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

Judgment reserved on: 08.08.2023

% **Judgment delivered on: 28.08.2023**

\+ **W.P.(C) 8335/2023 and C.M. Nos. 31900-31901/2023 & 32166/2023**

GMR HYDERABAD VIJAYAWADA EXPRESSWAYS PVT LTD ..... Petitioner

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Atul Sharma, Mr. Abhishek Sharma and Ms. Ragini Sharma, Advocates.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Respondent

Through: Mr. Santosh Kumar and Ms. Akshita Singh, Advocates.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SAURABH BANERJEE

JUDGMENT

SATISH CHANDRA SHARMA, C.J.

1. The Petitioner before this Court i.e., GMR Hyderabad Vijayawada Expressways Private Limited is a Special Purpose Vehicle (the "**SPV**") born out of a consortium between GMR Infrastructure Limited (the"**GMR**") and Punj Lloyd Limited (the"**PLL**") (hereinafter GMR and PLL shall collectively be referred to as the "**Consortium**"). The Petitioner participated in an open competitive bidding process for constructing and widening of existing road from KM.40.000 to KM.221.500 (a length of approximately 181 KMs) of Hyderabad-Vijayawada Section of National Highway ("**NH**") No.09 (the "**Existing Road**") in the State of Andhra Pradesh by four-laning the Existing Road and subsequently six-laning the Existing Road on a

design, build, finance, operate and transfer basis (the "**Project**"). The Consortium promoted and incorporated the Petitioner. The Petitioner was awarded the Project, and in furtherance of the Project, the Petitioner executed a Concession Agreement dated 09.10.2009 with the Respondent (the "**Concessions Agreement**").

2. The facts further reveal that the Petitioner has been granted an exclusive right, license and authority to design, engineer, construct, develop, finance, operate and maintain the Hyderabad-Vijayawada section of NH No.9 forming a part of the Project for a period of 25 (twenty-five) years. Moreover, Article 16.1.1 read with Article 16.5.1 of the Concessions Agreement mandated that in the event the Respondent/ NHAI required provisions of outside works and services which were not included in the Scope of the Project as contemplated by this Concessions Agreement, the Respondent shall award such works through a open-competitive bidding process only after giving notice to the Petitioner / Concessionaire (*as defined under the Concessions Agreement*) and upon considering the Petitioner's reply thereto. Pertinently, the Respondent has followed the aforesaid procedure as per the Concession Agreement.

3. Subsequently, the Respondent/NHAI following due process of law, issued a Request for Proposal dated 21.12.2022 (amended thereafter vide a corrigendum dated 16.03.2023) (the "**RFP**") vis-à-vis the Long Term Rectification of 17 (seventeen) blackspots identified by the Ministry of Roads, Transport and Highways (the "**Ministry**") and other ancillary works on an identified Section of NH– 65 in the State of Telangana (the "**Additional Project**").

4. It is an undisputed fact that the Petitioner did not submit any Bid under the RFP. The Petitioner has come before this Court with a case that the Petitioner being a Concessionaire has a legal and contractual 'Right of First Refusal' (the"**ROFR**") under Article 16.5.1 of the Concessions Agreement which thereafter has been incorporated into the RFP under Clause 1.2.6.

5. The Petitioner before this Court has argued that as per the terms and conditions of the RFP, the Petitioner, without submitting the Bid Security, is entitled to offer a bid by way of exercising its ROFR under the Concessions Agreement and the RFP. More particularly, the Ld. Counsel for the Petitioner argued that it is not required to furnish the Bid Security under Clause 1.2.4 of the RFP as the Petitioner is pre-qualified.

6. In those circumstances, the Petitioner has filed the present petition praying for *inter alia* the following reliefs:

> *"(a) Issue a writ of Mandamus or any other appropriate writ, order or direction to the National Highways Authority of India i.e. the Respondent directing it to permit the Petitioner to match the first ranked bid (if such bidder is someone other than the petitioner) in terms of the selection criteria set out in the Request for Proposal dated 21.12.2022 amended vide Corrigendum dated 16.02.2023 issued by the Respondent for Long Term Rectification of MORT&H identified blackspots (17 no's) and allied works on existing 4-lane Hyderabad-Vijayawada section of NH-65 from km.40.000 to km.221.500 in the state of Telangana in terms of the Petitioner's contractual rights to match under clause 16.5.1 of Concession Agreement dated 09.10.2009 as recognized and incorporated by the Respondent in clause 1.2.6 of RFP and in terms of the said clause 1.2.6 of the RFP, allow the Petitioner to submits its bid*

without requiring it to submit the Bid Security in terms of clause 1.2.4 of the RFP; Or in the alternative:

(b) Issue of a writ of Certiorari or any other appropriate writ, order or direction quashing the RFP for being contrary to clause 16.5.1 of the Concession Agreement dated 09.10.2009 if it is the Respondent's case that the Petitioner is required to meet and be evaluated on the technical capacity and financial capacity qualification criteria and accordingly also submit the Bid Security in terms of clause 1.2.4 of the RFP.

Pass any other order(s) as this Hon'ble Court may deem appropriate."

7. The Petitioner's contention is that the Concessions Agreement granted the exclusive right, license and authority to design, engineer, construct, develop, finance, operate and maintain the Project on a build, operate, transfer – toll basis for a period of 25 years and the Petitioner, i.e. the Concessionaire has a valuable legal and contractual right, including the right to carry out any additional work under the '*Change of Scope*' Construct enshrined under Article 16 of the Concessions Agreement (the "**COS Construct**"). Article 16 of the Concessions Agreement reads as under:

" *ARTICLE 16*

CHANGE OF SCOPE

16.1 Change of Scope

16.1.1 The Authority may, notwithstanding anything to the contrary contained in this Agreement, require the provision of additional works and services which are not included in the Scope of the Project as contemplated by this Agreement ("Change of Scope"). Any such Change of Scope shall be made *in accordance with the provisions of this Article 16 and the costs thereof shall be expended by the Concessionaire and reimbursed to it by the Authority in accordance with Clause 16.3.*

16.1.2 If the Concessionaire determines at any time that a Change of Scope is necessary for providing safer and improved services to the Users, it shall by notice in writing require the Authority to consider such Change of Scope. The Authority shall, within 15 (fifteen) days of receipt of such notice, either accept such Change of Scope with modifications, if any and initiate proceedings therefor in accordance with this Article 16 or inform the Concessionaire in writing of its reasons for not accepting such Change of Scope.

16.2 Procedure for Change of Scope

16.2.1In the event of the Authority determining that a Change of Scope is necessary, it shall issue to the Concessionaire a notice specifying in reasonable detail the works and services contemplated thereunder (the "Change of ScopeNotice"),

16.2.2Upon receipt of a Change of Scope Notice, the Concessionaire shall, with due diligence, provide to the Authority such information as is necessary, together with preliminary Documentation in support of:

(a)the impact, if any, which the Change of Scope is likely to have on the Project Completion Schedule if the works or services are required to be carried out during the Construction Period, and

(b)the options for implementing the proposed Change of Scope and the effect, if any, each such option would have on the costs and time thereof, including a detailed breakdown by work .classifications, specifying the material and labor costs calculated in accordance with the schedule of rates applicable to the works assigned by the Authority to its contractors, along with the proposed premium/discount on such rates; provided that the cost incurred by the Concessionaire in providing such

information shall be reimbursed by the Authority to the extent such cost is certified by the Independent Engineer as reasonable.

16.2.3Upon receipt of information set forth in Clause 16.2.2, if the Authority decides to proceed with the Change of Scope, it shall convey its preferred option to the Concessionaire, and the Parties shall, with assistance of the Independent Engineer, thereupon make good faith efforts to agree upon the time and costs for implementation thereof.Upon reaching an agreement, the Authority shall issue an order (the "Change of Scope Order") requiring the Concessionaire to proceed with the performance thereof. In the event that the Parties are unable to agree, the Authority may, by issuing a Change of Scope Order, require the Concessionaire to proceed with the performance thereof pending resolution of the Dispute, or carry out the works in accordance with Clause 16.5.

16.2.4 The provisions of this Agreement insofar as they relate to Construction Works and Tests, shall apply mutatis mutandis to the works, undertaken by the Concessionaire under this Article 16.

16.3Payment for Change of Scope

16.3.1 Within 7 (seven) days of issuing a Change of Scope Order, the Authority shall make an advance payment to the Concessionaire in a sum equal to 20% (twenty per cent) of the cost of Change of Scope as agreed hereunder, and in the event of a Dispute, 20% (twenty per cent) of the cost assessed by the Independent Engineer. The Concessionaire shall, after commencement of work, present to the Authority bills for payment in respect of the works in progress or completed works, as the case may be supported by such Documentation as is reasonably sufficient for the Authority to determine the accuracy thereof. Within.30 (thirty) days of receipt of such bills, the Authority .shall disburse to the Concessionaire such amounts as are certified by the Independent Engineer as reasonable and after making a proportionate deduction for the *advance payment made hereunder, and in .the event of any Dispute, final adjustments thereto shall be made under and in accordance with the Dispute Resolution Procedure.*

16.3.2 Notwithstanding anything to the contrary contained in Clause 16.3, all costs arising out of any Change of Scope Order issued during the Construction Period shall be borne by the Concessionaire, subject to an aggregate ceiling of 0.25% (Zero point two five per cent) of the Total Project Cost. Any costs in excess of the ceiling shall be reimbursed by the Authority in accordance with Clause 16.3.1. In the event, that the total cost arising out of Change of Scope Orders (if any) issued prior to the Project Completion Date is less than 0.25% (zero point two per cent) of the Total Project Cost, the difference thereof shall be credited by the Concessionaire to the Safety Fund within a period of 180 (one hundred and eighty) days of the Project Completion Date.

16.4 Restriction on certain works

16.4.1Notwithstanding anything contrary contained in this Article, the Authority shall not require the Concessionaire to undertake any works or services if such works or services are likely to delay completion of Court-Laning; provided that in the event that the Authority considers such works or services to be essential, it may issue a Change of Scope Order, subject to the condition that the works forming part of or affected by such Order shall not be reckoned for purposes of determining completion of Four-Laning and issuing the Provisional Certificate.

16.4.2 Notwithstanding anything to the contrary contained in this Article 16, the Concessionaire shall be entitled to nullify any Change of Scope Order if it causes the cumulative costs relating to all the Change of Scope Orders to exceed 5% (five per cent) of the Total Project Cost in any continuous period of 3 (three) years immediately preceding the date of such Change of Scope Order or if such cumulative costs exceed 20% (twenty *per cent) of the Total Project Cost at any time during the Concession Period.*

16.5 Power of Authority to undertake works.

16.5.1 Notwithstanding anything to the contrary contained in Clauses 16.2 and 16.3, the Authority may, after giving notice to the Concessionaire and considering its reply thereto, award such works or services to any person on the basis of open competitive bidding; provided that the Concessionaire shall have the option of matching the first ranked bid in terms of the selection criteria, subject to payment of 2% (two per cent) of the bid amount to the Authority (The Authority shall transfer 75% (seventy five percent) of the amount so received to the first ranked bidder whose bid has been matched by the Concessionaire), and thereupon securing the award of such works or services. For the avoidance of doubt, it is agreed that the Concessionaire shall be entitled to exercise such an option only if it has participated in the bidding process and its bid does not exceed the first ranked bid by more than 10% (ten percent) thereof.

16.5.2 The works undertaken in accordance with this Clause 16.5 shall conform to the Specifications and Standards and shall be carried out in a manner that minimizes the disruption in operation of the Project Highway. The provisions of this Agreement, insofar as they-relate to Construction Works and Tests, shall apply mutatis mutandis to the works carried out under this Clause 16.5.

16.6 Reduction in Scope of the Project

16.6.1 If the Concessionaire shall have failed to complete any Construction Works on account of Force Majeure or for reasons solely attributable to the Authority, the Authority may, in its discretion, require the Concessionaire to pay 80% (eighty percent) of the sum saved therefrom, and upon such payment to the Authority, the obligations of the Concessionaire in respect of such works shall be deemed to have been fulfilled.

> *16.6.2 For determining the obligations of the Concessionaire under this Clause 16.6, the provisions of Clauses 16.1, 16.2 and 16.4 shall apply mutatis mutandis, and upon issue of Change of Scope Order by the Authority hereunder, the Concessionaire shall pay forthwith the sum specified therein."*

8. The Petitioner further contended that under Article 16.5 of the Concessions Agreement, the Petitioner (i.e., the Concessionaire vis-à-vis the Project) was granted certain rights in relation to grant of additional works under the Change of Scope framework through an open-competitive bidding process, including *inter alia*:

(i) prior notice to the Petitioner in relation to the proposal to award additional work under COS Construct;

(ii) consideration of the reply of the Petitioner in this regard; and

(iii) providing the Petitioner with the option to exercise its ROFR;

provided that the Petitioner participates in the bidding process; that the Petitioner does not exceed the first ranked bid, i.e., L1 by more than 10% thereof; and payment of 2% of the bid amount to the Respondent/ NHAI.

9. The Petitioner further contended that the Petitioner, being the Concessionaire, is pre-qualified to participate in the bidding process, and therefore, not required to meet any selection criteria under the COS Construct/ RFP in light of Clause 1.2.6 of the RFP read with Article 16.2 of the Concessions Agreement.

10. Clause 1.2.4 of the RPF required all bidders to furnish the requisite Bid Security along with its bids. However, the Petitioner submits that in light of the non-obstante clause, i.e., Clause 1.2.6 of the RFP, the same is not applicable qua the Petitioner as the petitioner is pre-qualified in its *avatar* as the Concessionaire under the Concessions Agreement.

11. The Petitioner stated that they intended to participate in the competitive bidding process and in pursuance of the same, made multiple representations to the Respondent on *inter alia* the requirement of the Bid Security in terms of Clause 1.2.4 of the RFP. Particularly, the Petitioner *vide* its representation specifically:

(i) sought a clarification whether the Petitioner's parent company and / or associate company could submit the Bid Security on behalf of the Petitioner;

(ii) underscored that the Petitioner is an SPV bound by the terms of a Common Loan Agreementread with Clause 31 (*Escrow Account*) of the Concessions Agreement whereunder all accruals of the Petitioner were governed by an escrow arrangement (wherein the Respondent was a party). Thus, the petitioner would be unable to furnish the requisite Bid Security without violating its contractual obligations as outlined above; and

(iii) apprised the Respondent of its pre-qualification and sought multiple clarifications in relation to the certain key clauses of the RFP.

12. The Petitioner has further contended that owing to a technical glitch (i.e. non-acceptance of a bid in the absence of Bid Security), the Petitioner's inability to submit a bid would be violative of its fundamental rights under Article 19(1)(g) of the Constitution of India and the rights accrued in favor of the Petitioner under the Concessions Agreement which stood acknowledged by the Respondent in light of the Corrigendum dated 16.02.2023.

13. The Petitioner has further contended that the RFP would render the Concessions Agreement toothless as the Petitioner / Concessionaire (i.e., a SPV incorporated solely for the Project) would be unable to satisfy the technical and financial eligibility requirements under the RFP without being considered as an extension of the Consortium.

14. The Respondents have filed a detailed and exhaustive reply and contend that under Clause 1.2.6 of the RFP, the Petitioner may exercise its ROFR, subject to participation in the bidding process. It is further argued by the Respondents that the Petitioner was cognizant of the fact that a pre-requisite to participation in the bidding process included furnishing the Bid Security as is borne out of its representations which included seeking a waiver, and therefore, this Writ Petition is merely an afterthought.

15. The Respondents have stated that twin conditions i.e., (i) the Petitioner must participate in the bidding process; and (ii) the bid must not exceed the first ranked bid by more than 10% must be satisfied prior to exercise of the ROFR by the Petitioner The Respondent has also relied on Clause 2.20.2 of the RFP which provides that any bid submitted in relation

to the RFP without furnishing the requisite Bid Security shall be summarily rejected by the Respondent.

16. The Respondents have stated that the bidding process may be bifurcated into two stages i.e., (i) the first stage wherein participation of the bidders is uniform; and (ii) the second stage wherein the Petitioner would have been granted an opportunity to exercise its ROFR. Thus, adopting the Petitioner's interpretation would nullify the first stage of bidding process, and therefore, participation by Petitioner in the first stage is mandatory as per the terms and conditions of the RFP.

17. Heard learned counsel for the parties at length and perused the record. It is an undisputed fact that the Concessions Agreement was executed on 09.10.2009. The Petitioner is certainly a Concessionaire in respect of the Concessions Agreement which relates to *inter alia* designing, engineering, constructing, developing, financing, operating and maintaining the Project on a build, operate, transfer – toll basis for a period of 25 (twenty-five) years.

18. The dispute in the present case arose on account of the RFP issued on 21.12.2022 which was issued by the respondent/ NHAI in relation to the Long-Term Rectification of 17 blackspots identified by the Ministry and other ancillary works on an identified Section of NH– 65 in the State of Telangana i.e., the Additional Project. It is also an undisputed fact that in respect of Additional Project, the procedure was followed as provided in the Concessions Agreement and RFP came to be issued on 21.12.2022. Thereafter, a corrigendum was issued on 16.02.2023 incorporating relevant

rights of the Petitioner under the Concessions Agreement into the RFP. The relevant clause of the Concessions Agreement as contained in Clause 16.5.1 has already been reproduced hereinbefore.

19. The relevant clauses in the RFP dated 21.12.2022 (as amended on 16.02.2023) as contained in Clause 1.2.4, Clause 1.2.6, Clause 2.2.2.2, Clause 2.2.2.3 & Clause 2.6.3 read as under:

> *"**1.2.4** A Bidder is required to submit, along with its BID, a BID Security of Rs. 3.24 Crore (Rupees three crore and twenty four lakh only) (the "BID Security"), refundable not later than 150 (One hundred & fifty) days from the BID Due Date, except in the case of the Selected Bidder whose BID Security shall be retained till it has provided a Performance Security and Additional Performance Security (if any) as per the provision of this RFP and LOA. BID Security shall be submitted in the form of Account Payee Demand Draft, Banker's Cheque or Bank Guarantee (including Electronic Bank Guarantee (e-Bank Guarantee)).The Bank Guarantee (including e-Bank Guarantee) shall be transmitted through SFMS Gateway to NHAIs Bank. The Bidders shall also make online payment towards cost of tender document of Rs. 40,000/- (Rupees forty thousand only) in Authority's designated bank account and also upload online payment receipt of the same. Details of designated bank account are as under:*

S. No.	*Particulars*	*Details*
1.	*Name of Beneficiary*	*National Highways Authority of India*
2.	*Name of Bank*	*Canara Bank*
3.	*Account No.*	*8598201005819*
4.	*IFSC Code*	*CNRB0008598*

Signature Not Verified
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By:BHUPINDER SINGH
ROHELLA
Signing Date:29.08.2023
11:17:47

__1.2.6__ BIDs will be evaluated for the Project on the basis of the lowest cost required by a Bidder for implementing the Project (the "BID Price"), which is exclusive of Goods and Services Tax (GST). The total time allowed for completion of construction under the Agreement (the "Construction Period") and the period during which the Contractor shall be liable for maintenance and rectification of any defect or deficiency in the Project after completion of the Construction Period (the "Defect Liability Period") shall be pre-determined, and are specified in the draft Agreement forming part of the Bidding Documents. In this RFP, the term "Lowest Bidder" shall mean the Bidder who is quoting the lowest BID price. Notwithstanding anything to the contrary contained in this RFP, GMR Hyderabad Vijayawada Expressways Private Limited (hereinafter referred to as "Existing Concessionaire") of "Design, Construction, Development Finance, Operation and Maintenance of 4/6 Laning of Hyderabad - Vijayawada section from km 40.00 to Km 221.500 on NH-09 in the State of Andhra Pradesh" (hereinafter referred to as "Existing Concession Agreement") shall have the option of matching the first ranked bid in terms of the selection criteria subject to payment of 2% of bid amount to the Authority. The Authority shall transfer 75% of the amount so received to the first ranked bidder whose bid has been matched by the Existing Concessionaire. The Existing Concessionaire shall be entitled to exercise such an option only if it has participated in the bidding process and its bid does not exceed the first ranked bid by more than 10% thereof.

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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 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 324.24 crore (Rs. three hundred twenty-four crore and twenty-fourlakhs only) (the "Threshold Technical Capacity").

(ii) Provided that at least one similar work of 20% of Estimated Project Cost Rs. 64.85 crore (Rs. sixty-four crore and eighty-five 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 becompleted if more than 90% of the value of the work has been completed and such completed value of work is equal to or more than 20% of the estimated project cost. Eligible projects shall include following:

(a) Widening/reconstruction/up-gradation works on NH/SH/Expressway or on any category of road taken up under CRE, ISC/EI, SARDP, LWE

(b) Widening/reconstruction/up-gradation works on MDRs with loan assistance from multilateral agencies or on BOX basis

(c) Widening/reconstruction/up-gradation work of roads in Municipal corporation limits, construction of Bypasses

(d) Construction of stand-alone bridges, ROBs, tunnels

(e) Construction/reconstruction of linear projects like airport runways, railways (construction/re-construction of railway tracks, yards for keeping containers etc.) metro rail and ports (including construction/re-construction of Jetties)

If any Major Bridge/ROB/Flyover/Tunnel is (are) part of the project, then 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 Bridges/RoBs/Flyovers in the last 10 (Ten) financial years preceding the Bid Due date i.e. shall have completed at least one similar Major Bridge/ROB/Flyover having longest span length equal to or greater than:*

(a) In case, longest span of Bridge/ROB/flyover is less than or equal 60 m, no additional qualification is required.

(b) When longest span is more than 60 m, 50% of the longest span or 100 m, whichever is less, of the structure proposed in this project.

(iii) Deleted

(iv) The updation factor to update year indicated in table below:

Year	*Year-1*	*Year-2*	*Year-3*	*Year-4*	*Year-5*
Up-dation factor	*1.00*	*1.05*	*1.10*	*1.15*	*1.20*

2.2.2.3 *Financial Capacity:*

(i) The Bidder shall have a minimum Net Worth (the "Financial Capacity") of Rs. 16.21 crore (Rs. sixteen crore and twenty-onelakhs only) at the close of the preceding financial year.

(ii) The Bidder shall have a minimum Average Annual Turnover (updated to the price level of the year based on factors indicated in table below) of Rs. 48.64 crore (Rs. forty-eight crore and sixty-fourlakhs only) for the last 5 (five) financial years.

Year	*Year-1*	*Year-2*	*Year-3*	*Year-4*	*Year-5*
Up-dation factor	*1.00*	*1.05*	*1.10*	*1.15*	*1.20*

x x x x x x x x x

> ***2.6.3*** *In case it is found during the evaluation or at any time before signing of the Agreement or after its execution and during the period of defect liability subsistence thereof, that one or more of the eligibility and /or qualification requirements have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the contractor either by issue of the LOA or entering into of the Agreement, and if the Selected Bidder has already been issued the LOA or has entered into the Agreement, as the case may be, the same shall, notwithstanding anything to the contrary contained therein or in this RFP, be liable to be terminated, by a communication in writing by the Authority to the Selected Bidder or the Contractor, as the case may be, without the Authority being liable in any manner whatsoever to the Selected Bidder or the Contractor. In such an event, the Authority shall be entitled to forfeit and appropriate the BID Security or Performance Security, as the case may be, as Damages, without prejudice to any other right or remedy that may be available to the Authority under the Bidding Documents and / or the Agreement, or otherwise."*

20. Article 2.1 of the Concessions Agreement defines the term 'Scope of Project' to include the operation and maintenance of the Project Highway (*as defined therein*). Change of Scope (*as defined under Article 16.1.1 of the Concessions Agreement*) includes additional works and services which are not included in the Scope of Project. Admittedly, in the present case, the Additional Project falls within the Change of Scope and therefore has to be dealt with in accordance with Article 16 / COS Construct of the Concessions Agreement.

21. Article 16.5.1 of the Concessions Agreement grants a ROFR to the Petitioner. However, it was clarified time and again and also provided under the RFP that the exercise of the ROFR shall be subject to (i) participation in the bidding process; and (ii) the Petitioner's bid not exceeding 10% of the first ranked bid (the "**Twin Conditions**").

22. Clause 1.2.6 of the RFP *vide* a non-obstante clause acknowledged the Petitioner's ROFR, and thereafter, clarified that the exercise of the ROFR shall be subject to the Twin Conditions. Meaning thereby, the Petitioner was certainly entitled to exercise the right of ROFR only in case the Petitioner participated in the bidding process satisfying the Twin Conditions. In the present case, the Petitioner cannot be construed as a bidder as they did not submit a bid, and therefore, the question of permitting the Petitioner to exercise the ROFR in respect of the Additional Project does not arise.

23. The Hon'ble Supreme Court of India in ***Agmatel India (P) Ltd. Vs. Resoursys Telecom,*** (2022) 5 SCC 362, has analyzed the scope of judicial review in contractual matters, particularly in relation to the process of interpretation of a tender document. The Hon'ble Supreme Court of India in ***Agmatel India (P) Ltd.*** (supra) relying on ***Galaxy Transport Agencies Vs. New J.K. Roadways, Fleet Owners & Transport Contractors,*** (2021) 16 SCC 808; ***Montecarlo Ltd. v. NTPC Ltd.,*** (2016) 15 SCC 272; and ***Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.,*** (2016) 16 SCC 818, held as under:

> *"26. The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its*

> *interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given."*

24. Moreover, in ***Silppi Constructions Contractors v. Union of India,*** (2020) 16 SCC 489, the Hon'ble Supreme Court of India observed as under:

> *"20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realize that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind, we shall deal with the present case."*

25. In light of the aforesaid decisions of the Hon'ble Supreme Court of India, it is a well settled proposition of law that the author of the tender document is the best person to understand and appreciate its requirements. Even otherwise, in the present case there is no ambiguity in respect of the language used in the tender document.

26. The tender document i.e., the RFP with respect to a fresh bid explicitly states that the Petitioner must participate in the bidding process in order to exercise its ROFR. Meaning thereby, the Petitioner must be a bidder prior to the exercise of its ROFR. Admittedly, as the Petitioner herein has not submitted a bid and due to the inability to do so in the absence of the Bid Security the Petitioner never qualified as a bidder.

27. In the considered opinion of this Court, it is only when a person who submits a bid in accordance with the specific terms and conditions mentioned in the tender document naturally becomes a bidder. Otherwise, a person who does not submit a bid in consonance with specific terms and conditions of the RFP (in the absence of the Bid Security herein), cannot be construed to be bidder. As the petitioner is certainly not a bidder, hence, it lost its right to exercise the ROFR and cannot be permitted to do so.

28. Thus, in the peculiar facts & circumstances of the case, the question of granting relief to the Petitioner having not participated in the bidding process as per the terms and conditions of the RFP, does not arise.

29. The writ petition is, accordingly, dismissed.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(SAURABH BANERJEE)
JUDGE

AUGUST 28, 2023