Jmc Projects (India) Ltd. & Ors. vs National Highways Authority Of India & ... on 4 February, 2022

Author: Rekha Palli

Bench: Rekha Palli

Via Video Con

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on:-24.01.2022

Date of Decision:-04.02.2022

\+ W.P.(C) 13160/2021 & CM APPL. 41527/2021(interim)

JMC PROJECTS (INDIA) LTD. & ORS. ....

Through Mr. Sandeep Sethi, Sr. Adv.
Shamik Sanjanwala, Ms.Deepaprabha, Advs

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA & ORS.

..... Respondent

Through Mr. Parag P Tripathi, Sr. A
Ms. Gunjan Sinha Jain, Ms. Aparna Gupt
Anirudh Dusaj, Advs. for R-1
Ms.Manisha Agrawal, Narain, Mr.Aditya
Deshwal, Ms.Rakshita Goyal, Advs for R
Mr.Rishi Agrawala with Ms.Shruti Arora
for R-3.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J

JUDGMENT

1. The present petition under Article 226 of the Constitution of India assails the communication dated 18.11.2021, issued by the respondent no.1/National Highway Authority of India (hereinafter referred to as 'NHAI'). Vide the impugned communication the petitioner no.3, namely JMC-AGE Joint Venture, which is a joint venture (JV) of petitioner no.1, and M/s AGE INSAAT VE TICARET ANONIM SIRKETI (hereinafter referred to as 'AGE INSAAT'), a company incorporated in Turkey, has been informed that security clearance required for award of the contract in its favour by the respondent no.1 has been denied by the Competent Authority i.e., respondent no.2.

2. The petitioner no.1 is a company incorporated in India under the Companies Act, having its registered office at Ahmedabad, Gujarat. The petitioner no.1 is the lead member holding 76% share in the petitioner no.3 JV, while AGE INSAAT is holding the remaining 26% share therein. The petitioner no.2 is a shareholder of the petitioner no.1 company.

3. The respondent no.1/NHAI, an authority under the Ministry of Road Transport and Highways (hereinafter referred to as 'MORTH'), established vide the National Highways Authority of India Act, 1988, is responsible for the construction, development and maintenance of various highways across India. The respondent no.2/Ministry of Home Affairs (hereinafter referred to as 'MHA'), is the authority entrusted with the task of granting security clearance to bidders, or in the case of a joint venture, to such members, wherein the controlling interest of 50% or more is held by persons residing outside India. It is respondent no.2 which has taken the decision to not grant security clearance to the petitioners, based on which the impugned communication dated 18.11.2021 has been issued.

4. On 13.05.2021, the respondent no.1 issued a Request for Proposal (hereinafter referred to as 'RFP') for construction of 'four laning of part of Ramban to Banihal Section of NH-1A (now NH-44), from CH.154+2.0 to CH158+675 (North Bound) and from CH.155+940 to CH.160+282 (South Bound) including construction of Twin Tube Tunnel (Package-I) in the Union Territory of Jammu && Kashmir by EPC Mode' (hereinafter referred to as 'the project'). The work under the project was to be conducted in the EPC mode i.e. 'Engineering Procurement and Construction' mode. As per routine, the bidding process was divided in two parts i.e. determining the technical responsiveness, followed by the assessment of the financial bids. In terms of the conditions of the RFP, the bidding was, subject to certain conditions, also open to persons from countries other than India; one of the primary conditions for the same being approval of the Competent Authority from national security and public interest perspective, as per the applicable instructions of the Government of India, in terms of clause 2.1.12(a) of the RFP. It is this clause which is the bone of contention between the parties.

5. On 28.05.2021, the petitioner no.1 entered into a Joint Bidding Agreement with AGE INSAAT, whereafter a bid was submitted by the JMC-AGE JV on 20.07.2021. The JV was declared as technically qualified, and the petitioner no.3 was informed that the financial bids of all the six responsive bidders would be opened at the headquarters of the respondent no.1 on 27.08.2021. Upon the financial bids being opened, the petitioner no.3 emerged as the L-1 bidder as its bid at INR 1031 crores was found to be 20.31% lower than the respondent no.1's estimated project cost of INR 1293.78 crores. The details of the six bidders whose financial bids were opened may be noted hereinbelow:

Serial no.	Name of Bidder	Financial B
1.	JMC Projects (India) Ltd.-AGE INSAAT VE TICARET ANONIM SIRKETI (JV	INR.1031 Crores

2.	Tata Projects Limited - Private Joint Stock Company "Construction Association Interbudmontazh" (JV)	INR.1049 Crores
3.	HG Infra Engineering Limited- Patel Engineering Limited (JV)	INR.1078.1 Crores
4.	Apco Infratech Private Limited	INR.116 Crores
5.	Larsen & Toubro Limited	INR.118 Crores
6.	Gawar Construction Limited - Bharat Construction (lndia) Private Limited New India Structures Private Limited (JV)	INR.1190 Crores

6. It is the petitioner's case that, after having been declared as the L-1 bidder, while it was awaiting the issuance of a letter of award (hereinafter referred to as 'LOA') in its favour, the impugned communication dated 18.11.2021 was received from respondent no.1, whereby it was informed that the Competent Authority has declined to give security clearance in its favour. Consequently, despite having been declared as the L-1 bidder, the petitioner's bid was rejected.

7. It is at this stage, that the petitioners approached this Court by way of the present petition. On 23.11.2021, this Court adjourned the matter to 29.11.2021, to enable the learned counsel for respondent no.2 to obtain instructions. On 29.11.2021, when the matter was next listed, this Court was informed by the respondent no.1 that since security clearance for issuing the LoA to petitioner no.3 had been declined by respondent no.2, the same had now been awarded in favour of the second lowest bidder (hereinafter referred to as 'the L-2 bidder'), who had matched the price as quoted by the petitioner no.3. Since the award in favour of the L-2 bidder was made subject to further orders passed in the present petition, the said bidder has subsequently been impleaded as respondent no.3 in these proceedings.

8. In support of the petition, Mr. Sandeep Sethi, learned senior counsel for the petitioner, has made the following submissions:-

> i. Firstly, he contends that the very basis of the respondent no.1's action in seeking security clearance for issuance of the award in the petitioner no.3's favour, thereby making it ineligible for award of the contract, was contrary to the specific terms of the RFP. He submits that on a plain reading of clause 2.1.12 of the RFP, it is evident that the said clause was not applicable to petitioner no.3. Merely, because one of the members of the petitioner no.3 JV is a Turkish company, this could not have been a ground to apply clause 2.1.12(a) of the RFP, by ignoring the fact that the petitioner no.1, with 74% share in the JV is the lead member therein, and is a company incorporated in India and therefore, the control of the JV is with an Indian company, wherein a Turkish company was a minority participating member with the remaining 26% share. According to Mr. Sethi, the clause 2.1.12(a) of the RFP clearly envisages that requirement of approval from the Competent Authority from a national security

perspective is required only when not less than 50% of the aggregate issued, subscribed and paid-up equity shares in the L-1 bidder is held by persons resident outside India. The essence and substantive purpose of the clause is to bring within the scanner of security clearance all such JVs where the controlling interest of 50% or more is held by a member of the JV from a country outside India.

ii. He contends that in the present case, the petitioner no.3 is in fact, not even an incorporated body and, in any event, the lead participating partner as per the Joint Bidding Agreement is petitioner no.1, for which purpose he has drawn my attention to clauses 4 & 6 of the JV agreement executed by the petitioner no.1 and AGE INSAAT. He, therefore, urges that in the face of the specific provision of the RFP, which makes it abundantly clear that security clearance would be required only when the controlling interest of 50% or more was held by a person resident outside India, the respondent cannot now be permitted to interpret the clause in any other manner. He contends that the clauses of the RFP have to be read as a whole, instead of in bits and pieces, and in a manner which furthers the object behind the introduction of a condition like the present case. In support of his plea that the clauses of a commercial contract must be construed using the rule of purposive construction and in a business common sense, he relies on a decision of the House of Lords in Antaios Compania Navierya S A v. Salen Rederierna A B (the Antaios) (NO 2) House of Lords paragraph 13 which decision has also been followed by a Division Bench of this Court in RDS Projects v. Ratangiri Gas and Power pvt. Ltd. ILR (2012) I DELHI 490.

iii. Mr. Sethi, then, contends that even otherwise, the Turkish company forming part of petitioner no.3 JV has been executing several other projects in the country, including the USBRL Rail project in Jammu and Kashmir which project, as is well known, is of great national importance since it provides the Kashmir valley connectivity with the rest of the regions in the J&K state. He, thus, contends that, the ground provided for the rejection of the petitioner's bid on account of want of security clearance to AGE INSAAT, a member of the JV, is completely contrary to the stand taken by the Union of India (UOI) in the past with regard to the same company, and that too without any cogent reasons for this radically different view regarding the security concerns with AGE INSAAT.

iv. Mr. Sethi then submits, that the respondent's plea that the security clearance was necessarily required for awarding the contract to the petitioner no.3 merely because one of its' members, even though a minority member, was a Turkish company, controlled by persons resident outside India, is belied by the respondent no.1's adopted stand vis-à-vis the respondent no.3. Admittedly, no security clearance for respondent no.3 was ever sought for by respondent no.1 before awarding the contract in favour of the L-2 bidder/the respondent no.3 namely 'Tata Projects Limited - Private Joint Company Construction Association Interbudmontazh (hereafter referred to as the 'TPL-CAI JV'). Even though one of the members of the L-2 bidder is a Ukrainian company, yet no security clearance was ever sought from it; thus,

arbitrariness on the part of the respondent is writ large. This action besides being discriminatory, is also contrary to the interpretation sought to be given by the respondent itself to clause 2.1.12 (a). The respondent no.1, which is a body controlled by the MORTH, and falls within the ambit of the term 'State' under Article 12 of the Constitution, cannot be permitted to discriminate against the petitioners in such a manner. Being a State, all actions of the respondent no.1 are open to public gaze and must be fair and reasonable.

v. Finally, Mr. Sethi, submits that, if the plea of the respondent nos.1 & 2 were to be accepted that no security clearance was required for a joint venture bidder in case its foreign member was based in Ukraine, a country, which according to the respondent no.1 did not feature in the list of 'Countries of Concern', it was incumbent upon the respondent no.1 to disclose this fact in the RFP itself. This was essential to ensure that all bidders, including the petitioner no.1, who entered into a Joint Bidding Agreement with AGE INSAAT to form petitioner no.3 JV, could have arranged their affairs in an appropriate manner, and instead of entering into a Joint Bidding Agreement with a Turkish company, could have then entered into a Joint Bidding Agreement, if necessary, with a company based in a country for which no such security clearance would be required. Mr. Sethi, contends that, since it is an admitted position that no security clearance was sought in respect of respondent no.3, the LoA in its favour has to fail and the respondents ought to be directed to re-tender the project, as this decision of the respondent no.1 is patently arbitrary on the very face of it and such arbitrariness by a public authority can be permitted.

vi. In support of his arguments, Mr. Sethi, places reliance upon the decision of the Apex Court in Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries (1993) 1 Supreme Court Cases 71 to contend that the government, in contractual sphere as in all other state actions, has to necessarily conform to Article 14 of the Constitution of India, of which non-arbitrariness is a necessary facet. He, also places reliance, on the decision of the Apex Court in Ramayana Dayaram Shetty v. International Airport Authority of India and others (1979) 3 SCC 489 to emphasise on the importance of maintaining high standards when it comes to the decisions of public authorities, and the low tolerance for any form of arbitrariness which may creep into the process.

9. On the other hand Mr. Parag P. Tripathi, learned senior counsel for the respondent no.1 vehemently opposes the petition by making the following submissions:-

i. Firstly, Mr. Tripathi submits that the petitioner is seeking judicial review of a valid reasoned administrative action taken by the respondent no.2 for denial of security clearance to a member of the petitioner no.3 JV, which is not permissible in law, and therefore, the writ petition deserves to be rejected on this ground alone. He, contends that it was a specific condition of the RFP and the respondent no.1 had the absolute right to reject any bid or even cancel the tender, in terms of clause 2.16.1 of the RFP. In support of his plea, he places reliance on the decision of the Apex Court in State of Jharkand & Ors. V. CWE-SOMA Consortium (2016) 14 SCC 172, wherein it was held

that a decision of an authority cannot be interfered with by High Courts unless the same is found to be mala fide or arbitrary.

ii. He, further submits, that the decision to reject the petitioner's bid has been taken in public interest after the respondent no.2 has taken into account all relevant factors such as inputs from security agencies, international security concerns and the location of the project in question. This led to a refusal to grant security clearance to the petitioner no.3 and therefore, the power of judicial intervention, which needs to only be exercised in case of patent arbitrariness or irrationality, ought not to be exercised in the present case. Reference is made to the decision of the Supreme Court in Municipal Corporation, Ujjain & anr. V. BVG India Ltd. and ors. 2018 SCC OnLine SC 278 and also on Michigan Rubber (lndia) Ltd. v. State of Karnataka (2012) 8 SCC 216 to forward this plea.

iii. Mr. Tripathi, then, submits that the petitioner's plea that no security clearance from respondent no.2 was required because the Turkish JV member of petitioner no.3 is holding less than 50 % share in the JV, is contrary to plain reading of clause 2.1.12 (a) of the RFP. The petitioner is trying to misinterpret the clause by contending that security clearance is needed only when 50% of the paid-up share capital of the L-1 bidder is owned by a person who is a non-resident of India, by overlooking the fact that the said condition applies not only to a bidder but also to its members. Since, one of the two members of the L-1 bidder is a Turkish company whose entire shareholding is held by persons resident outside India, the requirement to obtain security clearance under clause 2.1.12

(a) was squarely applicable to it. The said clause, Mr. Tripathi submits, clearly envisages requirement of a security clearance not only in a case where 50% or more shareholding of the bidder is held by persons resident outside India, but even in a case where 50% or more of the shareholding of a member of the bidder is held by a person resident outside India. By placing reliance on paragraph 15 of Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. (2016) 16 SCC 818, he submits that unless the interpretation of the author of the tender documents can be said to be mala fide or perverse, the author's interpretation must be given primacy.

iv. He, thus contends, that if the petitioner's plea were to be accepted that the requirement of security clearance was not applicable in a case where the foreign member of the JV held less than 50% share therein, were to be accepted, it would frustrate the very purpose of the clause. The rationale behind this clause is to protect national security and public interest and therefore, it has to be read in a manner so as to give primacy to the plain reading of its language. Therefore, the clause 2.1.12(a) of the RFP was clearly applicable to the petitioner no.3 and the respondent no.1 had bona fidely sought security clearance from respondent no.2, which has unfortunately been declined and therefore, keeping in view the urgency involved in the project, the respondent no.1 has rightly awarded the contract in favour of the L-2 bidder, who had matched the financial bid of the petitioner no.3. In the light of the settled position of law that wherever, an authority has taken a

decision in the larger public interest, the Courts ought to exercise judicial restraint, it is contended that the decision to award the respondent no.3 the contract, ought not be interfered with. To forward this plea, he has placed reliance on paragraphs 60 to 63 of Municipal Corporation, Ujjain (Supra), wherein it has been held that since the larger public interest lies in expeditiously making available services to the public, the element of public interest must be considered when a Court is deciding whether a decision to tender any work should be interfered with.

v. Mr. Tripathi, then, submits that even though no specific security clearance was sought from respondent no.2 for awarding the contract in favour of respondent no.3 in terms of clause 2.1.12(a) of the RFP, the said decision was a bona fide one as there was already an implicit security clearance in favour of the respondent no.3. He, submits, that since the foreign member of respondent no.3 is a company incorporated in Ukraine, the respondent no.1 was well aware that as per the existing instructions of the Government of India, no security clearance was required from the L-2 bidder. By drawing my attention to the additional affidavit filed on 05.01.2022 by the respondent no.1, he submits that right from 2017, as and when security clearance was sought for a Ukrainian based company, the respondent no.2 had made its stand clear that Ukraine did not fall under the list of 'Countries of Concern'. In these circumstances, the action of respondent no.1 to award the contract in favour of respondent no.3 can neither be faulted nor can it be contended that the same is, in any manner, in breach of clause 2.1.12(a). The clause clearly provides that security clearance would be required as per the applicable instructions of the Government of India at the time. Once the Government of India had, in no uncertain terms, stated that no security clearance was required from Ukraine based companies, the action of respondent no.1 was strictly in accordance with the instructions issued by Government of India and was therefore, in consonance with the clause 2.1.12(a) of the RFP.

vi. Without prejudice to his aforesaid submissions, Mr. Tripathi finally submits that even if the petitioner's plea were to be accepted that, even in the case of respondent no.3, security clearance was required to be obtained from respondent no.2 before it could be awarded the tender, the respondent no.1 has no objection if the matter is referred to respondent no.2 for considering the prayer for grant of security clearance to respondent no.3 expeditiously, so that this project of national importance does not suffer from any further delay.

vii. Learned senior counsel for the respondent no.1, has also contended that even though the requirement of obtaining security clearance was equally applicable to respondent no.3, the same was not taken as, the stand of respondent no.2 in respect of persons residing in Ukraine was well known, since the said respondent has presumed, on the basis of earlier communications received from respondent no.2, that Ukraine does not figure on the list of 'Countries of Concern'. He has urged that the respondent no.2 had, on two previous occasions, once on 19.12.2017 and then on 21.12.2020, informed the respondent no.1 that no security clearance was required when the entity was based in Ukraine. Further he has submitted that the petitioners, being savvy and sophisticated business entities, ought to have gleaned which countries would be subject to a security clearance and which ones would not, from their wide experience in this field.

10. On the other hand, learned counsel for the respondent no.2, while defending its action of not granting security clearance in favour of the petitioner no.3 JV, has however, not fully endorsed the stand of respondent no.1 that there exists any implicit security clearance in respect of the companies from some countries, like Ukraine in this case. Her plea in fact is that on account of the ever-changing international relations, there cannot be any fixed list of 'Countries of Concern' or vice versa. Security clearance, at any given point of time, is dependent on the specific international concerns at the relevant time. In the present case, in respect to respondent no.3, no security clearance was ever sought by either respondent no.1 or by the MORTH, and therefore, there was no question of the respondent no.2 either stating that no security clearance was needed in respect of respondent no.3, or of the respondent no.1 presuming that there was any implicit security clearance in favour of respondent no.3, merely because its JV member is from Ukraine.

11. Having considered the submissions of the parties and perused the record, I find that the first and foremost issue arising for my consideration is as to whether the respondent no.1 was justified in seeking security clearance from respondent no.2 in respect of the petitioner no.3 after it had emerged as the L-1 bidder. In case, the answer to the first issue is in the affirmative, the second issue, which would then need to be determined, would be whether the NHAI was justified in foregoing the requirement of obtaining a security clearance for the respondent no.3.

12. Since the answer to the first issue depends on the interpretation of the clauses of the RFP, including clause 2.1.12(a), it would be apposite to first note the relevant clauses being 2.1.11 and 2.1.12, which read as under-

> "2.1.11 In case the Bidder is a Joint Venture, it shall comply with the following additional requirements:
>
> (a) Number of members in a Joint Venture shall not exceed 3 (Three);
>
> (b) subject to the provisions of clause (a) above, the Bid should contain the information required for each Member of the Joint Venture;
>
> (c) Members of the Joint Venture shall nominate one member as the lead member (the "Lead Member"). Lead Member shall met at least 60% requirement of Bid Capacity, Technical and Financial Capacity, required as per Clause 2.2.2.1, 2.2.2.2(i) & 2.2.2.3. The nomination(s) shall be supported by a Power of Attorney, as per the format at Appendix-III, signed by all the other Members of the Joint Venture. Other Member(s) shall meet at least 20% requirement of Bid Capacity, Technical and Financial Capacity required as per Clause 2.2.2.1, 2.2.2.2(i) & 2.2.2.3 and the JV as a whole shall cumulatively/collectively fulfil the 100% requirement;
>
> (d) the Bid should include a brief description of the roles and responsibilities of individual members, particularly with reference to financial, technical and defect liability obligations;

(e) the Lead Member shall itself undertake and perform at least 51 (fifty one) per cent of the total length of the Project Highway,

(f) members of the Joint Venture shall have entered into a binding Joint Bidding Agreement, substantially in the form specified at Appendix V (the "Jt. Bidding Agreement"), for the purpose of making the Application and submitting a Bid in the event of being pre-qualified. The Jt. Bidding Agreement, to be uploaded, on e-

tendering and BIMS portal along with the Application, shall, inter alia:

(i) convey the commitment(s) of the Lead Member in accordance with this RFP, in case the contract to undertake the Project is awarded to the Joint Venture; and clearly outline the proposed roles & responsibilities, if any, of each member;

(ii) commit the approximate share of work to be undertaken by each member conforming to sub-clause 2.1.11 (e) mentioned above;

(iii) include a statement to the effect that all members of the Joint Venture shall be liable jointly and severally for all obligations of the Contractor in relation to the Project until the Defect Liability Period is achieved in accordance with the EPC Contract; and

(g) except as provided under this RFP, there shall not be any amendment to the Jt. Bidding Agreement.

(h) No Joint Venture up to Estimate Project Cost of Rs. 100 crores (One Hundred Crores). However, Joint Venture for any Estimated Project Cost is permissible in case of maintenance works to be taken up on EPC mode."

AND 2.1.12 While bidding is open to persons from any country, the following provisions shall apply:

(a) Where, on the. date of the Application, not less than 50% (fifty percent) of the aggregate issued, subscribed and paid up equity share capital in the L-1 Bidder or its Member is held by persons resident outside India or where a Bidder or its Member is controlled by persons resident outside India, then the eligibility and award of the project to such L-1 Bidder shall be subject to approval of the competent authority from national security and public interest perspective as per the instructions of the Government of India applicable at such time. The decision of the authority in this behalf shall be final and conclusive and binding on the Bidder."

(b) Further, where the LoA of a project has been issued to an agency, not covered under the category mentioned above, and it subsequently wishes to transfer its share capital in favour of another entity who is a resident outside India or where a Bidder or its Member is controlled by persons resident outside India and thereby the equity

> capital of the transferee entity exceeds 50% or above, any such transfer of equity capital shall be with the prior approval of the competent authority from national security and public interest perspective as per the instructions of the Government of India applicable at such point in time.

13. What emerges is that clause 2.1.12(a) of the RFP prescribes that it is not only when 50% of the equity share capital of the L-1 bidder is held by persons resident outside India, but also where the bidder or its member is controlled by persons resident outside India, would there be a requirement of security clearance. Even though, learned senior counsel for the petitioner is right in contending that commercial contracts must be read in a way that it is in consonance with common business sense and must not be interpreted in a hyper-technical manner, it is equally important to remember that once a clause is unambiguous, it must be given its full import and merely because it may be inconvenient to one party, Courts cannot ignore the plain language of a clause.

14. Upon a bare perusal of both clauses 2.1.12 (a) and (b), I find that, the requirement for security clearance would not only be applicable when 50% of the equity share capital of the bidder is held by persons resident outside India, but would also be equally applicable when 50% of the equity share capital of any of the members of the L-1 bidder, which as in the present case may be a joint venture, is held by persons resident outside India. The use of the word 'or' between the term 'bidder' and 'its member' in clause 2.1.12(a) of the RFP is significant and cannot be ignored. It is trite law that the words used in the tender documents cannot be ignored or treated as redundant or superfluous, and they must be given meaning and their necessary significance, as has also been held in Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489. The relevant observation made therein reads as under:

> "7. ...It is a well-settled rule of interpretation applicable alike to documents as to statutes that save for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use". To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable."

15. In fact, in my view the clause 2.1.12(a) primarily seeks to outline the acceptable amount of aggregate, issued, subscribed and paid-up equity share capital held by a person, who is not a resident of India. It is apparent that this condition would be applicable not only to the bidder, but also to every member of the bidder, from the plain reading of clause 2.1.12(a) of the RFP. The petitioner's plea, that it is only when 50% or more of the equity share capital of the bidder as a whole is held by a person resident outside India, that the clause for security clearance would be applicable, fails to take into account that the clause does not in any manner refer to the lead member. What, in fact, emerges is that the clause does not make any distinction between bidders which have an Indian

lead member and those persons resident outside India. This is the manner in which respondent no.1, who is the author of the RFP, has understood and sought to interpret the clause. There is no compelling reason for this Court to discard or ignore the meaning sought to be given to this clause by respondent no.1.

16. At this stage reference may also be made to the decision of the Apex Court in Afcons (Supra) relied upon by the learned senior counsel for the respondent no.1 in support of his plea that interpretation given by the author of the RFP must be treated as paramount. Paragraph 15 of the said decision reads as under:

> "15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

17. Reference may also be made to the decision of the Apex Court in Caretel Infotech ltd. v. Hindustan Petroleum Corporation limited (2019) 14 SCC 81 wherein the Court has emphasised on the manner in which contracts must be interpreted. Paragraph 43 of the same reads as under:

> "43. We have considered it appropriate to, once again, emphasise the aforesaid aspects, especially in the context of endeavours of courts to give their own interpretation to contracts, more specifically tender terms, at the behest of a third party competing for the tender, rather than what is propounded by the party framing the tender. The object cannot be that in every contract, where some parties would lose out, they should get the opportunity to somehow pick holes, to disqualify the successful parties, on grounds on which even the party floating the tender finds no merit."

18. Furthermore, in a recent decision in National High Speed Rail Corporation Limited v. Montecarlo Limited and Anr., Civil Appeal No. 6466 of 2021, the Apex Court has reiterated that the meaning given by the author of a document, more specially a tender document must be given primacy. The relevant observations made therein read as under:

> "7.8.4 In the case of the Central Coalfields Limited & Anr. Vs. SLLSML [A Joint Venture Consortium] and Ors., (2016) 8 SCC 622, it is specifically observed and held by this Court that the Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable. It is further observed that whether a term of NIT is essential or not is a decision taken by the employer, which should be respected and soundness of that decision cannot be

questioned by Court."

19. In the light of the aforesaid, I have no hesitation in accepting the respondent no.1's plea that the award of any contract in favour of the petitioner was necessarily to be subject to the grant of security clearance by the respondent no.2, which unfortunately for the petitioners, has not been granted. The petitioners have not seriously made, and in my view rightly so, any challenge to the non-grant of security clearance by the respondent no.2 except urging that since the Turkish member of the petitioner no.3 JV is already carrying out work on various other projects in the country, it was entitled to security clearance as a matter of course. I do not find any merit in this submission. Firstly, because nothing has been placed on record to show that obtaining such a security clearance was a condition to be fulfilled in the past projects which it is claimed the Turkish member of the petitioner no.3 JV is executing. Moreover, as stated by respondent no.2, the grant of security clearance to a foreign entity would depend upon various factors, including international relations at the relevant time with concerned country, which keep changing from time to time. I am therefore inclined to accept the respondent's plea that the mere grant of security clearance to a foreign entity at a given time would not entitle it to claim security clearance as a matter of right for all times to come. The fact remains that the petitioner has not been granted security clearance which was a specific condition for issuance of the LOA in its favour as per the RFP and therefore, I do not find any infirmity in the impugned communication dated 18.11.2021.

20. Having found no merit in the petitioners; challenge to the communication dated 18.11.2021, it is now time to examine whether the respondent no.1/NHAI was justified in issuing the LoA in favour of respondent no.3 on 29.11.2021 without obtaining or seeking any security clearance qua respondent no.3 from the respondent no.2. Extensive submissions in this regard were made by the learned senior counsel for the petitioners to contend that, if the respondent no.1's plea were to be accepted that the clause mandated security clearance in every case where 50% or more of the equity share capital of any of the members of the joint venture bidder, is controlled by a person resident outside India, there is no justification as to why the respondent no.3 has been issued the LoA without taking the necessary security clearance. The petitioner's plea is that the respondent no.3 is also a joint venture with one of its members being a company incorporated in Ukraine, and therefore, the action of respondent no.1 in issuing the LoA in favour of respondent no.3 without security clearance was arbitrary, discriminatory and illegal.

21. The fact that the JV partner of the respondent no.3 is a company incorporated in Ukraine is not denied either by respondent no.1 or by respondent no.3. In fact, I find that interestingly, the respondent no.1 has not seriously disputed that the L-2 bidder/respondent no.3, in whose favour the LoA has been subsequently awarded on 29.11.2021, would indeed fall within the ambit of 2.1.12(a). The respondent no.1 has however, tried to defend its decision to not seek security clearance for respondent no.3, by contending that the member of this joint venture is a company incorporated in Ukraine, which does not fall within the list of 'Countries of Concern' maintained by respondent no.2. However, pertinently the respondent no.2 has taken a wholly contrary stand on this aspect, and has in unambiguous terms stated before this Court that there is no such fixed list of 'Countries of Concern'. It has also been urged by respondent no.2 that there can never be any such implicit approval for any entity on account of its country of origin, and therefore simply because the

respondent no.3 is a JV formed with a member based in Ukraine, there can be no automatic security clearance.

22. In the light of this categoric stand taken by respondent no.2, the respondent no.1/NHAI's plea that it was justified in not seeking any security clearance for respondent no.3 cannot be accepted. Merely because in the past security clearance was given to some companies from Ukraine would not lead to any presumption that there was any implicit security clearance for companies from Ukraine. It is, thus, evident that respondent no.1 has employed a pick-and-choose policy for the purpose of obtaining security clearances for the bidders in terms of the RFP, which, in my view is undoubtedly an arbitrary approach adopted by the respondent no.1. I, thus, find that, there is a marked difference in the stand taken by respondent no.1, when it comes to the applicability of clause 2.2.12(a) to different bidders. The justification sought to be given for this evident difference in its approach vis-à-vis petitioner and respondent no.3 in the matter of security clearance can just not be accepted.

23. Reference may also be made to Ramayana Dayaram Shetty (supra) wherein the Apex Court has held that arbitrariness by a public authority cannot be countenanced. The relevant extract whereof reads as under:

> "10. 2(a) It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. The defined procedure, even though generous beyond the requirements that bind such agency must be scrupulously observed. This rule, though supportable also as emanating from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority. It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.
>
> And
>
> 12. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with

> standard or norms which is not arbitrary, irrational or irrelevant, and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

24. The respondent no.1 has tried to urge that the decision taken by it not to seek security clearance for respondent no.3 was a bona fide one and therefore, the Court ought not to interfere with the said decision. I am however, of the view, that once the Court finds that the State or its instrumentalities, have, while awarding a contract, acted unreasonably and in a discriminatory manner, the Court cannot shut its eyes. Any arbitrary or discriminatory action on the part of the authorities must be deprecated.

25. In the present case, there can be no doubt about the fact that the reasons given by the respondent no.1 to justify its action vis-à-vis respondent no.3, fall flat in the light of the respondent no.2's stand on the issue. This Court, is unable to appreciate the different treatment meted out to the different bidders on a presumption by the respondent no.1, that members/countries from certain countries do not need any security clearance from the competent authority. The said presumption is contrary to the stand taken by respondent no.2 and therefore, the very basis of the respondent no.1's action in not seeking security clearance for respondent no.3 is evidently erroneous. I, thus, have no hesitation to hold that the respondent no.1 was, before issuing an LoA in favour of the respondent no.3 bound to strictly adhere to the process as laid down in the RFP, and therefore ought to have also referred its case for security clearance.

26. In the light of my aforesaid conclusion, that clause 2.1.12(a) of the RFP was applicable to 'Bidders or members' irrespective of the country of its origin, I do not find any merit in Mr. Sethi's alternative plea that the respondent no.1 not having disclosed the names of the countries for which no security clearance was required, the RFP deserves to be quashed. Once there is no such country, a resident whereof was exempted from the applicability of this clause, there is no question of the respondent no.1 having disclosed the names of such countries in the RFP. This plea of the petitioner therefore, also fails.

27. However, having found that the action of respondent no.1 in issuing the LoA in favour of the respondent no.3 without security clearance is not sustainable, what next? The surviving issue, that now needs to be considered is, whether this Court should quash the entire RFP, and direct the Respondent no.1 to invite fresh bids. It is imperative that this question be answered while keeping in mind the broader ramifications and consequences of issuing such directions at this stage when it is already almost nine months since the RFP inviting bids was issued in May, 2021. The project in question is an important project, pertaining to the four-laning of certain sections of NH-44, including construction of twin tube channel in the Union Territory of Jammu & Kashmir, which would serve a crucial purpose of increasing connectivity in the region. It is indeed a project where work must be completed at the earliest and therefore, before issuing any directions, this Court must keep in mind the aspect of larger public interest. Any direction for re-tendering of the project would, undoubtedly lead to a delay of minimum 6 months, which in my opinion, would be against public

interest which demands that the project be completed at the earliest. In this regard, reference may be made to the observations of the Apex Court in para 35 of Michigan Rubber (lndia) Ltd. v. State of Karnataka (2012) 8 SCC 216, which read as under: -

> "As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre- qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."

28. At this stage it may also be appropriate to refer to the observations of the Apex Court in its recent decision in National High Speed Rail Corporation Limited (supra) wherein the Court once again reiterated that, while dealing with matters relating to award of contracts by the State and its instrumentalities, the Court must take into account the public interest. The relevant para being 7.9 reads as under: -

> "7.9 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"?
>
> (ii) Whether the public interest is affected? If the answers to the above questions are in negative, then there should be no interference under Article 226.

29. I find that, even though the action of the respondent no.1 in issuing the LOA in favour of respondent no.3 is in the teeth of the RFP, it is not a situation where respondent no.3 has been denied security clearance by respondent no.2 and therefore ought to be treated as ineligible under clause 2.1.12(a) of the RFP. It appears that in its anxiety to award the tender at the earliest, the respondent no.1 has, on the basis of its past experience, wherein security clearance in respect of companies based in Ukraine was being given as a matter of routine, proceeded to bypass this important and crucial step before awarding the tender to respondent no.3. I am, therefore, of the considered view that, it would also be unfair to respondent no.3, who is admittedly the L-2 bidder, and has now matched the bid of the L-1 bidder, were to be ousted without its case of security clearance being considered by respondent no.2. It is not the petitioner's case that respondent no.3 is in any manner responsible for this failure of respondentno.1 to seek security clearance. There is no reason as to why the respondent no.3 should suffer on account of this failure on the part of respondent no.1 to follow the due procedure as laid down in clause 2.1.12(a) of the RFP.

30. I can also not lose sight of the fact that projects such as these are extremely crucial for a developing nation like ours to ensure better connectivity of remote locations with the rest of the State, which contributes to the economic growth of the country. Huge stakes are involved in such projects and any delay in executing the same may have a cascading effect on the project cost and ultimately lead to an increasingly significant financial burden upon the public exchequer, thus being in total contravention of the rationale of serving the larger public interest, which has been repeatedly held to be paramount by the Courts.

31. The Courts have consistently held that, the larger public interest should aways be kept in mind while deciding whether any intervention is called for or not, in tender matters demonstrated recently in the aforementioned decision. Ultimately, with any action of the authority, the public interest must be safeguarded. In my view, in the present case, the public would be directly interested in the timely fulfilment of the contract so that the highway becomes available to the public expeditiously and effectively, and provides better connectivity within regions of the J&K State. Therefore, in my considered opinion, directing a re-tendering of the project at this belated stage will cause undue delay to the work and ultimately be against larger public interest.

32. In this regard it may be apposite to refer to the observations of the Apex Court in National High Speed Rail Corporation Ltd. (supra), wherein the Court emphasised on the need to exercise restraint while entertaining writ petitions dealing with tender matter, which read as under:

> "Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition

> and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it."

33. Having given my thoughtful consideration to these aspects, I am of the opinion that while the action of the respondent no.1 in issuing the LoA in favour of respondent no.3 without seeking security clearance is undoubtedly blameworthy or faulty, it would still be in larger public interest, that instead of straightaway directing the cancellation of the LoA issued in favour of the respondent no.3, the same should be made subject to security clearance from the respondent no.2. Therefore, with the public interest perspective in mind, I am inclined to accept the respondent no.1's plea that the appropriate course of action to follow, would be to direct the respondent no.1/NHAI to seek security clearance qua respondent no.3, from respondent no.2 expeditiously.

34. For the aforesaid reasons, the writ petition alongwith the pending application, is disposed of, by rejecting the petitioner's challenge to the impugned communication dated 18.11.2021, with a direction to respondent no.1 to forthwith forward the proposal for grant of security clearance to respondent no. 3. A further direction is issued to respondent no. 2 to take a decision on the respondent no.1's request within three weeks. It is made clear, that in case, the said security clearance to respondent no.3 is declined for any reason whatsoever, the respondent no.1 will be free to proceed further as per the terms of the RFP to award the contract to the next bidder, subject to it meeting the criteria under clause 2.12.1(a) of the RFP, if applicable.

(REKHA PALLI) JUDGE FEBRUARY 4, 2022 Kk/sr