



2025:DHC:2287



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

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Date of Decision: 24.03.2025

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**W.P.(C) 6646/2010 and CM APPL. 40835/2022**

ATLANTA LIMITED

.....Petitioner

Through: Mr. Chirag M. Shroff, Advocate

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA  
& ANR.

.....Respondents

Through: Ms. Neetika Sharma and Mr. Varnit  
Vashistha, Advocates.

**CORAM:**

**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

**JUDGMENT (ORAL)**

1. By way of present petition, the petitioner impugns the letters dated 13.05.2010, 03.06.2010 and 20.07.2010 issued by the respondents (hereinafter, the NHAI) whereby petitioner's bid was held to be non-responsive and it was further made to deposit a sum of Rs.48.50 lacs being 5% of the bid security amount. The petitioner's bid was held to be non-responsive for not being accompanied by Board Resolution in favour of the person who had executed the Power of Attorney (hereinafter, the POA) in favour of the person signing the bid.

Petitioner claims that the Board Resolution was already furnished at the stage of Request for Qualification (hereinafter, RFQ) and was not required to be again submitted at the Request for Proposal (hereinafter, RFP) stage.



2. Facts, in a nutshell, are that on 29.10.2009, the NHAI had invited RFQ for the two-laning with paved shoulder of Dindigul-Theni section km. 2.750 to km. 73.400 of NH-45 (Extn.) and Theni -Kumili section from km. 215.500 to km 273.600 of NH-220 in the state of Tamil Nadu under NHDP Phase III Project. In terms of Clause 1.2.1 (Brief Description of the Bidding Process) of the RFQ, the NHAI adopted a two-stage bidding process. The first stage involved the interested parties submitting request applications for qualification whereafter the respondent would announce list of pre-qualified applicants who shall be eligible for participation in the second stage. The second stage involved bidding process comprise of RFP. Petitioner claimed that it submitted its RFQ on 04.12.2009 alongwith Board Resolution as well as RFP. A clarification was sought by NHAI vide letter dated 10.02.2010 which was duly answered by the petitioner on 16.02.2010. NHAI vide letter dated 05.03.2010 declared the petitioner as a qualified bidder who could participate in the second stage of bidding process.

3. As a consequence of above, the petitioner purchased documents against payment of sum of Rs.1.20 lacs and submitted its proposal on 23.04.2010 along with Bank Guarantee of Rs.9.70 crores. The said bid was signed by Mr. Ulhas N. Bhole and was accompanied by POA executed in his favour by Mr. Rajhoo Bbarot, Managing Director (MD) in terms of the format provided in Appendix III of RFP documents. The POA authorized Mr. Bhole not only for submitting bid but also for signing contracts including the concession agreement and undertakings consequent to acceptances of bid etc. In terms of Clause 2.6 of RFP, NHAI vide its letter dated 13.05.2010 stated that bid was not accompanied by Board Resolution in favour of the executor of the POA i.e. Mr. Rajhoo Bbarot. It was further



pointed out that the Articles of Association do not empower the MD to execute any POA. Petitioner was further asked to deposit sum of Rs.48.50 lacs, being 5% of the bid security amount within 7 days in terms of Clause 2.20.7 of Volume I of RFP.

4. Petitioner denied applicability of Clause 2.20.7 and objected to requirement of depositing Rs.48.50 lacs. NHAI vide its letter dated 03.06.2010 stated that RFP and RFQ being two different stages, all the documents were required to be submitted at RFP stage. It further reiterated its demand for payment of Rs.48.50 lacs failing which it threatened partial encashment of the Bank Guarantee.

5. In response, the petitioner vide letter dated 03.06.2010 requested for opportunity of personal hearing which was granted on 01.07.2010. Eventually, NHAI vide letter dated 20.07.2010 adhered to its stand and reiterated that the petitioner's bid was non-responsive. The petitioner, without prejudice to its rights, deposited a sum of Rs.48.50 lacs vide Pay Order No. 001165 dated 27.07.2010 drawn on ICICI Bank.

6. Learned counsel for the petitioner contended that the petitioner's bid was compliant with all the requirements of RFP and NHAI's insistence on Board Resolution was arbitrary and unreasonable for having received the same at the time of RFQ Application. It was further contended that Clause 2.20.7 of RFP stipulating encashment of 5% of the value of bid security in case bid is found to be non-responsive, is not a genuine pre estimate of the damages as NHAI has not suffered any loss since the contract was awarded to the successful bidder. It is next contended that in case the NHAI has to recover any damages, the same could be done in a civil suit where evidence would be required to be led. He has placed reliance on the decision of M/s



Gayatri-Dlf Consortium & Ors. v. NHAI<sup>1</sup>, claiming that in a similar set of facts where the bid was held to be non-responsive on account of POA, it was held that the bid security amount was not liable to be forfeited. Reliance is also placed in the case of National Highway Authority of India v. MEIL-EDB LLC (JV)<sup>2</sup>, wherein it was held that whether a contractual provision providing forfeiture of 5% of the value of the bid security is in terrorem and is punitive in nature should be left to Civil Courts. A Writ Court can, as temporary or preliminary view, decide whether the damages are punitive or otherwise but it should abjure from going into the minute calculations which should be left to the Civil Court. It was further observed that forfeiture of 5% of the bid security amount was clearly penal in nature. Reliance is also placed on the decision of MSK Projects India Limited v. National Highway Authority of India & Anr.<sup>3</sup>, IL & FS Transport Networks Ltd. vs. National Highway Authority of India & Ors.<sup>4</sup>, Atlanta PBA JV Mumbai v. National Highway Authority of India & Ors.<sup>5</sup>, Punj Lloyd Infrastructure Ltd. v. National Highway Authority of India & Anr.<sup>6</sup>, MSK Projects India Limited v. National Highway Authority of India & Ors.<sup>7</sup> and MSK Projects India Limited v. National Highway Authority of India & Anr.<sup>8</sup> to submit that in similar facts and circumstances, Co-ordinate Benches of this Court have held that even if the bid is held to be non-responsive, 5% of the security amount would not be forfeited.

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<sup>1</sup> 2011 SCC OnLine Del 1247

<sup>2</sup> Civil Appeal No. 3053 of 2015, Dated 18.03.2015

<sup>3</sup> W.P.(C) 4946/2010 dated 28.01.2019

<sup>4</sup> W.P. (C) 6781/2010 dated 19.09.2017

<sup>5</sup> W.P. (C) 6782/2010 Dated 19.09.2017

<sup>6</sup> W.P.(C) 7036/2010 Dated 19.09.2017

<sup>7</sup> W.P.(C) 5203/2010 dated 19.07.2022

<sup>8</sup> W.P.(C) 4945/2010 dated 28.01.2019



7. *Per contra*, learned counsel for NHAI has defended the impugned communications by contending that despite being granted a number of opportunities, the petitioner failed to cure the defect and bid submitted by it remained non-responsive as not only the petitioner's Articles of Association do not provide for the MD to authorise any person to submit bid document but also no such Board Resolution was placed at the RFP stage. It is further contended that it is for the petitioner to file a civil suit to establish that forfeiture of 5% of the bid security amount is not a genuine pre-estimate of the damages.

8. Having heard learned counsels for the parties, this Court deems it apposite to set out the Clause 3.2.1 of the RFP which, *inter alia*, provides as under :-

*“3.2 Tests of responsiveness*

*3.2.1 Prior to evaluation of Bids, the Authority shall determine whether each Bid is responsive to the requirements of this RFP. A Bid shall be considered responsive only if;*

- (a) it is received as per the format at Appendix-I;*
- (b) it is received by the Bid Due Date including any extension thereof pursuant to Clause 2.12.2;*
- (c) it is signed, sealed, bound together in hard cover and marked as stipulated in Clauses 2.10 and 2.11;*
- (d) it is accompanied by the Bid Security as specified in Clause 2.1.7;*
- (e) it is accompanied by the Power(s) of Attorney as specified in Clauses 2.1.9 and 2.1.10, as the case may be;*
- (f) it contains all the information (complete in all respects) as requested in this RFP and/or Bidding Documents (in formats same as those specified);*
- (g) it does not contain any condition or qualification; and*
- (h) it is not non-responsive in terms hereof.”*

9. NHAI claims that it is entitled to forfeit 5% of the bid security amount



in terms of Clause 2.20.7 which reads as under :-

*“2.20.7 The Bid Security shall be forfeited and appropriated by the Authority as mutually agreed genuine pre-estimated compensation and 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 thereunder, or otherwise, under the following conditions:*

*a) If a Bidder submits a non-responsive Bid;..*

*xxx*

*Subject however that in the event of encashment of bid security occurring due to operation of para 2.20.7 (a), the damage so claimed by the Authority shall be restricted to 5% of the value of the Bid security.”*

10. The controversy in the present case relates to petitioner's bid being declared non-responsive for it not being accompanied by Board Resolution as required in terms of Clause 2.1.9 of RFP Document. The said clause reads as under :-

*“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.”*

11. A reading of the aforesaid clause would show that the bid was required to be submitted alongwith POA in favour of the signatory in terms of the format as provided under Appendix-III of the RFP Documents. Concededly, the bid documents were accompanied by POA executed by Mr. Rajhoo Bbarot in favour of Mr. Ulhas N. Bhole. The disputes however, relates to whether the said POA was to be accompanied by another POA or a Board Resolution in favour of Mr. Rajhoo Bbarot, authorizing him to execute the POA in favour of Mr. Ulhas N. Bhole. NHAH claims that the same was answered in light of the notations appended in Appendix-III which



reads as under: -

*“The Mode of execution of the Power of Attorney 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/power of attorney in favour of the person executing this Power of Attorney for the delegation of power hereunder on behalf of the Bidder.*

*For a Power of Attorney executed and issued overseas, the document will also have to be legalised by the Indian Embassy and notarised in the jurisdiction where the Power of Attorney is being issued. However, the Power of Attorney provided by Bidders from countries that have signed the Hague Legislation Convention, 1961 are not required to be legalised by the Indian Embassy if it carries a conforming Apostille certificate”.*

12. The controversy narrows as to whether the petitioner was required to re-submit the Board Resolution in favour of Mr. Rajhoo Bbarot at the RFP stage. Indisputably, the same was filed at the stage of RFQ Stage. The Board Resolution clearly provided that Mr. Rajhoo Bbarot was authorized to execute POA in favour of Mr. Ulhas N. Bhole to submit the bid document. A Division Bench of this Court in IVRCL Infrastructures and Projects Ltd. v. National Highway Authority of India<sup>9</sup> held that minor technical irregularities could be waived. In the said case, the Court was dealing with a situation wherein the POA submitted did not have signatures of the Company Secretary. The Division Bench held that it was not fatal to the POA and observed as under:-



*“28. We cannot lose sight of the fact that the authority, which was vested in Mr. K. Ashok Reddy originated from the Board Resolution of 28.05.2008. The minutes of the meeting of 25.08.2010 are of the Executive Committee of the Board of Directors, which in respect of the particular contract bid authorized the Power of Attorney to be executed, but in no manner take away the general powers vested in Mr. K. Ashok Reddy in pursuance of the Resolution of 28.05.2008. As noticed above, a bare perusal of the resolution dated 25.8.2010 would show that the Executive Committee which was a delegatee of the BoD exceeded its powers in putting in caveats which did not find mention in the BoD’s resolution dated 28.5.2008. Even if the document / resolution of 26.08.2010 is considered in isolation, the alleged defect, if any, is of a very minor and insignificant character in the Power of Attorney and does not take away from the authorization of Mr. R.K. Singh to present the bid.*

*29. It cannot be lost sight of that the seriousness of the bid cannot be disputed as even the RFP papers are purchased after paying lakhs of rupees and the bid is supported by the EMD of `14 Crores. If at all, there was any doubt in the mind of the respondent regarding the same, a clarification or information could have easily been sought from the petitioner in terms of sub-clause (b) of Clause 2.6.2 of the RFP which gives adequate discretion to the respondent to consult with any bidder in order to receive clarification or further information. We may also refer to Clause 2.6.2(b) where the authority has the right to reject a bid if the bidder did not provide the supplemental information sought for. In the present case, the petitioner itself volunteered the information even of the earlier Board Resolution dated 28.05.2008 under the cover of its letter dated 18.10.2010 reiterating the authority of Mr. R.K. Singh and undertaking to abide by the bid.*

*30. There is no doubt about the proposition that the terms & conditions of a tender document must be strictly adhered to.*

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<sup>9</sup> 2011 SCC OnLine Del 1246



*However, the legal position in this behalf is enunciated in Poddar Steel Corporation Vs. Ganesh Engineering Works & Ors. (1991) 3 SCC 273. It was held that deviations from non-essential or ancillary / subsidiary requirement being a minor technical irregularity can be waived. The issue, thus, arises whether the discrepancy in the present case can be stated to be of such minor technical nature.”*

13. In the decision of Central Coalfields Ltd. and Anr. Vs SLL-SML (Joint Venture Consortium) and Ors.<sup>10</sup>, the Supreme Court observed that ‘issue of acceptance or rejection of a bid of a bidder should be looked at not only from the point of view of an unsuccessful party but also from the point of view of the employer’. The well-settled principle was reiterated by the Supreme Court that the soundness of an administrative decision may be questioned only if it is irrational or *malafide* or intended to favour someone. It was further opined that the decision which no responsible authority acting reasonably and in accordance with relevant law could have reached, was also susceptible to challenge on that ground.

14. There is no dispute that Board Resolution in favour of Mr. Rajhoo Bbarot was submitted at RFQ stage. A Coordinate Bench of this Court in MSK Projects India Limited (Supra) while being seized of a similar controversy, held that requirement of bid being accompanied by an additional POA alongwith Board Resolution was not a term of the instructions to bidders, let alone an essential term. The decision to reject the petitioner’s bid as non-responsive or its insistence on petitioner re-submitting the Board Resolution, is irrational and falls squarely within the limited scope of challenge available in respect of administrative decisions. A perusal of POA executed in favour of Mr. Bhole would show that the



same is very wide in scope and authorised to sign not only the bid but also concession agreement and undertakings consequent to acceptances of bid etc. Pertinently, it is Mr. Bhole who had submitted the RFQ which was accepted by NHAI. In *MSK Projects India Limited (Supra)*, a Coordinate Bench of this Court rejected the contention that petitioner ought to be relegated to file a civil suit. Accordingly, this Court is of the view that NHAI's decision to reject the petitioner's bid as non-responsive is absurd and irrational and the same is accordingly set aside.

15. Petitioner has placed reliance on the decision of *Union of India v. Seil Ltd. (Unit Mawana Sugar Works)*<sup>11</sup> and *Gayatri-Dlf Consortium (Supra)* to contend that if the stand of the NHAI is found to be absurd, the petitioner is entitled to interest. A Division Bench in *Gayatri-Dlf Consortium (Supra)* referred its decision in W.P.(C) 8418/2010 wherein after noting Section 74 of the Contract Act, it was observed that charge if any for processing the bid stood recovered in terms of the amount paid by the bidder for purchase of RFP documents. Though, in the proceedings, NHAI has claimed that it has not kept the sum of Rs.48.50 lacs in the form of any FDR however, that it has utilized the said amount. Accordingly, NHAI is directed to refund Rs.48.50 lacs to the petitioner alongwith 6% simple interest.

16. Petition is disposed of in the above terms alongwith pending application.

**MANOJ KUMAR OHRI**  
(JUDGE)

**MARCH 24, 2025/ga**

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<sup>10</sup> (2016) 8 SCC 622

<sup>11</sup> 2006 (86) DRJ 456 (DB)