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

Date of decision: 15th FEBRUARY, 2023

IN THE MATTER OF:

+ **W.P.(C) 32/2023 & CM APPL. 71/2023**

M/S J KUMAR INFRAPROJECTS LIMITED Petitioner

Through: Mr. Parag P. Tripathi, Sr. Advocate
with Mr. Somesh Chandra Jha, Ms.
Misha Rohatgi and Mr. Devansh
Srivastava, Advocates.

versus

NATIONAL HIGH SPEED RAIL CORPORATION (NHSRCL)

..... Respondent

Through: Mr. R. Venkataramani, Attorney
General with Mr. Rajshekhar Rao, Sr.
Advocate with Ms. Richa Kapoor, Mr.
Kunal Anand, Mr. Sandesh Kumar,
Ms. Tusharika Sharma, Mr. Jai Batra,
Mr. Prakhar Dixit, Mr. Amresh Bind
and Ms. Vishakha Gupta, Advocates.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

1. *Vide* the instant Writ Petition, the Petitioner herein seeks to quash the communication dated 27.12.2022 issued by the Respondent herein by which the Respondent had cancelled the Petitioner's bid in the last stage of the bid evaluation process. The Petitioner also claims for an appropriate writ/direction/order directing the Respondent herein to consider the Bid Documents submitted by the Petitioner.
2. On 21.07.2022, Respondent herein issued invitation for bids for International Competitive Bidding for the Work of Design and Construction

of Civil and Buildings Works, including Testing and Commissioning on Design-Build Lump Sum Price basis for Double Line High Speed Railway for Mumbai Underground Station Cut & Cover Tunnel and Shaft- 1 from MAHSR Km - 0.255 to Km. 0.775 at Bandra-Kurla Complex in the State of Maharashtra for the Construction of Mumbai-Ahmedabad High Speed Rail Package No.MAHSR-C-1.

3. It is stated that as per the tender document, the Petitioner herein executed a Non-Disclosure Obligation Agreement (*hereinafter referred to as 'the NDA'*) and uploaded the same on the e-procurement portal of NIC on 26.07.2022. It is stated that the Respondent herein, after considering the NDA submitted by the Petitioner herein allowed the Petitioner to make a payment of Rs.2,36,000/- towards cost of Bidding Document. It is stated that a pre-bid meeting was conducted by the Respondent herein on 22.08.2022 and the Petitioner herein submitted its Bid Document on 03.11.2022 along with the Bid Security.

4. It is pertinent to mention here that the entire bid evaluation was to be completed in 5 stages, with Technical Evaluation being at Stage No.4 and Financial Evaluation being at Stage No.5.

5. It is stated that the Petitioner herein realized that the Bid Document submitted by the Petitioner was not being considered by the Respondent as the Petitioner was neither receiving any queries nor any information from the Respondent herein. It is stated that on checking the copy of the Bank Guarantee for Bid Security issued by its Banker, i.e., Indian Bank, the Petitioner realised that a formal sentence in the end of the Bank Guarantee has been missing in the said Bank Guarantee. The said sentence reads as under:

"This guarantee is subject to the Uniform Rules for

*Demand Guarantees (URDG) 2010 Revision, ICC
Publication No. 758”*

6. It is stated that the Petitioner herein approached the Bank pointing out the missing line and a fresh bank guarantee was submitted by the Petitioner on 22.12.2022. It is stated that on 28.12.2022, the price bids of other bidders were opened and the bid of the Petitioner herein, which, according to the Petitioner, may be substantially lower, was not considered by the Respondent herein.

7. The Petitioner has, therefore, approached this Court by filing the instant Writ Petition stating that the reason for rejecting the bid was only a missing formal sentence in the Bank Guarantee that could not be a valid ground for rejection of the bid.

8. The matter came up for hearing on 06.09.2022 and this Court directed the Respondent herein to file a detailed reply in the matter.

9. Reply has been filed. In the reply, Respondent herein has raised a preliminary objection on the maintainability of the instant Writ Petition. The Respondent has relied on Clause 28.1 and 42.5 of the Instructions to Bidders and has stated that the instant Writ Petition is pre-mature. It is contended by the Respondent that as per Clauses 28.1 and 42.5 of the Instructions to Bidders, any challenge by the Petitioner to the disqualification of its technical bid by the Respondent is maintainable only after the tender is finalized. It is stated that the present case relates to a Foreign Sovereign Funded Mega Project i.e. Mumbai-Ahmedabad High Speed Rail, popularly known as the Bullet Train Project. It is stated that for the project, a Memorandum of Understanding was entered into between the Japanese and Indian Governments and it was agreed that the project would be fully funded by a Concessional Official Development Assistance (*hereinafter referred to*

as 'the ODA') loan of over Rs.80,000/- Crores by Japan International Corporation Agency (*hereinafter referred to as 'the JICA'*). It is stated that pursuant to signing of the MoU between the two countries, a discussion was held between the JICA and the Ministry of Railways, Government of India, and a Record of Discussion was released which included the following aspects:

- "(1) A Technical specifications and standards, as required for the project (excluding those prepared under the Follow- up Study);*
- (2) Basic Design Documents including drawings and Design Basis Reports necessary for bidding or including drawings and Design Basis Reports necessary for bidding or implementation of the Project;*
- (3) Standard design documents including drawings and design basic reports necessary for bidding or implementation of the project;*
- (4) Detailed Design Documents including drawings and Design Basis Reports necessary for bidding or implementation of the Project;*
- (5) Bidding Documents, including Prequalification Documents (*hereinafter referred to as "Bidding Documents"*);*
- (6) General Arrangements Drawings (*hereinafter referred to as "GAD"*);*
- (7) Cost Estimate of the Project;*
- (8) Construction Standards; and*
- (9) Updated Resettlement Action Plan, Environment Impact Assessment and Environmental Management Plan which were prepared under the Joint Feasibility*

Study (F/S) "

10. It is stated that the bidding documents are based on JICA's Standard Bidding Documents under Japanese ODA loans of JICA as well as JICA's procurement guidelines under Japanese ODA Loans and JICA has appointed Japan International Consultants Consortium (JICC) as the consultant for design and drafting of the bidding documents for the project packages including evaluation of bids and the process of bidding and the subsequent decisions are to be vetted by JICA. It is further stated that four bids, including the bid of the Petitioner, was received by the Respondent and as per the Japanese ODA Loan, all the four technical bids were sent to JICC for evaluation on 04.11.2022. It is stated that the Technical Bid Evaluation Report (TBER) dated 16.12.2022 was received by the Respondent from JICC and the Internal Tender Committee of the Respondent made recommendations in respect of the TBER and forwarded the same to JICA on 17.12.2022 and after receiving the approval from JICA, the result of the technical bid evaluation was notified to all the bidders on 27.12.2022. It is stated that it is only after a detailed evaluation conducted by JICC and the Internal Tender Committee of the respondent and approval by JICA, the technical bid of the Petitioner herein was rejected for being non responsive and the price bid of other three bidders was opened on 28.12.2022 as their technical bid was approved by JICA to be substantially responsive.

11. It is stated by the Respondent that the instant Writ Petition is premature as the parties are bound by Clause 28.1 of Instructions to Bidders for not disclosing the reasons to the Bidders until information on contract award is communicated to all the bidders in accordance with Clause 42 of the Instructions to Bidders. It is further stated that as per Clause 42.5 any unsuccessful bidder may request the Respondent herein, in writing, seeking

explanations on the grounds on which their bid has not been selected.

12. Heard the Counsel for the parties and perused the material on record.
13. Clause 28.1 & 42.5 of the Instructions to Bidders, on which reliance has been placed by the Respondent, reads as under:

“28.1 Information relating to the evaluation of Bids and recommendation of Contract award, shall not be disclosed to Bidders or any other persons not officially concerned with such process until information on Contract award is communicated to all Bidders in accordance with ITB 42.

42.5 After notification of award, unsuccessful Bidders may request , in writing, to the Employer a debriefing seeking explanations on the grounds on which their Bids were not selected. The Employer shall promptly respond in writing , to any unsuccessful Bidders who, after the notification of the award in accordance with ITB 42.1 , request a debriefing.”

14. A similar issued was raised before the Apex Court in National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd., (2022) 6 SCC 401. The case dealt with the very same Clauses on which reliance has been placed in the present case. In the said case, the High Court had allowed the Writ Petition filed by the bidder therein and had quashed the communication informing the bidder therein about rejection of his bid on the ground of being non-responsive and the Apex Court, after discussing the entire agreement and the case laws on the point, has observed as under:

“29. Thus, from the aforesaid decisions, it can be seen that a court before interfering in a contract matter in exercise of powers of judicial review should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour

someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”? And

(ii) Whether the public interest is affected?

If the answers to the above questions are in the negative, then there should be no interference under Article 226.

30. *Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and when a conscious decision was taken by JICC/JICA holding the bid submitted by the original writ petitioner as non-responsive/non-compliant to the technical requirements of the bidding documents and suffering from material deviation, we are of the opinion that the High Court has erred in interfering with the tender process and interfering with the decision of JICC/JICA rejecting the bid submitted by the original writ petitioner at technical stage.*

31. *At the outset, it is to be noted that the bid submitted by the original writ petitioner was rejected at the first stage on the ground of material deviation/non-responsive and having found that the tender submitted by the original writ petitioner was not found to be as per the terms and conditions of the tender document. However, the High Court by the impugned judgment and order [Montecarlo Ltd. v. National High Speed Rail Corp. Ltd., 2021 SCC OnLine Del 4112] has set aside the conscious decision taken by JICA, JICC and the appellant by observing that the bid submitted by the original writ petitioner can be said to be in substantial compliance and on the ground that though the other bidders were given opportunity to correct their errors/defects, however, the original writ petitioner was not afforded the same opportunity and therefore the*

decision not to give opportunity to correct the defects/errors can be said to be discriminatory and violative of Article 14 of the Constitution of India.

40. *Under the circumstances, the High Court has erred in interfering with the conscious decision of JICC/JICA/appellant/Tender Committee to reject the bid submitted by the original writ petitioner at Stage I on the ground that the bid submitted by the original writ petitioner was suffering from material deviation.*

41. *Now so far as the view taken by the High Court in the impugned judgment and order [Montecarlo Ltd. v. National High Speed Rail Corpn. Ltd., 2021 SCC OnLine Del 4112] that Clause 28 under Clause (e) of Option A Section 1 and Clause 42.5 of ITB are patently illegal, inasmuch as they seek to curtail the right of the bidders to challenge the rejection of their bid in a multi-stage bidding process at the earliest, and before the award of the contract is concerned, at the outset, it is required to be noted that as such the aforesaid clauses of ITB were not under challenge before the High Court. Even otherwise, it is required to be noted that Clauses 28.1 and 42.5 of ITB were well within the knowledge of the original writ petitioner at the time of participating in the tender process. The aforesaid clauses of ITB were put to the knowledge of all the participants/bidders and the same applied to all. Despite the above clauses in ITB, the original writ petitioner participated in the tender process. Therefore, once having accepted the terms and conditions of the tender process with the full knowledge of Clauses 28.1 and 42.5, and participated with full knowledge, thereafter, it was not open for the original writ petitioner to make a grievance with respect to such clauses.*

42. *Even otherwise, it is required to be noted that Clauses 28.1 and 42.5 are part of the instructions to the*

bidders (ITB) and, therefore, part of the bidding document. At this stage, it is required to be noted that loan agreement was materialised after a detailed memorandum of understanding and the loan agreement between the two Prime Ministers and how the project would be financed and operated. That thereafter followed by general consultancy of the project discussion, it was culminated into a loan agreement with the specific condition that the terms of the contract and the bid document shall be finalised and prepared by JICC and approved by JICA. It appears that the contents of the bidding document are based on JICA's standard bidding documents as well as JICA's procurement guidelines and form an integral part of the loan agreement. It is to be noted that such foreign funded investments in the form of concessional Official Development Assistance ("ODA") loan by JICA are made on the basis of non-negotiated terms and conditions, where the sole discretion as to what will be the terms and conditions of the tender and on what terms and conditions the project would be financed, vests with the investor foreign developed nation. Therefore, the impugned judgment and order [Montecarlo Ltd. v. National High Speed Rail Corpn. Ltd., 2021 SCC OnLine Del 4112] passed by the High Court on Clauses 28.1 and 42.5 would be altering the terms and conditions of the bid document/ITB, which as such were finalised and approved by JICC/JICA and which were provided as per JICA's international guidelines and which as such were to be complied with by all the bidders/participants.

43. *Even otherwise, the High Court has not at all appreciated the purpose of the aforesaid clauses. The aforesaid clauses stated that information relating to the evaluation of the bids and recommendation of the contract award, shall not be disclosed to bidders or any other person, until information on contract award is communicated to all the bidders in accordance with ITB 42 and as per Clause 42.5 "After notification of*

award, unsuccessful bidders may request, in writing, to the employer a debriefing seeking explanations on the grounds on which their bids were not selected". It further provides that "the Employer shall promptly respond, in writing, to any unsuccessful bidders who, after the notification of the award in accordance with ITB 42.1, request a debriefing".

43.1. *Thus, Clauses 28.1 and 42.5 read as under:*

"Option A — Section I. Instructions to bidders

Clause E. Evaluation and Comparison of bids

28. Confidentiality

"28.1. Information relating to the evaluation of bids and recommendation of contract award, shall not be disclosed to bidders or any other persons not officially concerned with such process until information on contract award is communicated to all bidders in accordance with ITB 42.

Clause F. Award of Contract

42. Notification of Award

42.5. After notification of award, unsuccessful bidders may request, in writing, to the employer a debriefing seeking explanations on the grounds on which their bids were not selected. The employer shall promptly respond, in writing, to any unsuccessful bidders who, after the notification of award in accordance with ITB 42.1, request a debriefing."

43.2. *The purpose of the aforesaid clauses appears to be to prevent a possible challenge to the multiple stage*

tender process midway. The High Court has construed that the said clauses would restrict the right of the bidders to seek judicial scrutiny of the tender process. However, the High Court does not seem to be wholly true. The High Court ought to have appreciated that first of all Clause 28 is a confidentiality clause. On general reading of the aforesaid two clauses, it can be said that it does not take away the right of the bidders to seek judicial scrutiny at all. Only the stage and time to know the reasons and thereafter if the unsuccessful bidder is aggrieved can seek the remedy, which is deferred till the final decision on award of contract is taken and communicated.

43.3. *As observed hereinabove, the object and purpose would be no interference in the tender process in between till the final decision to award the contract is taken. By no stretch of imagination, it can be said that it takes away the right of the unsuccessful bidder to seek the judicial scrutiny of the tender process. After the final decision is taken to award the contract and the contract is awarded, thereafter it will always be open for the unsuccessful bidders to ask for the reasons to which the employer is required to furnish promptly and thereafter the unsuccessful bidder may avail the legal remedy, which may be available to it, may be claiming the damages.*

43.4. *The High Court ought to have appreciated that it is always advisable that in such a foreign funded Mega project, delay may have a cascading effect and many a times have a financial burden due to delay in projects and therefore, there shall be minimal interference and/or no interference till the entire tender process or till the award of contract is completed. The foreign funded agency therefore is justified in providing such clauses to prevent challenge to the tender process midway. A foreign funded agency, who invests/funds such a huge amount for such a Mega project on bilateral talks*

between two countries is justified in insisting such clauses and to insist that the information relating to the evaluation of the bids and recommendation of contract award shall not be disclosed to bidders or any other person until information on contract award is communicated to all the bidders and the grounds on which the unsuccessful bidders' bids are not selected shall be provided thereafter.

43.5. The object and purpose of providing the aforesaid clauses is very clear, namely, no interference with respect to the tender process midway and till the final decision on awarding the contract is taken. Even, we are also of the opinion that in a Mega project, which is funded by a foreign country, there shall not be any interference with the tender process midway till the final decision is taken to award the contract. The reason behind this is that any delay in such a project may increase the ultimate project cost and it may affect the future investment by the foreign country, which would never be in the larger nation's interest.

44. Under the circumstances, the High Court has committed a grave error in holding that Clauses 28.1 and 42.5 are patently illegal, more particularly, in the absence of any challenge to the same and also on the ground that once the original writ petitioner participated having knowledge of the aforesaid clauses in ITB, thereafter it was not open for the original writ petitioner to challenge the same. The original writ petitioner was knowing right from the very beginning with respect to the confidentiality clause contained in Clause 28 and that grounds on which the bids of unsuccessful bidders are not selected shall be communicated only after a final decision to award the contract is communicated under Clause 42. If the original writ petitioner was aggrieved either it would not have participated and/or ought to have challenged such clauses before participating in the tender process.

Under the circumstances, the impugned judgment and order [Montecarlo Ltd. v. National High Speed Rail Corpn. Ltd., 2021 SCC OnLine Del 4112] passed by the High Court holding Clauses 28.1 and 42.5 as patently illegal cannot sustain and the same also deserves to be quashed and set aside.

45. Before we part, we deem it proper to express few words of caution to the High Courts while entertaining the writ petitions challenging the tender process midway and/or while interfering with the tender process in the contracts, more particularly, with respect to the contracts/projects funded by the foreign countries and with respect to the Mega project like the present one. Before entertaining the writ petition with respect to such Mega projects funded by the foreign countries, one has to appreciate that funds of such Mega projects by the foreign country is followed by a detailed discussion between the Prime Ministers of both the countries and to strengthen bilateral cooperation in the rail sector. The foreign country is ready to invest/fund such a huge amount on non-negotiated terms and the bid documents are prepared by the foreign financial agency/country in accordance with the latest version of the standard bidding documents. These investments from developed nations are made on the basis of non-negotiated terms and conditions, where the sole discretion as to what would be the conditions of the investments and on what terms the contractors would be chosen to implement the project, vests with the investor foreign developed nation. Considering the special peculiarities of such foreign sovereign funded development contracts, which can be envisaged and exist only due to the availability of the investment and willingness of the foreign sovereign country to finance such infrastructure project, the said contracts assume different characteristics. Therefore, there shall be different considerations so far as the judicial interference is concerned between the foreign funded

contracts and the ordinary public works contracts funded from public exchequer.”

(emphasis supplied)

15. The said case covers the instant case on all fronts. The instant Writ Petition is, therefore, pre-mature at this juncture.

16. At this stage, Mr. Parag P. Tripathi, learned Senior Advocate appearing for the Petitioner, submits that the Respondent be directed to give the reasons for rejecting the bid of the Petitioner herein not later than a week's time so as to enable the Petitioner to file a fresh Writ Petition.

17. Mr. R. Venkataramani, learned Attorney General appearing for the Respondent, contends that Clause 42.5 covers the issue in entirety.

18. As per Clause 42.5 of the Instructions to Bidders, after notification of award, unsuccessful Bidders may request, in writing, to the Employer a debriefing seeking explanations on the grounds on which their Bids were not selected and the Employer shall promptly respond in writing.

19. In view of the above, this Court is not inclined to interfere with the procedure as mentioned in Clause 42.5.

20. However, it is always open for the Petitioner to seek from the Respondent the grounds on which their bid has been rejected and the same shall be promptly replied to by the Respondent.

21. With these observations, the Writ Petition is dismissed, along with the pending applications.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

FEBRUARY 15, 2023/Rahul