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

\+ W.P.(C) 14657/2023 & C.M. APPL. 58283-84/2023

AMR INDIA LTD ...Petitioner

Through: Mr. Sandeep Sethi, Sr.Advocate, Mr. Rajeeve Mehra, Sr.Advocate, Ms. Madhu Sudan, Mr. Vikhyat Oberoi, Mr. Ilam Paridi, Mr. Ankit Kakkar and Mr. Ravi Sharma, Advocates.

versus

NBCC INDIA LTD & ORS ...Respondents

Through: Mr. G.G. Kashyap, Advocate for respondent no.1.

% **Date of Decision: 25th July, 2024**

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

JUDGMENT

MANMOHAN, ACJ: (ORAL)

1. Present writ petition has been filed under Article 226 of the Constitution of India, 1950, challenging the impugned decision dated 18th October, 2023, whereby the respondent no.1/NBCC disqualified the bid submitted by the petitioner for Construction of Border Fencing and Roads between multiple points falling within the State of Mizoram along the Indo-Bangladesh Border in various Packages.

2. The respondent no. 1/NBCC had floated a Notice Inviting e-Tender on 11th July, 2023 for Construction of Border Fencing and Roads between multiple points falling within the State of Mizoram along the Indo-Bangladesh Border in various Packages, namely, Pkg-I having NIT No. NBCC/CPG/IBB/Mizoram/Pkg1/2023/377; Pkg-III having NIT No. NBCC/CPG/IBB/Mizoram/Pkg3/2023/378 and Pkg-IV having NIT No. NBCC/CPG/IBB/Mizoram/Pkg4/2023/379.

3. It is the case of the petitioner that it has submitted all the requisite documents including receipts of payment for Tender Documents, Solvency Certificates, Bank Guarantees including for the revised/ increased Estimated Cost etc. The respondent no.1/NBCC for the first time on 18th October 2023 had mentioned in its e-Procurement Portal the status of the petitioner's Bids for Tenders as *'Disqualified'* and the reason for such rejection was that the petitioner did not submit the Bank Solvency Certificate of requisite value as per Tender conditions.

4. The petitioner states that the corrigendum/addendum no.06 dated 14th September, 2023 issued by the respondent no.1/NBCC did not have any instruction or stipulation or condition for submitting a new Bank Solvency Certificate to cover the revised/increased Estimated Cost apart from the remaining amount of Tender Document Fee and Earnest Money Deposit (hereinafter referred to as *"EMD"*) through Demand Draft to be made in favour of the respondent no.1/NBCC.

5. It is the case of the petitioner that impugned notification dated 18th October, 2023 in respondent no.1's e-Procurement Portal disqualifying the petitioner for non-submission of Solvency Certificate of requisite value is

only for the purpose of rejecting the Bid of the petitioner.

6. Thus, the impugned notification dated 18th October, 2023, disqualifying the petitioner for bidding, is challenged before this Court.

7. Mr. Sandeep Sethi, learned senior counsel appearing for the petitioner at the outset submits that the impugned decision/Online Status notification dated 18th October 2023 uploaded on the e-Procurement Portal of the respondent no.1/NBCC is highly unjustifiable as the same has been notified without appreciating the crucial aspect that the petitioner has complied with all the procedures and conditions mandated as NIT and in terms of the General Conditions of Contracts 2022 of the respondent no.1/NBCC.

8. Learned senior counsel submits that the petitioner has admittedly submitted Bank Solvency Certificate as mandated to the tune of 40% of Estimated Cost as per the initial Estimated Cost as notified in the NITs. He further submits that there is no need for submission of any additional Solvency Certificate against the revised additional Estimated Cost as no such requirement was notified or intimated in any of the corrigendum. He further urges that in case the respondent felt it necessary for the petitioner to furnish any revised additional Solvency Certificate, the same should have been notified in the corrigendum as it has been done in the case of requirement for the remaining amount of Tender Document Fee as well as EMD/Bank Guarantee which has been notified in corrigendum/addendum 06 dated 14th September, 2023.

9. Mr. Sandeep Sethi further submits that petitioner has submitted the remaining amount of the Tender Document Fees as well as EMD in view of

the revised corrigendum and the petitioner would have furnished additional Solvency Certificate for revised value, if it had been informed.

10. Learned senior counsel draws attention of this Court to a table which is a part of the counter affidavit, where the respondent no.1/NBCC has evaluated how the petitioner does not meet the solvency criteria which lead to the rejection of its bids. By referring the table, Mr. Sethi submits that the initial Estimated Cost for all the three (3) Packages was revised by way of a corrigendum/addendum no.05 dated 6th September, 2023. He further submits the respondent no.1/NBCC ought to have considered the consolidated amount of the Solvency Certificates covering atleast two tenders out of the three tenders.

11. Learned senior counsel further refers to an email/communication dated 26th September, 2023 from the respondent no. 1/NBCC to submit that the petitioner would have furnished additional Solvency Certificate for revised value if it has been informed like other requirements such as non-submission of the summarized audited balance sheets and profit & loss statements and financial details of the FY 2022-23 and a pre-signed Integrity Pact informed through this communication.

12. Mr. Sandeep Sethi, learned senior counsel submits that though the last date for the submission of the bid was 24th August, 2023 but that has been extended multiple times by the respondent no.1/NBCC after revision.

13. Mr. Sethi, learned senior counsel concluded his submissions by referring to the judgement of a Co-ordinate Bench of this Court in ***Best Buildwell Pvt. Ltd vs. New Delhi Municipal Council***, ***2022 SCC OnLine Del 2741*** to submit that this is not a case of non-filing of the Solvency

Certificate rather it is a case of non-submission of additional Bank Solvency Certificate for revised value and the petitioner could have been informed and given time to furnish the additional Bank Solvency Certificate and it cannot be said that the Bank Solvency Certificate submitted by the petitioner initially is so old or ancient that it tantamounts to non-filing of Bank Solvency Certificate. He then relies on the judgement of the Division Bench of Bombay High Court in ***B. Himmatlal Agrawal vs. Western Coalfields Ltd***, ***2010 SCC OnLine Bom 1152*** to submit that the respondent no.1/NBCC without application of mind has rejected the bid of the petitioner by stating that the solvency criteria has not been met and if the respondent no.1/NBCC had informed and allowed the petitioner, it could have submitted the additional Bank Solvency Certificate.

14. *Per contra*, Mr. G.G. Kashyap, learned counsel appearing for the respondent no.1/NBCC submits that by way of corrigendum/ addendum no.05 dated 6th September, 2023 certain absolute values such as Estimated Cost, EMD and Tender Fee were amended. All qualifying criteria such as Work Experience Criteria, Turnover criteria and Bank Solvency criteria are dependent on Estimated Cost. Hence it is obvious and understandable that if the Estimated Cost is getting changed, then all the above mentioned dependent qualifying criteria automatically get amended. He further submits that no terms of the tender other than the qualifying criteria dependent on Estimated Cost, would change. He further submits that no instruction is needed specifically with regard to Bank Solvency Certificate, as it was dependent on Estimated cost. He submits that there are three (3) bidders in total and no prospective bidders have raised any query regarding

the Bank Solvency Certificate and they have submitted their revised Bank Solvency Certificate

15. Mr. Kashyap, learned counsel draws attention of this Court to an e-mail dated 12th September, 2023 from the petitioner, which is a part of the counter affidavit and submits that *vide* that email the petitioner had sought clarification regarding payment of difference of cost of tender documents and Earnest Money Deposit but he did not ask about the revised Bank Solvency Certificate.

16. We have heard Mr. Sandeep Sethi, learned senior counsel for the petitioner, Mr. G.G. Kashyap, learned counsel for the respondent no.1/NBCC and considered the documents on record.

17. It is not disputed by the petitioner that Clause 2 (B) (iii) of NIT regarding *'Financial Strength'* stipulated that the bidders are to submit alongwith their respective bids, a Self Certified copy of Bank Solvency Certificate to the tune of atleast 40% of the Estimated Cost of the Project put to tender from a Nationalised or Scheduled Bank. It is cfurther not disputed by the parties that the petitioner herein did, in fact, submit Solvency Certificate to the extent of Estimated Cost of the three packages referred to above. It is also not disputed that the respondent no.1/NBCC by the corrigendum no.05 dated 6th September 2023 revised the Estimated Costs of the three packages. *Vide* the said corrigendum/addendum the Estimated Cost of Package No.I was revised from Rs. 93,52,32,627.50/- to Rs. 103,80,15,739.71/-. Similarly, Package Nos.III and IV were revised from Rs. 1,38,84,397/- to Rs. 154,65,15,925.35/- and Rs. 1,56,46,823/- to Rs. 174,55,65,187.59/- respectively. The bidders were directed to submit

fresh EMD, non refundable cost of tender document in terms of the revision. It is also not disputed that the petitioner herein had complied with the revised conditions. The only controversy which arises in the present petition is with respect to submission of self certified copy of the Bank Solvency Certificate, post the aforesaid revision.

18. According to learned senior counsel, since there was no corrigendum issued in respect of re-submission of the Solvency Certificate in respect of the aforesaid three packages, the need for re-submission by the petitioner did not arise. Whereas, the counsel for the respondent no.1/NBCC urged that there was no need for such stipulation since it was inherent to such revision. He also informs that, as a matter of fact, the other bidders have re-submitted the self certified Bank Solvency Certificate to the tune of 40% of the revised Estimated Costs.

19. This Court is unable to agree with the contentions of learned senior counsel for the petitioner. This is for the reason that according to Para B of Clause (2) of e-tender Notice dated 11th July 2023, particularly, clause (iii) thereof, the bidder is stipulated to furnish self certified copy of the Bank solvency certificate from a Nationalised or any Scheduled Bank for at least 40% of the Estimated Cost of the Project put to Tender. For clarity, the said Para B of e-tender Notice dated 11th July 2023, particularly, clause (iii) is reproduced hereunder:

> *"B. Financial Strength:*
> *i) xxx*
> *ii) xxx*
> *iii) **Self-certified copy of Bank Solvency Certificate issued from Nationalised or any Schedule Bank should be one in number for at least 40% of Estimated Cost of the Project put to tender. The certificate should have been issued within 6 months from original last date of the submission of the tender.***

iv) xxx"

(emphasis supplied)

20. It is apparent from the above that the Bank Solvency Certificate is to the extent of at least 40% of the Estimated Cost and it stands to reason that if there is any upward revision thereof, the Bank Solvency Certificate too would have to be furnished afresh. It is obvious that a bidder is to demonstrate its Solvency for the purposes of qualification and eligibility as per the tender conditions. This is to establish its financial stability as per its past record which would be a very important commercial consideration for the authority issuing tender to assess the eligibility of a particular bidder. This is how even the other similarly situated bidders are stated to have understood and made good the deficiency in their bids after revision. It appears to be only the petitioner who did not understand the aspect in the same manner. For misinterpretation of the basic tender conditions, the petitioner itself is to be blamed. Thus, this submission cannot be countenanced and is rejected.

21. The other submission of learned senior counsel with respect to non consideration of the Solvency Certificate furnished by it in respect of package III *qua* the revised estimated costs of package no.I stated to be higher than what was calculated for the revised package no.I is concerned, the same too merits rejection. This is for the reason that every package mandates an independent Estimated Cost. Clause (iii) of Para (B) of Clause (2) of the e-Tender stipulates submission of Bank Solvency Certificate to the extent of at least 40% of the Estimated Cost of the Project put to tender. As the packages appear to have separate and independent Estimated Cost, it also stands to reason that it would require every bidder to furnish/submit

the mandated Bank Solvency Certificate. Thus, every package has to be considered as separate units of the whole of the Project. Consequently, the Solvency Certificate for a particular package cannot be considered by the respondent no.1/NBCC for a different package. Therefore, this submission too stands rejected.

22. So far as the argument of learned senior counsel predicated on the email/communication dated 26th September, 2023 that though the respondent no.1/NBCC had sought further documents from the petitioner even after the corrigendum/addendum no.05 dated 6th September, 2023 was issued, yet, the direction to furnish fresh Bank Solvency Certificate in view of the revision of the estimated cost was not afforded, thus, was discriminatory is concerned, the same is untenable. This is for the reason that a plain reading of the aforesaid communication indicates that there were certain deficiencies in the documents submitted by the petitioner which do not appear to have any connection with the revised Estimated Cost of the Project. From the said communication it cannot be concluded with conviction that the communication had any remote connection with the revision in the Estimated Cost. It is also apparent that the said communication nowhere refers to the revision of the Estimated Cost which was effected before the communication was issued. Thus, we are unable to agree with the contention of learned senior counsel on this count too.

23. Learned senior counsel relied upon the judgement of a Division Bench of the Bombay High Court in ***B. Himmatlal Agrawal*** (supra). The ratio of the said case is not applicable being distinguishable on facts. In that case the petitioner had submitted Bank Solvency Certificate four days after

the date stipulated in the tender document expired. The High Court of Bombay had held that furnishing of Bank Solvency Certificate by a certain date cannot be said to be an essential condition of eligibility and is merely ancillary or subsidiary condition. However, in the present case the issue was in respect of furnishing a fresh Bank Solvency Certificate in terms of the revised estimated cost of the individual packages which was not furnished. Thus, there is no similarity in facts between the two cases.

24. Mr. Sandeep Sethi, learned senior counsel also relied upon the judgement of a Co-ordinate Bench of this Court in ***Best Buildwell Pvt. Ltd*** (supra). In this case the issue was that the petitioner therein had furnished the Bank Solvency Certificate which was issued by the bank six months before the date of issuance of the tender. The Court had, as a finding of fact recorded that though the benefit of providing further documents was extended to other bidders, yet the petitioner therein was discriminated for no valid reason. It was in such circumstances and the finding of discrimination meted out to the petitioner therein, that the Co-ordinate Bench had permitted the petitioner to file a fresh Bank Solvency Certificate whereas, in the present case the issue is in respect of furnishing a fresh Bank Solvency Certificate in terms of the revised Estimated Cost of the individual packages which was not furnished. As is apparent, there is no similarity on facts between both the cases and as such would not be applicable to the facts obtaining in the present case.

25. It is trite that Court would not, ordinarily, interfere in the tender conditions unless there is an apparent arbitrariness or unfairness in the process. We are supported in our view by the judgement of the Supreme

Court in ***Tata Cellular v. Union of India***, ***(1994) 6 SCC 651*** wherein it was laid down that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. That apart, in case we agree with the second proposition submitted by learned senior counsel, it would amount to re-casting the tender conditions. This is prohibited. The Supreme Court in ***Airport Authority of India vs. Centre for Aviation Policy, Safety & Research (CAPSR)***, ***2022 SCC OnLine SC 1334*** has categorically held as under:-

> *"30. In the case of Michigan Rubber (India) Ltd. (supra), after considering the law on the judicial scrutiny with respect to tender conditions, ultimately it is concluded in paragraph 23 as under:*
>
> > *"23. From the above decisions, the following principles emerge:*
> >
> > *(a) 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. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;*
> >
> > *(b) 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;*
> >
> > *(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;*

> *(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and*
>
> *(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."*

26. We thus do not find any arbitrariness or unfairness in the procedure adopted by the respondent, in the facts obtaining in the present case. In view thereof, the writ petition is dismissed with no order as to costs.

27. Pending applications, if any, stand disposed of.

ACTING CHIEF JUSTICE

TUSHAR RAO GEDELA, J

JULY 25, 2024/*rl*