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

+ W.P.(C) 5203/2010 & CM No.10262/2010, CM No.19901/2010

MSK PROJECTS LIMITED

..... Petitioner

Through: Mr. Karan Luthra and Mr.
Prabhav Bahuguna, Advs.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA AND ORS

..... Respondents

Through: Ms. Padma Priya, Adv.

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

19.07.2022

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1. Respondent 1-NHAI invited bids for four-laning of the Sambalpur-Orissa border stretch, of 88 km, of NH-6, in the State of Orissa. The bidding process envisaged application, by the interested reader, who fulfilled the qualifications stipulated in the Request for Qualification (RFQ), whereafter the NHAI would announce a list of prequalified applicants, who could participate in the bidding process by submitting the Request For Proposal (RFP). The petitioner MSK Projects obtained a copy of the RFQ from NHAI. Thereafter, a Consortium comprising the petitioner and Respondents 3 and 4 submitted an application, as a bidder for the Project. The petitioner was the lead member of the Consortium.

2. Clause 2.2.5 of the RFQ required submission, by the interested



reader, of a Power of Attorney (POA), in the following terms:

“2.2.5 The Applicant should submit a Power of Attorney as per the format at Appendix-II, authorising the signatory of the Application to commit the Applicant. In the case of a Consortium, the Members should submit a Power of Attorney in favour of the Lead Member as per the format at Appendix-III.”

4. Thus, it was clear that, whether under the RFP or under the RFQ, (i) where the bidder was a Consortium, the Members of the Consortium were required to furnish a POA in favour of the Lead Member and (ii) the Bidder was required to submit a POA, authorising submission of the Bid by the signatory thereof. The formats for the POA to be submitted under Clauses 2.1.10 of RFP (by the Members of the Consortium in favour of the Lead Member) and 2.1.9 of RFP (by the Bidder authorising the signatory who submits the Bid) were to be found in Appendices IV and III to the RFP, respectively.

5. On 5th February, 2010, NHAH wrote to the petitioner, querying, as to why (i) the POA, authorising the signing of the application submitting the bid, was signed by the same person who had signed the application, i.e. Ms Vandana C Patel, and (ii) Respondents 3 and 4 had both not signed the POA in the format provided in Appendix II to the RFQ.

6. The petitioner responded on 9th February, 2010. Vandana Patel, it was submitted, was the authorised signatory of the petitioner, in which capacity, she had authorised signing of the application



submitting the bids by herself. Apropos Appendix II, it was submitted that the format in Appendix II envisaged submission of the POA by the authorised person of the Lead Member of the Consortium and not by all members of the Consortium.

7. Vide letter dated 8th March, 2010, NHAI declared the petitioner the “Pre-qualified Applicant” for the Project.

8. On the basis thereof, the petitioner purchased, from NHAI, a copy of the RFP. Clause 1.2.4, read with Clause 2.1.7 of the RFP, required the bidder to deposit of the security of ₹ 9.09 crores. Additionally, Clauses 2.1.9 and 2.1.10 of the RFP required the Bidder to provide two POAs, thus:

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

2.1.10 In case the Bidder is a Consortium, the Members thereof should furnish a Power of Attorney in favour of the Lead Member in the format at Appendix-IV.”

9. Appendices III and IV to the RFP provided the following formats, for the POAs to be submitted in terms of Clauses 2.1.9 and 2.1.10 of the RFP:

“APPENDIX-III
Power of Attorney for signing of Bid
{Refer Clause 2.1.9}

Know all men by these presents, We, (name of the firm and address of the registered office) do hereby irrevocably constitute, nominate, appoint and authorise



Mr./Ms. (Name), son/daughter/wife of and presently residing at who is presently employed with us/the Lead Member of our Consortium and holding the position of as our true and lawful attorney (hereinafter referred to as the “Attorney”) to do in our name and on our behalf all such acts, deeds and things as are necessary or required in connection with or incidental to submission of our bid for the Four Lanning of Sambalpur – Baragarh – Orissa/Chhatisgarh Border section of NH -6 from Km 0.00 to Km. 88.00 in the State of Orissa to be executed as BOT (Toll) project on DBPO pattern under NHDP Phase III Project proposed or being developed by the National Highways Authority of India (the “Authority”) including but not limited to signing and submission of all applications, bids and other documents and writings, participate in bidders’ and other conferences and providing information/responses to the Authority, representing us in all matters before the Authority, signing and execution of all contracts including the Concession Agreement and undertakings consequent to acceptance of our bid and generally dealing with the Authority in all matters in connection with or relating to or arising out of our bid for the said Project and/or upon award thereof to us and/or till the entering into of the Concession Agreement with the Authority.

AND we hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be done by our said Attorney pursuant to and in exercise of the powers conferred by this POA and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us.

IN WITNESS WHEREOF WE, THE ABOVE NAMED PRINCIPAL HAVE EXECUTED THIS POA ON THIS DAY OF 20.....

For
(Signature, name, designation and address)

Witnesses:

- 1.
- 2.



Accepted Notarised

(Signature, name, designation and address of the Attorney)

Notes:

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

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

For a POA executed and issued overseas, the documents will also have to be legalized by the Indian Embassy and notarized in the jurisdiction where the POA is being issued. However, the POA provided by Bidders from countries that have signed the Hague Legislation Convention, 1961 are not required to be legalized by the Indian Embassy if it carries a conforming Apostile certificate.”

APPENDIX-IV

Power of Attorney for Lead Member of Consortium {Refer Clause 2.1.10}

Whereas the National Highway Authority of India (the “Authority”) has invited bids from pre-qualified and short-listed parties for the Four lanning of Sambalpur – Baragarh – Orissa/Chhatisgarh Border section of NH-6 from Km 0.00 to Km. 88.00 in the State of Orissa to be executed as BOT (Toll) project on DBFO pattern under NHDP Phase III Projedt (the “Project”).

Whereas and (collectively the “Consortium”) being Members of the Consortium are interested in bidding for the Project in accordance with the terms and conditions of the Request for Proposal and other connected documents in respect of the Project, and



Whereas, it is necessary for the Members of the Consortium to designate one of them as the Lead Member with all necessary power and authority to do for and on behalf of the Consortium, all acts, deeds and things as may be necessary in connection with the Consortium's bid for the Project and its execution.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS

We, having our registered office at, M/s having our registered office at and M/s having our registered office at (hereinafter collectively referred to as the "Principals") do hereby irrevocably designate, nominate, constitute, appoint and authorise M/s having its registered office at being one of the Members of the Consortium, as the Lead Member and true and lawful attorney of the Consortium (hereinafter referred to as the "Attorney") and hereby irrevocably authorise the Attorney (with power to sub-delegate) to conduct all business for and on behalf of the Consortium and any one of us during the bidding process and, in the event the Consortium is awarded the Concession/Contract, during the execution of the Project, and in this regard, to do on our behalf and on behalf of the Consortium, all or any of such acts, deeds or things as are necessary or required or incidental to the submission of its bid for the Project, including but not limited to signing and submission of all applications, bids and other documents and writings, accept the Letter of Award, participate in bidders' and other conferences, respond to queries, submit information/documents, sign and execute contracts and undertakings consequent to acceptance of the bid of the Consortium and generally to represent the Consortium in all its dealings with the Authority, and/or any other Government Agency or any person, in all matters in connection with or relating to or arising out of the Consortium's bid for the Project and/or upon award thereof till the Concession Agreement is entered into with the Authority.

AND hereby agree to ratify and confirm and do hereby ratify and confirm all acts, deeds and things done or caused to be



done by our said Attorney pursuant to and in exercise of the powers conferred by this POA and that all acts, deeds and things done by our said Attorney in exercise of the powers hereby conferred shall and shall always be deemed to have been done by us/Consortium.

IN WITNESS WHEREOF WE THE PRINCIPALS ABOVE NAMED HAVE EXERCUTED THIS POA ON THIS DAY OF 20.....

For(Signature, Name & Title)

For(Signature, Name & Title)

For(Signature, Name & Title)

(Executants)

(To be executed by all the Members of the Consortium)

Witnesses:

- 1.
- 2.

10. In accordance with the RFP, the petitioner submitted its bid on 29th April, 2010, along with the said documents. The required Bank Guarantee of ₹ 9.09 crores towards security was also provided by the petitioner.

11. On 19th May, 2010, NHAI addressed the following communication to the petitioner:

“NHAI/VIT/11012/73/SB/2009/OR

Dated 19th May, 2010

To,

MSK-Chetak-Prakash Consortium
707, Sterling Centre,
RC, Don Road, Alkapuri,
Baroda-390005
Tele: 0265-2344756/2359893
Fax; 02642341642



Sub.: Four Laning of Sambalpur- Baragarh - Chhatisgarh/ Orissa Border section of NH-6 from 0.00 to km. 88 in the state of Orissa to be executed as BOT (Toll) on DBFO Pattern under NHDP Phase-III- Non responsive bid reg.

Ref: Bid received on 29.04.2010

Sir,

Please refer to your bid received on 29.04.20010 and subsequent bid opening attended by your authorized representative. During the course of opening your bid was found to be non-responsive since the two Consortium Member namely M/s Chetak Enterprises Limited and Prakash Asphaltting & Toll Highways (India) Limited, though submitted Board Resolution in favour of Shri Hukmi Chand Jain and Shri Nitin Agrawal, respectively, but did not provide POA (POA) in the form and manner prescribed in accordance with Clause 2.1.9 and Appendix-III of RFP Volume-I, in favour of the above named official to commit the bid. This was also informed to your authorised representative.

Clause 2.20.7 of Volume-I of RFP stipulates for encashment of 5% of value of Bid Security by NHAI if a bid is found to be non-responsive. Accordingly. it is requested to deposit Rs. 45.45 lakhs' (5% of Rs.9.09 Crore) within 7 days from the date of this letter by way of Demand Draft favouring 'National Highways Authority of India' failing which NHAI would proceed for partial encashment of Bank Guarantee as per the said Clause.

Yours faithfully,

(M.P.S.Rana)
General Manager (T)OR”

12. The petitioner responded to the above communication dated 19th May, 2010, submitting that the Members of the Consortium were required only to sign the POA envisaged by Appendix IV to the RFP, and were not required, individually, to sign the POA envisaged by



Appendix III. The identical objection, earlier raised after the submission of the RFQ, it was pointed out, had already been answered by the petitioner vide its letter dated 9th February, 2010, and had impliedly been accepted by NHAI which proceeded to declare the petitioner as the successful prequalified Bidder.

13. On 2nd August, 2010, NHAI again wrote to the petitioner, intimating the petitioner that its response, to the earlier communications from NHAI, had been considered, but that the petitioner's bid was found not to be responsive to the requirements of the RFP documents. The petitioner was, therefore, directed to deposit ₹ 45.45 lakhs, representing 5% of ₹ 9.09 crores, within 3 days from the date of the letter, failing which NHAI threatened to proceed for partial encashment of the Bank Guarantee submitted by the petitioner towards bid security as per Clause 2.20.7 (a) of RFP.

14. Aggrieved by the above communications from NHAI, the petitioner has invoked Article 226 of the Constitution of India by means of the present writ petition, seeking quashing of the letters dated 19th May, 2010 and 2nd August, 2010 supra, issued by NHAI, alleging the POAs submitted by the petitioner to be non-compliant the RFP and the requirements envisaged therein.

15. I have heard Mr. Karan Luthra and Ms. Padmapriya, learned Counsel on behalf of the petitioner and NHAI, respectively.

16. The controversy does not brook of any complexity, whatsoever.



17. On a holistic and juxtaposed reading of Clauses 2.1.9 and 2.9.10 and Appendices III and IV to the RFP, it is clear that the reasoning contained in the communications dated 19th May, 2010 and 2nd August, 2010 is unsustainable in law.

18. Mr. Karan Luthra, learned Counsel for the petitioner submits, correctly, that, where a bidder is a Consortium, separate POAs by each member of the Consortium, are envisaged only by Clause 2.1.10 which require each Member of the Consortium to separately issue a POA in favour of the Lead Member of the Consortium in the format set out in Appendix IV to the RFP.

19. As against this, there is no reference, in Clause 2.1.9 to POAs being issued by each member of the consortium. All that it states that the bidder is required to submit *a POA*, as per the format in Appendix III. The use of the singular “a” is also indicative of the fact that only one POA is envisaged by clause 2.1.9, and not multiple POAs.

20. The formats for the POAs to be submitted under Clauses 2.1.9 and 2.1.10, as contained in Appendices III and IV to the RFP, also indicate that the POA at Appendix III, relatable to Clause 2.1.9, is to be submitted by one bidder, whereas the POAs at Appendix IV, relatable to Clause 2.1.10 would be submitted by each member of the consortium in favour of the lead member.

21. It is not in dispute that each member of the consortium of which



the petitioner was the lead member did submit POAs authorising the petitioner, as required by Clause 2.1.10 and that the petitioner, as the lead member of the consortium also submitted the requisite POA under Clause 2.1.9.

22. Clearly, therefore, there was no default on the part of the petitioner in complying with Clause 2.1.9 or with Appendix II to the RFQ, or with Appendices III and IV to the RFP.

23. The impugned order dated 19th May, 2010 is, therefore, unsustainable on facts and in law and is accordingly quashed and set aside.

24. The respondent is also directed to return, to the petitioner, the bank guarantee/bank guarantees submitted by the petitioner in accordance with the RFP and other bid documents.

25. Rule made absolute accordingly.

26. The petition stands allowed accordingly with no orders as to costs.

C.HARI SHANKAR, J

JULY 19, 2022/kr