



2023:DHC: 8463



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

Date of decision: 24.11.2023

+ **W.P.(C) 8591/2016 & CM APPL. 35354/2016 & 42902/2017**
M/S. KMC CONSTRUCTIONS LTD. Petitioner
Through: Mr.Yash Anand &
Mr.Shubhankar, Advs.
versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI)
& ANR. Respondents
Through: Mr.Ujjwal K. Jha & Mr.Anshul
Misra, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. This petition has been filed by the petitioner praying for the following reliefs: -

“a) Issue a writ or any writ, order or direction in the nature of certiorari, quashing the decision of the Competent Authority/Respondent No.1 dated 16.09.2016 wherein the Petitioner's bid has been rejected being declare as abnormally low bid/non-responsive and its subsequent decision dated 22.09.2016 to forfeit the Bid Security amounting to Rs. 18.48 Cr. without considering the representation and the explanation;

b) issue a writ, order or direction in the nature of mandamus directing the Respondent No.1 to consider the Petitioner representation and allow the petitioner to participate in the bidding process by rectifying the financial bid @ Rs.1539 Cr. against the estimated cost of Rs. 1848.37 Cr;

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c) issue a writ, order or direction in the nature of mandamus directing the respondent No.2 not to encash the bank Guarantee illegally invoke by the Respondent No. 1;
d) Ad interim orders in terms of prayers (a), (b) & (c) above;"

2. The learned counsel for the petitioner confines his prayers to the return of the Bid Security Amount submitted in the form of a Bank Guarantee.

3. Briefly stated, the facts giving rise to the present petition are that on 06.04.2016, the respondent no.1 had floated an e-tender for Rehabilitation and Upgradation of Angul-Sambalpur Section of NH 42 in the State of Odisha (km. 112.00 to km. 265.00) under NHDP IV on EPC mode. The estimated cost of the aforesaid project was Rs.1848.37 crores. The petitioner along with its JV partner participated in the said e-tender and submitted its bid. The petitioner claims that though they intended to offer a price of Rs.1539/- Crores, due to some technical problem, the bid was locked as Rs. 1539/- only. The petitioner claims that it was only when the financial bids were opened by the respondent no.1, that the petitioner became aware of the said mistake. The petitioner made a representation to the respondent no.1 in this regard, however, the same was rejected by the respondent no.1. The respondent no.1 also decided to forfeit the Bid Security Amount of Rs.18.48 Crores that had been submitted by the petitioner in the form of a Bank Guarantee with the respondent no.1 at the time of bidding.

4. The learned counsel for the petitioner submits that in

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terms of Clause 2.20.5 of the request for proposal, the Bid Security can be forfeited by the respondent no.1 only in given circumstances, non-responsive bid not being one of them. He submits that, in fact, in an earlier e-tender, the respondent had reserved a specific power to itself to forfeit the Bid Security Amount in case it finds the bid to be 'non-responsive'. However, in the present e-tender, this power was expressly deleted from Clause 2.20.5. He submits that, therefore, in the absence of any authority, even assuming that the bid of the petitioner was non-responsive, the respondent could not have forfeited the Bid Security Amount deposited by the petitioner by way of the Bank Guarantee. He submits that, therefore, the Bank Guarantee is liable to be returned to the petitioner.

5. On the other hand, the learned counsel for the respondent no.1 submits that the law on the injunction on a Bank Guarantee encashment too is well settled. He submits that such an injunction can be granted only on ground of egregious fraud or irretrievable injustice. In support, he places reliance on the judgment of the Supreme Court in *National Highway Authority of India v. Ganga Enterprises & Anr.*, 2003 (7) SCC 410; and of this Court in *JCL Infra Ltd. (Formerly Known as J.Sons Co. Ltd.) v. Govt. of NCT of Delhi Through Chief Secretary & Anr.*, Neutral Citation no. 2015:DHC:2515.

6. He further submits that the plea of the petitioner that there was a technical glitch leading to the bid not being properly submitted is false, as is evident from the Technical Expert



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Report of the respondent no.1.

7. He submits that in terms of Clause 2.20.4, the respondent no.1 is entitled to forfeit the Bid Security where it would suffer a loss or damage on account of withdrawal of the bid by the bidder or for any default by the bidder. He submits that by placing a bid of only Rs.1539/-, the petitioner has, in fact, caused loss and damage to the respondent no.1.

8. I have considered the submissions made by the learned counsels for the parties.

9. As noted hereinabove, the petitioner is now not pressing upon its prayer for the directions to the respondent no.1 to allow the petitioner to participate in the fresh bidding process by rectifying its final bid to Rs.1539/- crores instead of Rs.1539/- only. The learned counsel for the petitioner has also not laboured on showing that the bid was, in fact, submitted at Rs.1539/- because of some technical glitch in the portal of the respondent no.1. This Court shall, therefore, proceed with the assumption that the bid submitted by the petitioner was, in fact, for Rs.1539/- only.

10. The question before this Court is whether the respondent no.1 can still forfeit the Bid Security Amount submitted by the petitioner in form of a Bank Guarantee.

11. In this regard, Clauses 2.20.4 and 2.20.5 of the Request for Proposal (in short, 'RFP') would be relevant and are reproduced hereinbelow:-

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“2.20.4 The Authority shall be entitled to forfeit and appropriate the BID Security as Damages inter alia in any of the events specified in Clause 2.20.5 herein below. The Bidder, by submitting its BID pursuant to this RFP, shall be deemed to have acknowledged and confirmed that the Authority will suffer loss and damage on account of withdrawal of its BID or for any other default by the Bidder during the period of BID validity as specified in this RFP. No relaxation of any kind on BID Security shall be given to any Bidder.

2.20.5 The BID Security shall be forfeited and appropriated by the Authority as damages payable to the Authority for, inter-alia, time cost and effort of the Authority without prejudice to any other right or remedy that may be available to the Authority under the bidding documents and / or under the Agreement, or otherwise, under the following conditions:

(a) Deleted

(b) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice or restrictive practice as specified in Section 4 of this RFP;

(c) If a Bidder withdraws its BID during the period of Bid validity as specified in this RFP and as extended by mutual consent of the respective Bidder(s) and the Authority;

(d) In the case of Selected Bidder, if it fails within the specified time limit by Authority-

(i) to sign and return the duplicate copy of LOA;

(ii) to sign the Agreement; or

(iii) to furnish the Performance Security within the period prescribed therefor in the Agreement; or

(e) In case the Selected Bidder, having signed the Agreement, commits any breach thereof prior to furnishing the Performance Security.”



12. A reading of Clause 2.20.4 would show that the respondent no.1 is entitled to forfeit and appropriate the Bid Security as damages *inter alia* in the events specified in Clause 2.20.5. In addition, the Bid Security can also be forfeited where the bidder withdraws its bid or commits a default during the period of Bid validity as specified in the RFP.

13. It is not the case of the respondent that the petitioner withdrew its Bid or committed any other default during the period of the Bid validity.

14. The question, therefore, is whether the respondent no.1 can invoke Clause 2.20.5 of the RFP. The Clause 2.20.5 of the RFP states that the bid security shall be forfeited by the respondent no.1 as damages payable to the respondent no.1 under the following conditions:-

- 1) If a Bidder engages in a corrupt practice, fraudulent practice, coercive practice, undesirable practice, or restrictive practice as specified in Section 4 of the RFP;
- 2) If a Bidder withdraws its BID during the period of Bid validity as specified in the RFP and as extended by mutual consent of the respective Bidder(s) and the Authority/Respondent no.1;
- 3) In the case of Selected Bidder, if it fails within the specified time limit by Authority/Respondent no.1-
 - (i) to sign and return the duplicate copy of LOA;
 - (ii) to sign the Agreement; or
 - (iii) to furnish the Performance Security within the period



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prescribed therefor in the Agreement; or

4) In case the Selected Bidder, having signed the Agreement, commits any breach thereof prior to furnishing the Performance Security.

15. Admittedly, submission of a non-responsive bid or a bid of an abnormally low price is not mentioned in the RFP as a circumstance or condition on which the Bid Security can be forfeited and appropriated by the respondent no.1. None of the other conditions set out in Clause 2.20.5 are also stated to have arisen in the present case. In the absence thereof, the respondent cannot forfeit or appropriate the Bid Security submitted by the petitioner herein only because the Bid submitted by the petitioner was of an abnormally low price. In fact, as submitted by the learned counsel for the petitioner, the respondent earlier had such power vested in itself, however, the same stood withdrawn by deletion of Clause 2.20.5(a) in the present RFP.

16. In similar circumstances, this Court in its judgment in ***The Indian Hotels Company Ltd. v. Union of India & Ors.***, Neutral Citation no. 2022:DHC:1154, has observed as under:-

“34. That takes the Court to consider the submission of Dr. Singhvi resting on the principles of manifest arbitrariness. Indubitably, Article 14 of our Constitution constitutes its heart and soul. It infuses meaning and guides our understanding of the scope and content of the various provisions contained in that foundational document. The earliest judgments of the Supreme Court explaining the ambit of this Article had propounded the concept of “discrimination”

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as being the anvil on which State action was to be judged. This led to the evolution of principles such as “reasonable classification” and “intelligible criteria” to test whether an impugned action fell foul of the mandate of Article 14. The Supreme Court then proceeded to note that the aforementioned concepts may have constricted and stifled the contemplated breadth of this Article as envisioned by our founding fathers. As time progressed, Supreme Court evolved the principles of the rule of law and the abhorrence of arbitrary exercise of power. The aforesaid precepts however remained limited to a “procedural due process” review with State action being tested on the just and fair doctrine. These principles ultimately gave way to the Supreme Court adopting and extending the principles of substantive due process and manifest arbitrariness. All that may be noted today is that Courts are not confined to merely consider whether a fair procedure was followed but more fundamentally to adjudge whether the impugned action would stand the test of reasonableness and fair action in the substantive sense. Article 14 today has thus crossed the threshold and the rubicon of hesitation to judge whether the impugned action would withstand the test of good conscience and sense.

35. Viewed on the aforesaid pedestal the Court finds itself unable to uphold the action of the second respondent. Not only did it fail to place parties on notice of what would constitute a breach warranting forfeiture, it has also and more fundamentally failed to justify its action as being warranted by the acts of the petitioner. An authority which would constitute State cannot be permitted to unjustly enrich itself based on a perceived or assumed power to forfeit even though it be unfair or unjustified. The facts obtaining here constrain the Court to hold that the action of forfeiture was clearly unjustified. The mere existence of



power, even if it were assumed to inhere, would not justify the impugned action. This more so in light of the facts that have been presented by the petitioner based on the responses obtained under RTI. The respondents have abjectly failed to prove prejudice or loss. Their action cannot be sustained on the provisions contained in the RFP. The Court thus has no hesitation in recording that the action was not only clearly ultra vires, it is also manifestly arbitrary and thus cannot be sustained.”

17. As far as the Judgments of **Ganga Enterprises** (Supra) and **JCL Infra Ltd.** (Supra), relied upon by the learned counsel for the respondent no.1 are concerned, in the absence of any power with the respondent under the RFP to forfeit the Bid Security, these judgments would have no application in the facts of the present case.

18. In view thereof, the present petition is partially allowed. The forfeiture of the Bank Guarantee for the Bid Security Amount by the respondent no.1 is held to be unlawful. The respondent no.1 is directed to return the Bank Guarantee for the Bid Security Amount to the petitioner within a period of eight weeks from today.

19. The petition and the pending applications are disposed of in the above terms.

20. There shall be no order as to costs.

NAVIN CHAWLA, J

NOVEMBER 24, 2023/rv/AS

Click here to check corrigendum, if any