relief. Earlier hereto, the petitioner had filed W.P.(C) No.5744/2020 wherein, identical reliefs were prayed for. The said petition was listed before this Bench on 28.8.2020, on which date, learned counsel for the petitioner had stated that the petitioner was found to be L-1 by the respondent No.1/NHAI on 3.4.2020, on declaration of the results of the bid evaluation. However, learned counsel for the respondent No.1/NHAI had controverted the said submission and pointed out that L-1 in the said case was not the petitioner, but the Joint Venture (JV) (respondent No.3 herein) wherein the petitioner was a partner. He had opposed the maintainability of the said petition on the ground that the petitioner cannot singularly approach the court for relief when it was only a part of the JV. It was further stated that both the representations dated 6.7.2020 and 21.8.2020 made by the petitioner to the respondent No.1/NHAI, were not submitted by the JV and therefore, the prayer made in the petition that the petitioner be awarded the subject contract exclusively, could not be entertained.

3. Learned counsel for the respondent No.1/NHAI had further stated that the writ petition was not maintainable on account of non-joinder of the JV partner and the petitioner being a part of the JV of which a foreign entity is a member, respondent No.1/NHAI had addressed a letter to the respondent No.2/UOI in the end of June, 2020 seeking security clearance from the Competent authority in terms of Clause 2.1.12 of the Instructions to Bidders, forming a part of the tender document, which was still awaited. In the absence of security clearance, no Letter of Acceptance could be issued to the L-1. The aforesaid petition was held to be bad for non-joinder of necessary parties and was accordingly disposed of on 28.8.2020 with liberty granted to the petitioner to take steps to implead necessary and proper parties before approaching the court for relief.

4. Within one week therefrom, the present petition has been filed by the petitioner wherein, the Joint Venture, VARAHA-CREC JV has been impleaded as respondent No.3 and the Joint Venture partner, a Chinese entity has been impleaded as respondent No.4. The reliefs prayed for in the petition are more or less the same as in the earlier petition.

5. When the present petition was listed for admission physically on 03.09.2020, a request was received from learned counsel the petitioner that it may be taken up for virtual hearing. Accordingly, the matter was adjourned to 8.9.2020. In the meantime, on 4.9.2020, the respondent No.1/NHAI scrapped the subject tender. On 8.9.2020, Mr. Harish Salve, learned Senior Advocate had appeared for the petitioner and stated that the petitioner be permitted to amend the writ petition to challenge the annulment of the bidding process in respect of the subject project by the respondent No.1/NHAI. He had also submitted that when it came to two other tenders

issued by NHAI, described as Packages No.29 and 31 in para 8 of the amendment application, instead of annulling the entire bidding process in terms of para 3 of the order dated 23.7.2020, issued by the Ministry of Finance, UOI, the respondent No.1/NHAI had deviated from its policy prescribed in Para 2.1.12 (4) of the tender documents and had negotiated and awarded Letters of Acceptance to the L-2's there. Claiming that this act was discriminatory and the respondent No.1/NHAI could not have acted differently in different projects and ought to have considered the petitioner's request of being accepted as L-1 in the instant case, *de hors* its Joint Venture partner/respondent No.4, a request was made to call upon the respondent No.1/NHAI to explain its stand.

6. Though, this court had recorded in the order passed on 8.9.2020, that it was not persuaded by the submissions made on behalf of the petitioner on the aspect of Packages No.29 and 31 referred to by learned Senior Advocate appearing for the petitioner, we had directed learned counsel for the respondent No.1/NHAI to obtain instructions from the department and informs us as to whether NHAI had awarded the tenders to L-2s in those projects, in exercise of the option available in the tender documents, prior to the Ministry of Finance, UOI issuing the order dated 23.7.2020, or was the decision taken subsequently. The matter was then adjourned to 14.9.2020.

7. On 14.9.2020, an affidavit was filed by the respondent No.1/NHAI stating *inter alia* that vide letter dated 1.7.2020, Government of India had denied security clearance to the L-1 bidders in respect of Packages No.29 and 31 as the L-1 was a JV comprising of a Chinese and an Indian company. In view of denial of security clearance, the respondent No.1/NHAI had exercised the option available to it in Para 2.1.12 (4) of the RFP, which

permitted it to approach L-2 and L-3, the eligible bidders and give them a counter offer (one by one sequentially) to match the bid of L-1. The L-2 bidder, who was an Indian entity in respect of Package No.29, was afforded an opportunity to match the bid of the L-1 bidder in terms of the letter dated 8.7.2020, issued by the respondent No.1/NHAI. Similarly, in respect of Package No.31 too, a letter dated 3.7.2020 was issued by the respondent No.1/NHAI giving a counter offer to the L-2 bidder, an Indian entity to match the bid of the L-1 bidder.

8. The L-2 bidders in respect of both the Packages had accepted the counter offers vide separate letters dated 20.7.2020, which were accepted by the respondent No.1/NHAI on 22.7.2020 and Letters of Acceptance were issued in favour of the respective L-2s for the Packages on the very next day, i.e., on 23.7.2020. The affidavit has further clarified that on insertion of Rule 144 (xi) in the General Financial Rules by the Government of India on 23.7.2020, NHAI has not taken any action by exercising the option available in Para 2.1.12(4) of the tender documents. Lastly, Mr. Mittal, learned counsel for the respondent No.1/NHAI has submitted that after scrapping the subject tender on 4.9.2020, fresh bids have been invited by the NHAI on 11.9.2020 and the last date of submission of bid is 26.10.2020. If the petitioner is keen to participate in the said tender on its own, it has the opportunity to do so this time.

9. Mr. Arvind Nigam, learned Senior Advocate appearing for the petitioner however submits that the respondent No.1/NHAI has acted in such a hasty manner only to render the present petition infructuous; that the petitioner is competent and financially and technically qualified to execute the subject project independently which fact can be borne out by the fact that

it is the lead partner of the JV as also from the documents filed in support of the bid; that the respondent No.4/foreign entity is represented through a counsel who is willing to make a statement that it has no objection to the petitioner being awarded the subject contract; that the policy of the Government of India having been amended after evaluation of the bid and declaration of the respondent No.3/ JV as L-1, the respondent No.1/NHAI can easily amend the terms and conditions of the RFP and award the subject project in favour of the petitioner. To substantiate the submissions made above, learned Senior Advocate has cited Chahal Engg. & Construction, Company Private Ltd. & Ors. vs. State of Gujarat & Anr., **1986 SCC OnLine Guj. 27** and GVPREL-MEE (J.V.) vs. Government of Andhra Pradesh & Anr., **2006 SCC OnLine 61.**

10. Mr.Ankur Mittal, learned counsel for the respondent No.1/NHAI refutes the above submissions and states that not only is the present petition infructuous, the petitioner has not demonstrated any right to insist that its representations made to the respondent No.1/NHAI for being awarded the subject project as L-1, be entertained when it had not even submitted the bid. Rather, the respondent No.3/JV was the bidder and it was found to be L-1. He submits that only because NHAI had exercised the option available to it in the bid documents in respect of Packages 29 and 30 which were awarded to Indian entities therein who were L-2, the same cannot enure to the benefit of the petitioner herein as it is neither L-1 nor L-2 or even L-3, in its personal capacity.

11. Learned counsel for the respondent No.1/NHAI has also referred to the Joint Bidding Agreement dated 07.11.2019 in relation to the respondent No.3/JV comprising of the petitioner and the respondent No.4, which clearly

states in para 2.2 that *"the parties hereby undertake to participate in the bidding process only through this Joint Venture and not individually and/or through any other joint venture constituted for this project, either directly or indirectly"*. Further, he has drawn our attention to Para 2.1.9 falling under Section 2 of the Instructions to Bidders of the bid document which states in so many words that *"This RFP is not transferable."* It is thus stated that the petitioner does not have the *locus standi* to file the present petition as it cannot be treated as a bidder in respect of the subject RFP. In support of his submissions, learned counsel has relied on Ratnagiri Gas and Power Private Limited vs. RDS Projects Limited & Ors., reported as (**2013) 1 SCC 524**.

12. We have heard learned counsel for the parties, examined the averments made in the petition and the documents enclosed therewith as also the affidavit filed by the respondent No.1/NHAI and have no hesitation in holding that the petitioner is not entitled to any relief in the present petition. The petitioner can neither insist that the respondent No.1/NHAI be called upon to award the subject project in its favour on the ground that it was the lead partner of the respondent No.3/JV that had submitted the bid, or on the ground that it has the technical and financial capacity to execute the project single handedly. The terms and conditions of the Joint Bidding Agreement dated 07.11.2019, make it clear that the petitioner cannot attempt to independently apply for the subject RFP. A similar embargo has been placed on the respondent No.1/NHAI, as the terms and conditions of the NIT clearly states that the RFP is non-transferable. Award of the contract in favour of the L-2s in respect of Packages No. 29 and 30, cannot be of any assistance to the petitioner when it had not even submitted a bid in its personal capacity in respect of the subject NIT. The petitioner had

admittedly joined hands with respondent No.4/foreign entity to constitute respondent No.3/JV. Merely because the petitioner is the lead partner of the JV would not place it in a better position qua the respondent No.1/NHAI.

13. It is also pertinent to note that the petitioner has not laid a challenge to the policy of the Central Government whereby, Rule 144 of the General Financial Rules, 2017 were amended and sub-Rule (xi) was inserted imposing restrictions on procurement from bidders from a country/countries on the ground of national security. In the absence of a challenge to the said amendment or its effect, the plea of the petitioner that the rule was brought about only subsequent to the opening of the financial bids in the instant case and would not apply to the petitioner, cannot be entertained.

14. Neither of the two decisions cited by learned Senior Advocate appearing for the petitioner can be of any assistance as there is no parity in the fact situations. In GVPREL-MEE (J.V.) (supra), the Division Bench of the Andhra Pradesh High Court was required to decide as to whether if one of the parties to the Joint Venture (JV) had informed the Government that they had withdrawn from the JV, could the respondent/Government still allot the tendered work to the said JV on it being declared as L-1. Turning down the plea of the petitioner therein, who was the lead member of the JV that notwithstanding the subsidiary partner walking out of the JV, the work ought to have been awarded to the JV as L-1, the court opined that once the subsidiary partner had informed the respondent/Government that it had withdrawn from the JV, the JV was not in existence and that the petitioner therein had not tendered for the work in its individual capacity for claiming any allotment. In the present case, it is not as if the JV is not in existence. The no objection by the JV partner in favour of the petitioner, can therefore

not be of any consequence. The petitioner cannot be treated as L-1 on that basis.

15. In Chahal Engg. & Construction Company (supra), the grievance of the petitioners therein was that the respondent/Government had illegally declined to pre-qualify the Joint Venture consortia comprising of several national and international companies. One of the pleas taken in defence by the respondent/State Government was that there is no Joint Venture group in existence in terms of Clause 14 of the Joint Venture Agreement and therefore, the bids of the petitioners were treated as non-responsive. The Gujarat High Court was called upon to interpret Clause 14 of the Joint Venture Agreement and examine as to whether a co-venturer would be entitled to withdraw before completion of the purpose of the venture and if it does not do so, the effect thereof. Taking note of the manner in which pre-qualification bids were processed by the respondent/Government, the court observed that one of the co-venturers was capable and qualified to execute the Project and issuance of incomplete documents and procedural discrepancies in the basic documentation could have been resolved as they appeared to be inadvertent errors. Again, there can be no comparison with the facts of the aforesaid case with those at hand. Here, there is no request made by the petitioner to participate in a pre-bid qualification. Rather, the entire tender process had culminated in the respondent No.3/JV being declared as L-1. Due to a sudden change in the rule position, the respondent No.1/NHAI could not issue a Letter of Acceptance to the respondent No.3/JV as one of its members is a foreign entity. In the above circumstances, the decision taken by the respondent No.1/NHAI to scrap the entire tender process and invite fresh bids for the Project cannot be faulted.

16. For the aforesaid reasons, we are not inclined to issue any directions to the respondent No.1/NHAI to consider the petitioner's representations for being awarded the subject project to be executed by it independently, *de hors* the respondent No.3/JV. The project in question is still available for allotment as a fresh tender has been issued by the respondent No.1/NHAI. If the petitioner claims that it has eligible to qualify on its own without joining hands with a co-venturer, it is free to compete with other bidders. The present petition is accordingly dismissed in *limine* as meritless along with the pending applications.

HIMA KOHLI, J

SUBRAMONIUM PRASAD, J

SEPTEMBER 14, 2020
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