

(2005) 01 DEL CK 0106

In the Delhi High Court

Case No : WP (C) No's. 18060 and 18188 of 2004 and CM 13602 and 13728 of 2004

Balkrishna Ramkaran Goyal

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-01-2005

Acts Referred:

Citation : AIR 2005 Delhi 351 : (2005) 1 CTLJ 197 : (2005) 117 DLT 338 : (2005) 80 DRJ 268

Hon'ble Judges : H.R. Malhotra, J;D.K. Jain, J

Bench : Division Bench

Advocate : U.N. Bhachawat and Alok Bhachawat, for the Appellant; Parag Tripathi and Sandeep Sethi and Sachin Sood, for R-2, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Jain, J.—Rule D.B.

2. Having regard to the urgency of the matters, with the consent of learned counsel for the parties, these have been taken up for final disposal at this stage itself.

3. The issue involved and even the parties in both these writ petitions being common, both the petitions were heard together and are disposed of by this common judgment.

4. Challenge in these writ petitions under Article 226 of the Constitution is to the legality and propriety of the decision taken by the National Highways Authority of India (NHA) for short), respondent No. 2 herein, not to open the financial bids submitted by the petitioner in response to their Notice Inviting Tender (NIT for short) for short term improvements and routine maintenance of road between Kanwalias (Bhilwara) to Jojro Ka Kheda (Chittorgarh). The petitioner seeks a direction to the NHA to open their financial bids and consider the same along with the other bids in the manner contemplated in the NIT and if found to be the

lowest, award the contract to them. The Union of India, through the Secretary, Ministry of Road Transport and Highways, has been imp leaded as the first respondent and the third respondent is the successful tenderer.

5. Factual matrix, as projected in WP(C) 18060/2004, in brief, is as follows:

In the month of May 2004 the NHAI issued the NIT for the aforementioned work. The bidding documents, supplied by the second respondent were in two volumes. The first volume contained the instructions to bidders; forms of bid and bank guarantee and conditions of contract etc. whereas the second volume consisted of bill of quantities. The tendering was to be through a two bid process. The first part was to consist of technical bid, which was to be accompanied by various documents. The second part was o contain the financial bid. Complete bid documents were to be issued from 24 May 2004 to 22 June 2004 The last date for submission of the bid was 24 June 2004 up to 1100 hours. The financial bids were to be opened on 24 June 2004 at 1200 hours in the presence of the representatives of the bidders, if any.

5.2 At this juncture, a reference to some of the material Instructions to the Bidders (ITB) regarding submission of the tenders, contained in section II of Form I of the bid documents would be apposite. These are as follows:

"4. Qualification of the Bidder:

4.1 xxxxxxxxxxxxxxxxxxxx

4.2 xxxxxxxxxxxxxxxxxxxx

4.3 xxxxxxxxxxxxxxxxxxxx

4.4 A xxxxxxxxxxxxxxxxxxxx

4.4 B (a) Each bidder must produce:

(i) An affidavit on a stamp paper, duly attested from the Notary Public, that the information furnished with the bid documents is correct in all respect; and

(ii) Such other certificates as defined in the Appendix to ITB

(iii) Failure to submit the certificates/documents as specified above or in Appendix to ITB shall make the bid non-responsive.

(b) Each bidder must demonstrate:

(i) Evidence of availability (either owned or leased or rented) of items of construction equipment as stated in the Appendix to ITB.

(ii) Availability for this work of technical personnel as stated in the Appendix to ITB

(c) deleted

(d) Failure to submit the certificates/documents as specified above or in

Appendix to ITB shall make the bid non-responsive."

"B. Bidding Documents:

8. Content of Bidding Documents:

8.1 The set of bidding documents comprise the documents listed below and addenda issued in accordance with Clause 10:

Volume-1:

1. Notice Inviting Tender
2. Instructions to Bidders
3. Forms of bid and Bank Guarantee
4. Conditions of contract

(Part I General Conditions of Contract, and Contract Data, Part II Special Conditions of Contract)

5. Specifications
6. Implementation Manual
7. Drawings

Volume-II:-

8. Bill of Quantities.

(underlined by us for emphasis)

8.2 xxxxxxxxxxxxxxxxxxxxxxxxx

8.3 The bidder is expected to examine carefully all instructions, conditions of contract, contract data, forms, terms, specifications, bill of quantities, forms and drawings in the Bid Document. Failure to comply with the requirements of Bid Documents shall be at the bidders own risk. Pursuant to clause 26 hereof , bids, which are not substantially responsive to the requirements of the Bid Documents, shall be rejected.""

9. Clarification of Bidding Documents

9.1 A prospective Bidder requiring any clarification of the bidding documents may notify the Employer in writing or by cable (""cable"" includes facsimile) at the Employer's address indicated in the Notice Inviting Tenders. The Employer will respond to an request for clarification received earlier than 10 days prior to the deadline for submission of bids. Copies of the Employer's response will be forwarded to all purchasers of bidding documents, including a description of the inquiry, but without identifying its source."

"15. Bid Validity

15.1 Bids shall remain valid for a period of 120 days after the deadline date for bid submission specified in Clause 20. A bid valid for a shorter period shall be rejected by the Employer as non-responsive.

15.2 In exceptional circumstances, prior to expiry of the original time limit, the Employer may request that the bidders may extend the period of validity for a specified additional period. The request and the bidder's responses shall be made in written or by cable. A bidder may refuse the request without forfeiting his bid security. A bidder agreeing to the request will not be required or permitted to modify his bid, but will be required to extend the validity of his bid security for a period of the extension, and in compliance with Clause 16 in all respects.

16. Earnest Money/Bid Security

16.1 The Bidder shall furnish, as part of the Bid, Earnest Money, in the amount specified in the Appendix to ITB.

16.2 The Earnest Money shall, at the Bidder's option, be in the form of Bank Guarantee/Demand Draft of any scheduled commercial bank approved by RBI having a net worth of not less than Rs. 500 cores as per the latest annual report of the bank. In case of foreign bank (issued by a branch in India) the net worth in respect of the Indian operation shall only be taken into account. It shall be valid for 45 days beyond the validity of the bid.

16.3 Any bid not accompanied by an acceptable Earnest Money, unless exempted in terms given in the Appendix to ITB, shall be rejected by the Employer as non-responsive.

16.4 The Earnest Money of unsuccessful bidders will be returned within 28 days of the end of the Bid validity period specified in Sub-Clause 15.1"

"23. Bid Opening

Bid opening shall be carried out in two stages. Firstly, "Technical Bid" of all the bids received (except those received late) shall be opened on the date and time mentioned in the Appendix to ITB. ""Financial Bid"" of those bidders whose technical bid has been determined to be substantially responsible shall be opened on a subsequent date, which will be notified to such bidders.

23.1 xxxxxxxxxxxxxxxxxxxxxxxxxxxx

23.2 In all other cases, the amount of Earnest Money, forms and validity shall be announced. Thereafter, the Employer at the opening as the Employer may consider appropriate, will announce the bidder's names and such other details.

23.3 The Employer will prepare minutes of the Bid opening, including the information disclosed to those present in accordance with Clause 23.1.

23.4 Within three or four days after the opening of the technical bids, their evaluation will be taken up with respect to bid security, qualification information

and other information furnished in Part 1 of the bid in pursuance to Clause 12.1 and a list will be drawn up of the responsive bids whose financial bids are eligible for consideration.

23.5 The Employer shall inform the bidders, whose technical bids is found responsive, of the date, time and place of opening of the financial bids. The bidders so informed, or their representative, may attend the meeting of opening of financial bids.

23.6 At the time of the opening of the "Financial Bid", the names of the bidders whose bids were found responsive in accordance with Clause 23.5 will be announced. The financial bids of only these bidders will be opened. The remaining bids will be returned unopened to the bidders. The responsive bidders' names, the Bid prices, the total amount of each bid, any discount/rebate, modification of financial bids pursuant to Clause 22 and such other details as the Employer may consider appropriate will be announced by the Employer at the time of bid opening. Any Bid price, which is not read out and recorded, will not be taken into account in Bid Evaluation.

23.7 The Employer shall prepare the minutes of the opening of the Financial Bids."

26. Examination of Bids and Determination of Responsiveness.

26.1 During the detailed evaluation of ""Technical Bids"" the Employer will determine whether each Bid (a) meets the eligibility criteria defined in Clauses 3 and 4; (b) has been properly signed; ? is accompanied by the required securities; and (d) is substantially responsive to the requirements of the bidding documents. During the detailed evaluation of the ""Financial Bids"" the responsiveness of the bids will be further determined with respect to the remaining bid conditions i.e. Priced bill of quantities, technical specifications and drawing.

26.2 A substantially responsive ""Financial Bid"" is one, which conforms to all the terms, conditions and specifications of the bidding documents, without material deviation or reservation. A material deviation or reservation is one (a) which affects in a y substantial way the scope, quality or performance of the works; (b) which limits in any substantial way, inconsistent with the bidding documents, the Employer's rights or the Bidder's obligations under the Contract; or (c) whose rectification would affect unfairly the competitive position of other bidders presenting substantially responsive bids.

26.3. If a "Financial Bid" is not substantially responsive, it will be rejected by the Employer, and may not subsequently be made responsive by correction or withdrawal of the nonconforming deviation or reservation."

5.3 Pursuant to and in furtherance of the NIT, the petitioner, a firm registered under the Partnership Act, 1932, submitted their bid documents on 24 June 2004, which included the earnest money of Rs. 13.10 lacs as required in Clause

16.1 along with the guarantee as required under Clause 16.2 in the form of bid and bank guarantee as prescribed in Section III of Volume I of the NIT. Since the entire controversy revolves around the period of validity of the bank guarantee, for the sake of ready reference material portion thereof is extracted below: ""This guarantee will remain in force up to and including the date 30 days beyond the validity of the bid as such deadline is slated in the instructions to Bidders or as it may be extended by the Employer, at any time prior to the closing date for submission of the Tender Notice of which extension to the Bank is hereby waived. Any demand in respect of this guarantee should reach the Bank not later than the above date of expiry of this guarantee.

"Notwithstanding anything contained herein:

i) our liability under this Bank Guarantee shall not exceed Rs. 13,10,000/- (Rupees thirteen lacs ten thousand only)

ii) this Bank Guarantee shall be valid up to 31/10/04 and

(iii) we are liable to pay the guaranteed amount or any part thereof under this Bank Guarantee only if you serve upon us a written claim or demand on or before 30/11/04 (date of expiry of guarantee)".

5.4 The technical bids were opened on 24 June 2004 in the presence of the representative of the petitioner. On 30 June 2004 the NHAI sent a letter to the Punjab National Bank, who had furnished the guarantee on behalf of the petitioner, seeking confirmation on the bank guarantee. The Bank sent the confirmation vide their letter dated 5 July 2004

5.5 According to the petitioner since they did not receive any intimation about the result of the technical bids, they reasonably believed that it may be because of exceptional circumstances that the technical bids could not be opened prior to the expiry of the original time limit of the validity of the bids. Nevertheless, on 21 October 2004 the petitioner addressed a letter to the General Manager of the NHAI, inter alias, stating thus:

"(1) That the technical bid of tender under reference was opened on due date of 24.8.2004 The validity of Bid was 120 days which thus has expired on the 21.10.2004

(2) That since we have not been communicated any thing adverse, and moreover we can foresee no other reason, we reckon that we are responsive bidders

(3) That however, to our surprise, since we have not been communicated till expiry of validity period, we of our own hereby EXTEND THE BID VALIDITY till and interim suitable date of 30.11.04.

(4) That kindly recall and note that the Bid security duly submitted along with Bid Documents in form of Bank Guarantee is also valid up to to 30.11.04.

(5) That accordingly you now have at the powers and convenience and liberty to

consider/accept our Responsive Bid before 30.11.04.

(6) That accordingly you are hereby officially requested/demanded on records to kindly acknowledge and respond.

(7) That in case you further wish the Bid validity or validity of Bank Guarantee to be further extended, kindly immediately communicate with your specific requisites. We assure your good self to duly consider and respond immediately.

(8) That in case no reply is received from your end it shall be construed and shall so prevail that our responsive Bids are still in your Active Consideration. Please take note."

5.6 The petitioner claims to have learnt in the first week of November 2004 that on 29 October 2004 the NHAH had opened the financial bids of the bidders except that of the petitioner. It is stated that thereafter the petitioner called on the concerned officials of the NHAH to know about the fate of their technical as well as the financial bid. But they were not furnished with any information. Having failed to get any response from the NHAH and apprehending that their technical bid had been declared to be non-responsive, the petitioner preferred the present writ petition.

6. In the petition, it is alleged that the action of the NHAH is arbitrary, capricious and mala fide because: (i) Clause 26.1 in Volume I of the NIT casts an obligation on the NHAH to intimate the respective bidders the result of the examination of the bids along with the ground to those bidders whose bids are rejected, but no such communication was sent; (ii) the officials of the NHAH neither intimated the rejection of the petitioner's bid nor returned the earnest money as stipulated in Clause 16.4, in order to prevent the petitioner from taking recourse to legal remedy and obtain an order for consideration of their financial bid and in the process expose their illegality and (iii) had petitioner's bid been opened, it being the lowest and there being no other valid reason for its rejection, it had to be accepted, ousting respondent No. 3.

7. The petition is resisted by the NHAH. In the affidavit in opposition filed in response to the show cause notice, it is stated that technical bid of the petitioner was non-responsive in terms of clause 16.3 of the ITB for the reason that the bank guarantee furnished by the petitioner as bid security was not an "acceptable earnest money" within the meaning of the ITB. It is averred that the bid was to remain valid for a period of 120 days i.e. 22 October 2004 and the bid security was to be valid for 45 days from the bid validity period i.e. up to 6 December 2004 But the bid security furnished by the petitioner was valid up to 31 October 2004, which was short of the mandatory period. It is also alleged that the last two paragraphs of the bank guarantee are mutually contradictory and destructive of each other inasmuch as at one place it records that the guarantee was to remain in force up to 30 days beyond the validity of bid, which comes to 21 November 2004, whereas in the following paragraph it is mentioned that the bank guarantee was to be valid up to 31 October 2004 and in the next sentence

again the date of 30 November 2004 is mentioned as the date up to which time a written claim or demand may be made from the bank. The same date is mentioned as the date of expiry of the guarantee. It is, thus, stated that apart from the fact that the said two dates do not conform to the mandate of clause 16.2 of the ITB i.e. of 6 December 2004, even otherwise the different dates mentioned in the guarantee bold confused the matter and rendered the document defective, uncertain, unclear and ineffective. It is pleaded that in the matters of bid security NHAH cannot accept any uncertainty or ambiguity because it is necessary that they are able to invoke and call the bid security in terms of their entitlement under the ITB and they do not wish to be caught up in uncertainties and ambiguities of the documents. Refuting the claim of the petitioner that the bank guarantee furnished by the petitioner is in terms of the form of the bid security, annexed to the ITB, and that the same is in compliance therewith, it is stated that the form annexed with the ITB is merely for reference of the bidders and it does not override the express terms of Clause 16.2 of the ITB which clearly prescribes that the bid security should be valid for 45 days from the validity of the bid. It is asserted that the terms of Clause 16.2 are primary and not subject to the forms issued. It is also highlighted that Clause 9 permitted and enabled any and every bidder to seek clarification of any terms of the ITB but despite sufficient time available to the petitioner, no such clarification was ever sought by them. It is, thus, pleaded, that the petitioner having failed to avail of the said facility of seeking clarification, it does not now lie in their mouth to allege that they have been misled by the form of the guarantee.

8. In the rejoinder affidavit filed by the petitioner, while pointing out that the bids of some other bidders were not in conformity with Clause 4 in Section II of the ITB yet they were given an opportunity to furnish the deficient documents/certificates but such an opportunity has been denied to the petitioner. It is pleaded that Clause 16.2 contains general instructions, whereas form of bank guarantee supplied with the bid documents is a specific document and Therefore, no bidder could afford to make any change or variation in the format supplied. It is thus pleaded that the bank guarantee furnished by the petitioner as per the format supplied could not be said to be vague, uncertain or confusing, as alleged. It is also pleaded that if the bank guarantee furnished by the petitioner was found to be defective, NHAH ought to have asked for its confirmation by the issuing bank.

9. We have heard Mr. U.N. Bhagawat, learned senior counsel appearing on behalf of the petitioner and Mr. Sander Seth and Mr. Parag Tripathi, senior counsel on behalf of respondent No. 2.

10. Challenging the validity of the said decision, Mr. Bhagawat has strenuously urged that the petitioner having furnished the requisite bank guarantee in the manner, mode and for the period as prescribed in the format, supplied as part of the bid documents in terms of Clause 8 of the ITB, petitioner's technical bid could not be declared to be non-responsive because of some discrepancy in the

form and the instructions. It is urged that if there was some printing error in the forms, as orally pleaded by the NHAI, they were obliged to issue corrigendum or at least inform those prospective bidders, who had purchased the tender documents from them about the error. Learned senior counsel contends that NHAI cannot be permitted to take advantage of its own wrong and deprive the petitioner of their valuable right to participate in the bidding process. It is asserted that even if it is assumed for the sake of argument that the bank guarantee was to be valid for 45 days beyond the validity of the bid, as stipulated in Clause 16.2 of the ITB, and not for 30 days as prescribed in the sample form of bank guarantee, the petitioner should have been given an opportunity to rectify the error, if any, as was done by the NHAI in the case of some other bidders who had not furnished all the documents with their bids as required under Clause 4.4B(b) of the ITB. It is thus contended that the NHAI acted capriciously and arbitrarily in declaring petitioner's technical bid as non-responsive merely because the validity period of the bank guarantee furnished fell short by six days. Learned counsel has also submitted that the male fides on the part of the officers of the NHAI are apparent from the fact that though petitioner's technical bid was declared as non-responsive on 24 June 2004, still it was not returned to them within 28 days of the end of the bid validity period as stipulated in Clause 16.4 of the ITB. The allegation of the learned counsel is that this was done deliberately in order to somehow frustrate the right of the petitioner to challenge the decision of the NHAI in Court of Law before the financial bids of other bidders were opened. Learned senior counsel has also submitted that the post facto haste in awarding the tender clearly shows that NHAI wanted to favor respondent No. 3, who is carrying on the same business in petitioner's district and is jealous of petitioner's fast growth as a competitor to them. It is asserted that the bid submitted by the petitioner ought to have been accepted as the same had confirmed to all the terms of the bid documents. In support of the proposition that the NHAI was under obligation to intimate the reasons for rejection of petitioner's bid, reliance is placed on the decisions of the Apex Court in *Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.*, and *M/s. Star Enterprises v. C.I.D.C. Of Maharashtra Ltd.*, 1990 (3) SCC 281 and a decision of this Court in *Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Rail Tel Corporation of India Ltd.*, .

11. Per contra, Mr. Sandeep Sethi, learned senior counsel appearing for the NHAI, while asserting that the NHAI has not committed any wrong and having evaluated the bids strictly in terms of NIT, it cannot be said that they had acted arbitrarily and capriciously, learned counsel submits that had the petitioner any doubt about the validity period of the bank guarantee on account of some printing error in the form, they could seek clarification in terms of Clause 9.1 of the ITB. Having failed to do so, the petitioner could not have ignored the express stipulation in Clause 16.2 of the ITB. It is submitted that the tender conditions did not envisage any clarification by the NHAI from the bidders. The allegation of male fide and bias on the part of the HAI is refuted by learned counsel with

reference to the proceedings recorded by the tender evaluation committee.

12. Mr. Parag Tripathi, learned senior counsel also appearing for the NHAI, while reiterating the submissions made by Mr. Sethi, has submitted that unless the alleged omission on the part of the NHAI in not clarifying the printing error in the bank guarantee format vis-a-vis the instructions and the decision of the NHAI to declare the technical bid submitted by the petitioner as non-responsive on account of the shorter validity period is held to be perverse, this Court in the exercise of power of judicial review would not like to interfere. Strong reliance is placed on the decision of the Apex Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, . In support of the proposition that where two views are possible the Court would not interfere, reliance is placed on the decisions of the Apex Court in *Union of India and Others Vs. M/s. Shatabdi Trading and Investment Pvt. Ltd. and Others*, and *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others*, .

13. In order to appreciate the rival contentions, it will be useful to notice the broad parameters governing the exercise of power of judicial review while examining an administrative decision. Although Article 226 of the Constitution confers on the High Courts a very wide power of judicial review to examine whether the administrative action is valid or not, but judicial restraint in interfering in matters relating to administrative functions, particularly in contractual matters is the order of the day. In administrative matters, the quest has been to find a right balance between the administrative discretion and the public policy. Ultimately what prevails with the Courts in such like matters is that while public interest is paramount, there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. The State or its instrumentality cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situated. [Refer: *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*,]

14. Though it is true that even in contractual matters a public authority does not have an unfettered discretion to ignore the norms recognised by the Courts while dealing with public authority but at the same time if a decision has been taken by a public authority in a bona fide manner, although not strictly following the norms laid by the Courts, such decision is upheld on the principle that the Courts, while judging the constitutional validity of executive decision, must grant certain measure of freedom of "play in the joints" to the executive [See: *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*,]. Taking note of these observations, in *Union of India v. Dines Engineering Corporation*, (supra), strongly relied upon by learned counsel appearing for the petitioner, their Lordships of the Apex Court have observed that a public authority even in contractual matters should not have an unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the

norms recognised by the Courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities, whose actions are amenable to judicial review. In *Preston, in re.* (1985) 2 All ER 327 it was observed that "the principle of fairness has an important place in the law of judicial review" and "unfairness in the purported exercise of a power can be such that it is an abuse or excess of power". Thus, merely because the authorities have certain "elbow room" available for use of discretion in accepting offer in contracts, the same will have to be exercised within the four corners of the requirements of law, especially Article 14 of the Constitution.

15. Again in *Patel Engineering (supra)*, the Apex Court has observed that tender conditions have to be adhered to scrupulously for otherwise any relaxation or waiver of a tender condition, unless so provided in the NIT would encourage and provide scope for discrimination, arbitrariness and favoritism, which are totally opposed to rule of law and our constitutional values. It was also observed that where power to relax or waive a condition exists under the Rules, it has to be done strictly in compliance with the Rules.

16. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, , taking note of various earlier decisions, including *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, *Tata Cellular Vs. Union of India*, , their lordships of the Supreme Court observed that the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review but the court can examine the "decision making process" and interfere if it is found vitiated by mala fides, unreasonableness or arbitrariness. It was held that even if some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. It was emphasized that the Court should always keep larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to the conclusion that overwhelming public interest requires interference, the court should intervene.

17. The same principles have been reiterated recently by the Supreme Court in *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, . While observing that in exercise of their power of judicial review it is open to the Court to scrutinize the award of contracts by the Government or its agencies to prevent arbitrariness or favoritism, their lordships have said that the Court would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias.

18. Thus, the question that falls for our consideration is as to whether the decision of the NHAI, to declare petitioner's technical bid as non-responsive because validity period of the bank guarantee submitted by them fell short of 45

days beyond the validity of the bid, can be said to be arbitrary, capricious or actuated by malafides, warranting interference in judicial review ?.

19. Having examined the original files produced by the NHA I, wherein all the bids received by them were evaluated, we are of the view that though the NHA I has failed to scrupulously adhere to the conditions stipulated in Clauses 16.4 and 23.3. of the ITB , extracted above, yet the decision to declare the technical bid of the petitioner as non-responsive for the aforementioned reason cannot be said to be arbitrary or capricious, warranting our interference in exercise of the power of judicial review. As noticed supra, the technical bids received by NHA I were opened on 24 June 2004 and a tabulated statement showing the name of the agency, details of the earnest money in the form of bank guarantee and its validity up to 6 December 2004 was prepared. Except for the bank guarantee furnished by the petitioner all other bank guarantees were valid up to 6 December 2004 or beyond that date. In the case of the petitioner two dates of validity, namely 31 October 2004 and 30 November 2004 have been noted against heir name. The said statement is signed by the representatives of all the bidders including the petitioner. It is true that specific minutes as stipulated in Clause 23.3 were not recorded but the tender evaluation committee met on 14 July 2004 and as per its minutes the technical bids of three agencies including the petitioner were declared as technically non-responsive. It is recorded that "M/ s. Balkrishan Ramkaran Goyal have submitted the bid security for a lesser period than required as per Claus

16.2 of Section II of the ITB of the bid document"". Similarly, the earnest money of the petitioner, whose technical bid was declared as non-responsive on 24 June 2004 was not refunded within 28 days of the end of the bid validity period, as stipulated in Clause 16.4 of the ITB. But we are of the view these omissions on the part of the NHA I would not, per se, lead to the conclusion that it was done to somehow non-suit the petitioner and to show undue favor to respondent No. 3 as alleged by the petitioner. We do not find any material on record to hold that the impugned decision of the NHA I was actuated by mala fides. We are also unable to persuade ourselves to agree with learned senior counsel for the petitioner that the petitioner has been discriminated against, inasmuch as they were not afforded an opportunity to rectify the alleged defect in the bank guarantee, as was done in the case some other bidders, who were given a week's time to furnish requisite documents to ""demonstrate"" the availability of construction equipment and technical personnel, as stipulated in Clause 4B(b) of the ITB. A plain reading of Clauses 4B(b) and 16.2 of the ITB, makes it clear that whereas Clause 16.2, being in the nature of a mandate, is an essential condition, instructions contained in Clause 4B(b) are subsidiary inasmuch as they do not have material bearing on the terms of the bid submitted by any party. That being the fine distinction, the tender evaluation committee could deviate from and not insist upon a strict literal compliance of the condition in Clause 4B(b) of the ITB.

20. As noted supra, as per Clause 16.2, the bank guarantee was to remain valid

for 45 days beyond the validity period i.e. 120 days after the deadline date for the bid submission, but, somehow, in the format of the bank guarantee supplied as a part of the bid documents, the period was printed as 30 days. The plea of the petitioner that before rejecting the bid of the petitioner, the NHAI should have sought clarification from the bank or afforded an opportunity to them to furnish a fresh bank guarantee i stated to be rejected. No such methodology is envisaged in the ITB. On the contrary, as noted above, Clause 9.1 of the ITB clearly provided that a prospective bidder could seek clarification of the bid documents within a specified time i.e. ten days prior to the deadline for submission of bids. Though there may be some substance in the contention of learned counsel for the petitioner that the petitioner could not ignore the format of the bank guarantee supplied by the NHAI but at the same time the petitioner was equally bound to comply with the specific terms of the bid documents. Even if we were to accept the stand of the petitioner that the Bank Guarantee furnished was valid up to 30 November 2004 and not 31 October 2004, still its validity period fell short by six days. Thus, the technical committee on evaluation of petitioner's bid in the light of the documents furnished, rightly came to the conclusion that the bank guarantee furnished was for a shorter period and could not be accepted. It was a conscious decision by the technical committee and we are unable to read into it any arbitrariness or bias in favor of the third respondent as alleged by the petitioner.

21. For the foregoing reasons, we are of the considered view that though the NHAI has failed to stick to certain time schedules fixed in the NIT, yet their decision to scrupulously adhere to and enforce rigidly Clause 16.2 of the ITB, prescribing the period of validity of the bank guarantee to be furnished, and declare the technical bid of the petitioner as non-responsive on that score, goes beyond the scope of judicial review, as elucidated in the afore-noted decisions of the Apex Court. In the final analysis, Therefore, we do not find any merit in both the writ petitions and the same are dismissed accordingly. Rule is discharged. However, on the facts and in the circumstances of the case, there shall be no order as to costs.