



\$~51

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

+ **W.P.(C) 3639/2024 & CM APPLs. 15078-15079/2024**

KCC INFRA PRIVATE LIMITED

..... Petitioner

Through: Mr. Viraj Datar, Senior Advocate
with Mr. Bhaskar Vali and Mr. Rajat
Jain, Advocates

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ANR

..... Respondents

Through: Mr. Santosh Kumar and Kushagra
Aman, Advocates

%

Date of Decision: 12th March, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MINI PUSHKARNA

JUDGMENT

MINI PUSHKARNA, J.: (ORAL)

1. The present petition has been filed seeking quashing and setting aside of the letter dated 05th March, 2024 issued by respondent no.1-National Highways Authority of India ("NHAI") to the petitioner, whereby the technical bid of the petitioner has been held to be non-responsive. Thus, by way of the present petition, petitioner has prayed for direction to the respondent no.1-NHAI to consider and declare its technical bid to be responsive, open its financial bid and consider the same for award of tender.

2. Facts in brief are that, Notice Inviting Tender ("NIT") dated 08th December, 2023 was issued by respondent no.1-NHAI for 'Rectification of MoRTH identified blackspots at seven (07) - locations on Jaipur-Reengus-Sikar Section of NH-52 in the State of Rajasthan on Engineering,



Procurement & Construction (EPC) mode'. Pursuant to the aforesaid NIT, respondent no.1 issued a Request for Proposal ("RFP") in February, 2024 delineating the schedule of the bidding process. Consequently, the petitioner submitted its bid on 26th February, 2024.

3. Subsequently, the respondent no.1-NHAI vide its letter dated 01st March, 2024 sought a clarification from the petitioner regarding its technical bid and directed that the same be furnished latest by 05th March, 2024 upto 1:00 PM. Thereafter, the petitioner submitted its clarification vide letter dated 05th March, 2024.

4. However, by the impugned communication dated 05th March, 2024, the technical bid of the petitioner was held to be non-responsive, aggrieved by which, the present petition has been filed.

5. Learned Senior Counsel appearing for the petitioner submits that the criteria as given in Clause 2.2.2.2(iii) of the RFP, is duly met by the petitioner. He submits that the work executed by the petitioner in Manipur for the National Highways and Infrastructure Development Corporation Limited, MoRTH ("Manipur Project") falls squarely within the four corners of the eligibility criteria. He submits that the petitioner has completed the aforesaid Manipur Project, wherein the petitioner has duly constructed two bridges with four spans longer than 15 meters each and the cost of the said similar project is more than 51.02 Crores.

6. Attention of this Court has been drawn to the letter dated 05th March, 2024 written by the petitioner, whereby clarification was given by the petitioner on the evaluation of its technical bid.

7. He further submits that the respondent No. 1 has malafidely declared the technical bid of the petitioner as non-responsive by adopting a



discriminatory interpretation of technical capacity requirements and are creating an irrational and arbitrary discrimination. Thus, he submits that the eligibility criteria stipulated under Clause 2.2.2.2(iii) for a sole bidder and under Clause 2.2.2.4 in the case of a Joint Venture (“JV”), are disparate and discriminatory.

8. Per contra, learned counsel appearing for respondent no.1 submits that the petitioner does not fulfill the criteria of technical qualification, as the petitioner did not execute work of a similar nature related to bridges, for a cost of Rs. 51.02 Crores, in terms of the criteria laid in the RFP. He further submits that work has already been awarded to the successful bidder on 09th March, 2024.

9. Having heard learned counsel for the parties, it is apposite to consider the relevant terms of the RFP, which read as under:

“xxx xxx xxx

2.2.2.2 Technical Capacity

(i) For demonstrating technical capacity and experience (the “**Technical Capacity**”), the Bidder shall, over the past 10 (ten) 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 255.09 crore (Rs. Two hundred fifty five crore and nine lakh only) (the “**Threshold Technical Capacity**”).

(ii) Eligible projects shall include following:

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

(ii) Widening/ re-construction/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, ROB, tunnels.



(v) 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/reconstruction of Jetties)

(iii) The sole Bidder or in case the Bidder being a Joint Venture, any member of Joint Venture shall have completed at least one similar Major Bridge/ROB/Flyover project in the last 10 (ten) financial years preceding the Bid Due Date, having span equal to or greater than 15 m and also the cost of such similar project shall be at least 20% of the Estimated Project Cost i.e. 51.02 crore (Fifty one crore and two lakh only). 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 20% of the Estimated Project Cost i.e. 51.02 crore (Fifty one crore and two lakh only).

(iv) The updation factor to update the price of the eligible projects for the 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. 12.76 crore (Rs. Twelve crore and Seventy Six 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. 38.27 (Rupees Thirty Eight crore and Twenty Seven lakh 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

2.2.2.4 In case of a Joint Venture:

(i) The Bid Capacity, Technical Capacity and Financial Capacity of all the Members of Joint Venture would be taken into account for satisfying the above conditions of eligibility. Further, Lead Member shall meet at least 60% requirement of Bid Capacity, Technical and Financial Capacity as per Clause 2.2.2.1, 2.2.2.2(i) and 2.2.2.3 and each of other JV members shall meet at least 20% requirement of Bid Capacity, Technical and Financial Capacity individually as per



Clause 2.2.2.1, 2.2.2.2(i) and 2.2.2.3. For avoidance of doubt it is further clarified that the Joint Venture must collectively and individually satisfy the above qualification criteria i.e. JV shall cumulatively/collectively fulfill the 100% requirement.

(ii) For requirement of 2.2.2.2 (ii) & (iii), one similar work of 20% of Estimated Project Cost should have been completed from the Eligible Projects in Category 1 and/or Category 3 individually by any of the JV members as a single work.

xxx xxx xxx”

(Emphasis Supplied)

10. Perusal of the aforesaid Clause 2.2.2.2(iii) of the RFP, displays that the bidders were required to fulfill three criteria viz. (a) one similar project of bridge/Road Over Bridge (“ROB”)/Flyover having span equal to or greater than fifteen (15) meters, in the last ten financial years preceding the bid due date; (b) cost of such similar project shall be at least 20% of the estimated project cost, i.e., Rs. 51.02 Crores (Rupees Fifty One Crore and Two Lacs Only); (c) 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 20% of the estimated project cost, i.e., Rs. 51.02 Crores (Rupees Fifty One Crore and Two Lacs Only).

11. Considering the aforesaid criteria, it is clear that the petitioner has failed to fulfill the said technical criteria, as the cost of the bridge work completed by the petitioner in the Manipur Project is only to the tune of Rs. 5,40,61,681/- (Rupees Five Crore Forty Lacs Sixty One Thousand Six Hundred and Eighty One only). The said value is much below the benchmark of the required criteria of having completed similar work of value of Rs. 51.02 Crores (Rupees Fifty One Crore and Two Lacs Only). The Work Execution Certificate submitted by the petitioner related to the Manipur Project which shows the value of the bridge work executed by the petitioner to the tune of only Rs. 5,40,61,681/- (Rupees Five Crore Forty



Lacs Sixty One Thousand Six Hundred and Eighty One only), is reproduced hereunder:



Work Execution Certificate

It is to certify that M/s Krishna Construction Company has executed the following quantities in the project i.e., "Strengthening/Widening to Two laning with hard shoulder of Pallei- Chandel section from Km. 0+000 to 18+292 of NH-102C in the state of Manipur on Engineering, Procurement & Construction (EPC) Mode."

Name of Work -	Widening to Two laning with hard shoulder of Pallei Chandel section from Km. 0+000 to 18+292 of NH-102C in the state of Manipur on Engineering, Procurement & Construction (EPC) Mode.
LOA No. -	NHIDCL/Manipur/Civil Work/P-C/2019/180728/1428, 27.03.2020
Agreement Date	29.05.2020
Contract Amount-	Rs 71,01,00,000/-
Total Work Done-	Rs 75,28,80,712/- (With Escalation)
Date of Appointed -	01.07.2020
Schedule Completion Date-	30.06.2022
Actual Date of Completion-	15.05.2022
Cost of Bridge Work: -	Rs. 5,40,61,681/-

Sl. No.	Span Arrangement of Bridge	Total Length (M)	Remarks
1.	3 x 16 Mtr.	48.00 Meter	Completed
2.	1 x 20.16 Mtr.	20.16 Meter	Completed

Project Management Unit – Tengnoupal,
Tengnoupal Bazar, Opposite Police Station, Manipur – 795131
Email ID – nhidcl.heng@gmail.com

(Prabal Das)
Dy. General Manager (P)
NHIDCL, PMU-Tengnoupal,
Dy. General Manager (Project)
National Highways & Infrastructure
Development Corporation Limited
Project Management Unit, Tengnoupal



12. This Court also finds no merit in the submission of the petitioner regarding discriminatory criteria of the technical and financial capacity vis-à-vis a sole bidder and a JV. Perusal of Clause 2.2.2.4 of the RFP clearly shows that in case of a JV, each of the JV member, shall meet at least 20% requirement of bid capacity, technical and financial capacity individually and the JV shall cumulatively /collectively and individually satisfy the qualification criteria as given in the RFP. The said criteria as laid in the RFP, is neither arbitrary nor discriminatory. The respondent no.1 has every authority to fix its own terms of invitation to tender, which are not open to judicial scrutiny. The petitioner has not been able to point out any malafide or bias on the part of the respondent no.1.

13. It has been held in a catena of judgments that Government and their Undertakings must have a free hand in setting terms of the tender. Discretion is available to a tendering authority to set tender conditions/eligibility criteria in a tender. Courts must concede greater latitude to the State Authorities in matters of formulating conditions of tenders and awarding contracts. Interference by court is not warranted, unless action of tendering authority is shown to be malafide, arbitrary, discriminatory or actuated by any bias. Thus, the Supreme Court in the case of *Tata Motors Limited Versus Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Others*¹, has held as under:

“xxx xxx xxx

48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their

¹2023 SCC OnLine SC 671



powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. **In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.** (See: Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489)

xxx xxx xxx

53. The law relating to award of contract by the State and public sector corporations was reviewed in Air India Ltd. v. Cochin International Airport Ltd., reported in (2000) 2 SCC 617 and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

xxx xxx xxx

54. As observed by this Court in Jagdish Mandal v. State of Orissa, reported in (2007) 14 SCC 517, that while invoking power of judicial



review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

xxx xxx xxx”

(Emphasis Supplied)

14. Similarly, law in this regard is clear that the award of the contract is essentially a commercial transaction involving commercial considerations and while taking such decisions, the State can choose its own terms of invitation to tender. Thus, holding that Courts cannot interfere with the terms of the tender prescribed by the Government or a Government Undertaking merely because it feels that some other terms in the tender would have been fair, wiser or logical, the Supreme Court in the case of ***Union of India and Others Versus Bharat Forge Ltd and Another***², has held as follows:

“xxx xxx xxx

19. Having cleared the air with regard to the jurisdiction of the High Court in the matter of a Writ of Mandamus or a direction in the nature thereof, we may proceed next to the law relating to the ambit of the Court's jurisdiction in judicial review in contractual matters. It is, undoubtedly, too late in the day to countenance the contention that the mandate of fairness in State action does not extend to the realm of contract entered into by the State. We would not burden our judgment chronicling the catena of decisions, which have expounded the law in this regard. We deem it sufficient if we refer to the judgment of this Court in *Reliance Telecom Ltd. v. Union of India and another*⁵. After an exhaustive survey of case law, this Court, inter alia, held as follows:

²2022 SCC OnLine SC 1018



“42. In *Global Energy Ltd. v. Adani Exports Ltd.* [Global Energy Ltd. v. Adani Exports Ltd., (2005) 4 SCC 435], this Court reiterated the principles that : (SCC p. 441, para 10)

“10. ... the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.”

xxxxxxxxx

44. In *Michigan Rubber (India) Ltd. v. State of Karnataka* [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216], the Court, after referring to *Jagdish Mandal v. State of Orissa* [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] and *Tejas Constructions & Infrastructure (P) Ltd. v. Municipal Council, Sendhwa* [Tejas Constructions & Infrastructure (P) Ltd. v. Municipal Council, Sendhwa, (2012) 6 SCC 464], expressed the view that (at SCC p. 229, para 23) 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 and actions are amenable to judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose and if the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities. **It further observed that 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 unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers and greater latitude is required to be conceded to the State authorities in the matter of formulating conditions of a tender document and awarding a contract. The Court also laid emphasis on public interest and the prudence in applying the principle of restraint where the action is fair and reasonable and does not smack of mala fides. It was also emphasised that the courts cannot interfere with the terms of the tender prescribed by the Government simply because it feels that some other terms in the tender would have been fair, wiser or logical.”**

xxx xxx xxx”

(Emphasis Supplied)



15. Considering the aforesaid facts and circumstances, we find no merit in the present petition. Accordingly, the same is dismissed along with pending applications.

MINI PUSHKARNA, J

ACTING CHIEF JUSTICE

MARCH 12, 2024

au