

M/S Jsp Projects Pvt Ltd vs National Highways Authority Of India ... on 13 August, 2021

Author: Vipin Sanghi

Bench: Vipin Sanghi, Jasmeet Singh

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ W.P.(C) 5946/2021 & CM APPL. 18763/2021

M/S JSP PROJECTS PVT LTD

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA THROUGH

ITS CHAIRMAN Respondent

+ W.P.(C) 6056/2021 & CM APPL. 19175/2021

M/S JSP PROJECTS PVT. LTD.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA THROUGH

ITS CHAIRMAN Respo

+ W.P.(C) 6249/2021 & CM APPL. 19759/2021

M/S JSP PROJECTS PVT LTD Petitioner

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA THROUGH

ITS CHAIRMAN Respondent

MEMO OF APPEARANCE

For the petitioner

Mr. Manish Gupta and Mr. Neelmani Guha, Advs.

For the respondent

Mr. K. M. Nataraj, Additional Solicitor General of
Maurya Vijay Chandra and Mr.Vinayak Sharma, Advs.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

% 13.08.2021 W.P.(C) 6249/2021 & CM APPL. 19759/2021 Since it has been pointed out, that the rejection of the petitioner's technical bid after issuance of show cause notice to the petitioner was communicated on 30.03.2021, whereas the present writ petition has been preferred only on 07.07.2021 and, therefore, this petition is barred by delay and laches, the learned counsel for the petitioner does not fairly press this petition. The same is, accordingly, dismissed as withdrawn for the aforesaid reason.

W.P.(C) 5946/2021 & CM APPL. 18763/2021 & W.P.(C) 6056/2021 &

1. These petitions involve a similar question of law in a similar factual background and, therefore, they are being dealt with by this common order.

2. The petitioner responded to the RFPs in question initiated by the respondent being RFPs dated 18.01.2021 and 01.04.2021.

3. The disqualification in respect of RFP dated 18.01.2021 (which is under challenge in W.P.((C) NO. 5946/2021) was communicated on 11.06.2021, on the ground "non-responsive on account of a case pending in CBI/ ED involving the bidder relating to money laundering". Similarly, in respect of RFP dated 01.04.2021(which is under challenge in W.P.((C) NO. 6056/2021), the respondent communicated the petitioner's disqualification vide communication dated 23.06.2021, which too contained similar ground of disqualification.

4. The submission of learned counsel for the petitioner is that the said disqualification is bad primarily for three reasons. Firstly, learned counsel for the petitioner submits that the tender conditions envisaged the appointment of Independent External Monitors (IEM) to provide a platform to the bidders for ventilating their grievances in the event of there being difference of perception between the bidder and the respondent authority on any matter. The petitioner's grievance is that in relation to these two RFPs, no IEM was nominated by the respondent.

5. The RFPs in question are governed by Annexure VII of Appendix-1A in terms of Clause 1.2.1. The said Annexure VII of Appendix-1A contains the Office Memorandum dated 13.07.2001 issued by the Department of Disinvestment, Government of India bearing No. 6/4/2001-DD-II. The said Office Memorandum lays down the guidelines for qualification of bidders seeking to acquire stakes of public sector enterprises through the process of disinvestment. It contains the decision of the Government to prescribe additional criteria for qualification/ disqualification of the parties seeking to acquire stakes in public sector enterprises through disinvestment. This O.M. inter alia, provides in Clause b - which is sought to be relied upon by the respondent to disqualify the petitioner, as follows:

"(b) In regard to matters relating to the security and integrity of the country, any charge-sheet by an agency of the Government/ conviction by a Court of Law for an offence committed by the bidding party or by any sister concern of the bidding party would result in disqualification. The decision in regard to the relationship between the sister concerns would be taken, based on the relevant facts and after examining whether the two concerns are substantially controlled by the same person/ persons."

6. Clause (f) of the said Office Memorandum reads as follows:

f) Before disqualifying a concern, a Show Cause Notice why it should not be disqualified would be issued to it and it would be given an opportunity to explain its position.

7. The second grievance of the petitioner is that for holding the petitioner to be disqualified by resort to Clause (b), the respondents were obliged to issue a show cause notice under clause (f) as to why he should not be disqualified, and the petitioner should have been given an opportunity to explain his position. However, that opportunity has, admittedly, not been granted to the petitioner, since no show cause notice was issued, and the petitioner straight away was visited with the impugned disqualification communication.

8. The third submission of learned counsel for the petitioner is that the disqualification of the petitioner by resort to clause (b) of Annexure VII in Appendix IA is also erroneous inasmuch, as, to invoke the said clause, it was necessary for the respondent to satisfy themselves that the pendency of the ECIR against the erstwhile director of the petitioner company under the Prevention of Money Laundering Act, 2002 (PMLA), raises issues of security and integrity of the country.

9. The petitioner was required to place before this Court, the documents in relation to the proceedings initiated under the PMLA vide our order dated 20.07.2021. They have been placed on record along with the rejoinder filed by the petitioner in W.P.(C) No. 5946/2021. The same has been adopted by the petitioner in the other matter aforesaid as well.

10. Learned counsel for the petitioner submits that the gist of the charge against the accused in the said PMLA case is that the accused, firstly, indulged in acts of corruption while occupying a public office (in respect of which a case under the Prevention of Corruption Act is registered by the CBI), and the proceeds of the said crime, namely, those accumulated by resort to acts of corruption, have been laundered by the accused to create/ acquire properties. Learned counsel for the petitioner has submitted that merely because a case under the PMLA has been registered against the accused, it does not follow that, necessarily, it is a matter relating to the security and integrity of the country. Therefore, Clause (b) of Annexure VII Appendix IA would not be attracted, even if the allegations contained in the ECIR in question were assumed to be true.

11. Mr. Nataraj, learned ASG who appears for the respondent fairly concedes that before disqualification of the petitioner, no show cause notice was issued to it, and the petitioner was not granted an opportunity to explain its position. At the same time, he submits that to issue a show cause notice, and to grant an opportunity to the petitioner would be an empty formality, since - according to the respondent's understanding, mere registration of ECIR under the PMLA raises issues of security and integrity of the country. For this he seeks to place reliance on the Introduction to the PMLA, which opens with the words "Money-laundering poses a serious threat not only to the financial systems of countries, but also to their integrity and sovereignty"

12. We have heard learned counsel for the petitioner, the learned ASG, and also perused the record. We have also perused the Prevention of Money Laundering Act, 2002 (PMLA). An act of money laundering may pose a serious threat to the financial system of the country. However, it does not follow that every act of money laundering, even if established, would necessarily impinge on the integrity and sovereignty of the nation. In the facts of the present case, there is no allegation against the accused of undertaking an activity, or resorting to conduct which would, ex facie, be described having a bearing on the integrity and sovereignty of the country. As aforesaid, the case is one where

the accused has been charged of indulging in corrupt activities, and proceeds of that crime have allegedly been laundered to acquire properties and assets.

13. In our view, if the respondent had granted an opportunity to the petitioner to show cause as to why it should not be disqualified by resort to clause (b) of Annexure VII Appendix IA, the petitioner may have been able to satisfy the respondent that its case is not covered by the said Clause (b). We are, therefore, of the view that the impugned communications issued to the petitioner rejecting its bid cannot be sustained and we, accordingly, set aside the same. We leave it open to the respondent to issue show cause notice to the petitioner on the aforesaid ground, or any other ground that it may validly have in respect of both the matters; call for the explanation; and, then take a reasoned decision on the aspect of the petitioner's disqualification, inter alia, under Clause (b) of Annexure VII Appendix IA. The respondents would, thereafter, be free to proceed with the tender process in accordance with law.

14. At this stage, we are informed that the financial bids of the earlier qualified bidders have been opened. Learned counsel for the petitioner, on instructions, states that insofar as Package 1 is concerned - which is the subject matter of W.P.(C) No. 5946/2021, the rates quoted by the petitioner are lower than the rates found in the financial bids so far opened. Therefore, if the petitioner's financial bid is opened, the petitioner would be L1 bidder. However, he fairly concedes in relation to Packages 2 and 3 which are the subject matter of W.P.(C) No. 6056/2021, the petitioner is not the L1 bidder.

Therefore, issuance of show cause notice in terms of this decision, and the calling of explanation from the petitioner would be of no avail in relation to Package 2 and 3. Accordingly, the show cause notice may be issued in respect of Package 1, which forms the subject matter of W.P.(C) No. 5946/2021, and the issuance of show cause notice is dispensed with in relation to Packages 2 and 3 forming subject matter of W.P.(C) No. 6056/2021. The respondent may proceed to further process the RFP in respect of Packages 2 and 3.

15. The petitions stand disposed of in the aforesaid terms.

VIPIN SANGHI, J JASMEET SINGH, J AUGUST 13, 2021 N.Khanna